



THE NINTH AMENDMENT AS A RULE OF CONSTRUCTION

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THE NINTH AMENDMENT AS A RULE OF CONSTRUCTION

Ryan C. Williams*

The past two decades have seen a wealth of scholarship addressed to recovering the original meaning of the Ninth Amendment. This scholarship has focused almost exclusively upon identifying the original meaning of the Amendment's reference to "other[] [rights] retained by the people." Scholars who have addressed this question have tended to proceed on the assumption that such "other" rights, once properly identified, are entitled to the same level of protection that is accorded to enumerated constitutional rights. This Article contests that assumption by demonstrating that regardless of the original meaning of the Amendment's reference to rights "retained by the people," the Amendment itself does not compel treating such rights as if they were constitutional rights. Rather, the original meaning of the Ninth Amendment does nothing more than state a narrow and precise rule of construction targeted at a specific form of constitutional argument.

Renewed attention to the rule of construction prescribed by the Ninth Amendment can help to identify constitutional arguments that violate the Amendment's interpretive command, especially arguments premised on using enumerated rights to narrow the scope of other rights. The Article suggests examples of such arguments relating to such diverse issues as capital punishment, hate speech, and state sovereign immunity that might plausibly be ruled out of bounds by a proper understanding of the Ninth Amendment's rule of construction. The Article also considers the possible continuing relevance of the Ninth Amendment to arguments seeking to ground judicially enforceable "unenumerated" constitutional rights in other textual or extratextual sources.

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INTRODUCTION

For a provision once famously analogized to a constitutional “ink-blot,”¹ the Ninth Amendment² has attracted a remarkable degree of serious and sustained scholarly attention. For the past two decades, constitutional scholars have devoted considerable efforts to excavating the textual and historical evidence bearing on the provision’s original meaning, resulting in a diverse range of theories regarding the Amendment’s proper interpretation.³ With few exceptions, these efforts have focused almost

1. Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 248–50 (1987) [hereinafter Bork Nomination Hearings] (statement of Judge Robert H. Bork); see also *infra* text accompanying notes 21–22.

2. U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

3. Prominent examples of such scholarship include: Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 54–60, 224–69 (2004) [hereinafter Barnett, Lost Constitution] (arguing that rights “retained by the people” was meant to refer to “open-ended” list of natural rights); Daniel A. Farber, Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have 21–44 (2007) [hereinafter Farber, Retained by the People] (arguing that Ninth Amendment was originally intended to secure protection for unenumerated individual natural rights); Kurt T. Lash, The Lost History of the Ninth Amendment 13–70 (2009) (concluding that Ninth Amendment was originally understood as a “federalism” provision protecting against expansive constructions of federal powers); Randy E. Barnett, Kurt Lash’s Majoritarian Difficulty: A Response to *A Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 937, 940–63 (2008) [hereinafter Barnett, Majoritarian Difficulty] (contending that “federalist” reading defended by Professor Lash is inconsistent with Amendment’s true original meaning); Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev. 1, 21–76 (2006) [hereinafter Barnett, What It Says] (surveying variety of founding-era evidence regarding Amendment’s original meaning and concluding that “other rights” referred to in Amendment were individual natural rights); Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223, 259 (1983) (contending that “[b]y the provision which ultimately became the ninth amendment, Madison intended to assure the antifederalists that the Constitution would leave intact those individual rights contained in the state constitutions, statutes, and common law”); Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment, 83 Tex. L. Rev. 597, 603–708 (2005) [hereinafter Lash, Lost Jurisprudence] (surveying judicial interpretations of Ninth Amendment between 1789 and 1964 and concluding that Amendment was most frequently invoked prior to New Deal as a protection of state autonomy); Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, 83 Tex. L. Rev. 331, 394–99 (2004) [hereinafter Lash, Lost Original Meaning] (arguing that Ninth Amendment was originally understood as “federalism-based rule of construction” limiting “the power of the federal government to interfere with matters believed left to state control”); Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 Stan. L. Rev. 895, 900–14 (2008) [hereinafter Lash, Textual-Historical] (offering textualist defense of reading Amendment as federalist provision); Calvin R. Massey, Federalism and Fundamental Rights: The Ninth Amendment, 38 Hastings L.J. 305, 329–43 (1987) (arguing that Ninth Amendment should be understood to protect individual natural rights, including unenumerated right to privacy); Thomas B. McAfee, The Original Meaning of the Ninth Amendment, 90 Colum. L. Rev. 1215, 1221–23 (1990) [hereinafter McAfee, Original Meaning] (defending “residual rights” interpretation of Ninth Amendment whereby “the other rights retained by the people are defined residually from

exclusively on identifying what was meant by the Amendment's cryptic reference to "other[] [rights] retained by the people."⁴ The most influential of these theories have proceeded on the assumption that proper identification of such "retained" rights is essential because, once identified, these rights would themselves be entitled to the same legal force as the rights specifically enumerated in the Constitution.⁵ Without wading into the difficult question of exactly what the "retained" rights referred to in the Ninth Amendment were originally understood to encompass, this Article argues that resolution of this question is likely to be far less significant than most participants in the debate over the provision's original meaning have tended to assume.

The Ninth Amendment, properly understood, does not itself protect *any* rights from governmental interference, nor does it preclude treating "other" rights differently from enumerated rights. Rather, the Amendment merely establishes a very narrow and precise rule of construction. The plain language of the Ninth Amendment prohibits one, and only one, particular form of constitutional argument—that because some particular right or set of rights is mentioned in the Constitution, some other claimed right or set of rights should either be "denied" (i.e., assumed either not to exist or to have been delegated to the federal government) or "disparaged" (i.e., accorded a diminished level of protection or respect). In other words, the Ninth Amendment acts as a "hold harmless" provision⁶ that prevents the fact that a particular right has been enumerated in the Constitution from being used as an argument against the existence or status of some other claimed right. So long as no argument of this form is made, the Ninth Amendment's literal command has nothing to say about either the existence or enforceability of claimed rights or the proper scope of federal power; in fact, it has nothing to say *at all*.

Though the Ninth Amendment's principal function as a rule of construction is acknowledged in the literature addressing its original meaning,⁷ this principal meaning is often downplayed in preference to the presumed implicit meanings that might be inferred from the Amendment's oblique reference to "other[] retained" rights.⁸ This Article contends

the powers granted to the national government"); see also *infra* Part I (summarizing scholarship and interpretations of Ninth Amendment).

4. See, e.g., Lash, *Lost Original Meaning*, *supra* note 3, at 341 ("Debates over the meaning of the Ninth Amendment generally focus on the 'other rights' retained by the people."); see also *infra* Part I (reviewing historical emphasis on "other" rights in Ninth Amendment literature).

5. See *infra* notes 25–41 and accompanying text (summarizing these theories).

6. See McAfee, *Original Meaning*, *supra* note 3, at 1300 n.325 (analogizing Ninth Amendment to "hold harmless" provision); see also, e.g., Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 *Nw. U. L. Rev.* 857, 884 (2009) [hereinafter Paulsen, *Prescribe Rules*] (describing Ninth Amendment as "a classic lawyer's 'savings clause' such as one might commonly find in a contract or a statute").

7. See *infra* note 42 (discussing views of Professors Barnett and Lash).

8. See, e.g., Paulsen, *Prescribe Rules*, *supra* note 6, at 884 ("It is remarkable that, in the voluminous academic discussion of the Ninth Amendment, so little is made of the

that this emphasis on presumed implied content, in preference to the Amendment's explicit command, has matters exactly backward and has allowed the Ninth Amendment's express rule of construction to be repeatedly ignored in contemporary constitutional argument. Recognizing the Ninth Amendment's true role as a limited rule of construction thus not only promises to correct the misplaced assumption that the Amendment must have something important to say about the constitutional status of "unenumerated" rights but may also allow the Amendment's actual interpretive command to play a more prominent role in contemporary constitutional debates.

The Article proceeds in four parts. Part I provides a brief history of modern scholarship on the Ninth Amendment's original meaning and summarizes the leading contemporary interpretations of the Amendment's reference to "other[] [rights] retained by the people."

obvious textual fact that the Ninth Amendment is a rule of construction, not a substantive rule."). A few important recent exceptions deserve note. Professor Paulsen's article, which is directed to constitutional interpretation in general, contains a brief textual argument for reading the Ninth Amendment as a limited rule of construction. *Id.* at 884–88. Professor Laurence Claus and Professor (and former federal judge) Michael McConnell have endorsed a similarly limited reading of the Ninth Amendment. Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement and the Ninth Amendment*, 79 *Notre Dame L. Rev.* 585, 621–25 (2004); Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 *N.Y.U. J.L. & Liberty* 1, 20–21 (2010). The ultimate conclusions of these scholars regarding the proper domain of the Ninth Amendment are similar to the conclusions of this Article, though there are important distinctions. First, neither Professor Paulsen, Professor Claus, nor Professor McConnell considers the possible implied content of the Ninth Amendment, which, as explained below, has emerged as an important focus in the two leading theories of the Amendment's original meaning. See *infra* notes 151–153 and accompanying text (summarizing role of implied meaning in interpretations of Amendment proposed by Professors Barnett and Lash). Second, none of these scholars considers the possible significance of the Ninth Amendment for resolving apparent conflicts between enumerated constitutional rights. See *infra* Part IV.A (discussing Ninth Amendment's potential role in preventing use of particular enumerated rights to narrow the scope of other enumerated rights).

In a recent draft article, Professor Louis Michael Seidman has advanced arguments similar to some of the arguments presented here in the course of an "internal critique" of the leading originalist accounts of the Amendment's original meaning. Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism* 13–26 (Georgetown Pub. Law Research Paper No. 10-11, 2010), available at <http://ssrn.com/abstract=1567512> (on file with the *Columbia Law Review*). Though Professor Seidman rightly concludes that the Amendment's text and background context do not require judicial recognition and enforcement of "unenumerated" rights, he mistakenly infers from the provision a prohibition on using the constitutional text, in any way, to resolve questions regarding the existence or enforceability of such rights. *Id.* at 30–40. But as explained in Part IV.B below, the Ninth Amendment does not preclude recourse to non-rights-conferring portions of the constitutional text, such as the Vesting Clause of Article III or the Necessary and Proper Clause of Article I, in resolving questions regarding the legal status and judicial enforceability of such "unenumerated" rights. See *infra* notes 307–319 and accompanying text (discussing Vesting and Necessary and Proper Clauses as possible authority for enforcing unenumerated rights).

Part II examines the relevant historical background leading up to the Amendment's enactment and the specific language used in the Amendment, both of which strongly support reading the Amendment as a limited, precise rule of construction directed at a particular form of argument that might otherwise have been available if the Amendment had not been included in the Bill of Rights.

Part III considers the possibility that, notwithstanding the Amendment's relatively precise language, it may nonetheless carry an implied secondary meaning that might be used to authorize (or require) judicial enforcement of the "retained" rights to which it refers. Drawing on insights from linguistic philosophy and New Textualist theories of statutory interpretation, this Part argues that ordinary rules of conversational implicature applicable to direct one-on-one communications are less reliable when applied to the work of a complex legislative process, such as the constitutional amendment procedures set forth in Article V.⁹ Because reading implied content into a constitutional amendment risks upsetting carefully negotiated bargains that may have been necessary to secure the Amendment's enactment, such readings should generally be disfavored. The preratification history of the Ninth Amendment suggests that its relatively precise and limited text was the product of exactly this type of legislative negotiation and compromise and that explicitly recognizing a judicially enforceable role for "other[] retained" rights may very well have threatened its prospects for ratification.

Part IV considers the contemporary significance of the Ninth Amendment's limited rule of construction. Contrary to the view shared by certain scholars that such a limited reading would effectively make the Amendment a dead letter,¹⁰ this Part argues that the Ninth Amendment's interpretive command may continue to play an important role in contemporary debates and identifies specific examples of contemporary constitutional arguments relating to such diverse issues as capital punishment, free speech, and state sovereign immunity that might plausibly be foreclosed under a proper understanding of the Ninth Amendment's rule of construction. Part IV also considers the implications of the limited rule of construction interpretation proposed in this Article for the constitutional status of "unenumerated" rights. Though the Ninth Amendment itself provides an insufficient textual basis for judicial enforcement of such rights, the Amendment might still have a supporting role to play in arguments concerning the existence and judicial enforceability of those rights.

9. U.S. Const. art. V.

10. See *infra* note 270 (providing examples of commentators espousing dead letter view).

I. THE NINTH AMENDMENT AND UNENUMERATED RIGHTS:
THE DEBATE THUS FAR

In order to understand the significance of the rule of construction interpretation defended in this Article, and why such a seemingly straightforward interpretation might be viewed by some as controversial, it will be useful to conduct a brief survey of modern scholarship on the Amendment and the recent constitutional history that provides the relevant background against which such scholarship has been written.

For most of its history, courts interpreted the Ninth Amendment relatively uniformly as a guarantee of state autonomy.¹¹ In this connection, the Ninth Amendment was frequently invoked alongside the Tenth Amendment¹² as twin guarantees playing the complementary roles of protecting the reserved rights of the states and ensuring a limited construction of enumerated federal powers.¹³ With the ascendancy of the New Deal in the late 1930s, this “federalist” reading of the Ninth Amendment faded in significance as federal powers were construed to reach a wider range of intrastate activities.¹⁴

In 1965, the Ninth Amendment reemerged as a focal point of constitutional debate as a result of Justice Goldberg’s invocation of the Amendment in his concurring opinion in *Griswold v. Connecticut*.¹⁵ Justice Goldberg’s *Griswold* concurrence identified the Ninth Amendment as a possible source of constitutional authority for the federal judiciary to recognize and protect “fundamental” individual rights that were not specifically identified elsewhere in the constitutional text.¹⁶ In dissent, Justices Black and Stewart rejected Goldberg’s expansive reading of the Amendment, emphasizing the limited federalism-based reading that had predominated in earlier decades.¹⁷

Though the Supreme Court’s subsequent “fundamental rights” jurisprudence did not follow the path suggested by Justice Goldberg in

11. See Lash, *Lost Jurisprudence*, *supra* note 3, at 601–02 (recounting history of Ninth Amendment interpretations).

12. 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.”).

13. Lash, *Lost Jurisprudence*, *supra* note 3, at 603–04.

14. *Id.* at 602.

15. 381 U.S. 479 (1965).

16. *Id.* at 492 (Goldberg, J., concurring) (“[T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”).

17. *Id.* at 529 (Stewart, J., dissenting) (“The Ninth Amendment, like its companion the Tenth, . . . ‘states but a truism that all is retained which has not been surrendered’ . . .” (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941))); *id.* at 520 (Black, J., dissenting) (“[The Ninth Amendment] was passed, not to broaden the powers of this Court or any other department of ‘the General Government,’ but . . . 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.”).

Griswold,¹⁸ the individual rights-based reading of the Ninth Amendment continued to attract scholarly interest, particularly with the emergence of self-consciously “originalist” theories of constitutional interpretation in the 1970s and 1980s.¹⁹ Scholars who took a skeptical view of originalist theories of interpretation pointed to the Ninth Amendment’s reference to “rights . . . retained by the people” as a potential textual embarrassment to originalist critics of *Griswold* and other “unenumerated” rights decisions.²⁰ Such antioriginalist arguments resulted in questions posed to Judge Robert Bork—a prominent self-described originalist jurist—during the 1987 confirmation hearings on his nomination to the Supreme Court regarding how his interpretive method would deal with the Ninth Amendment.²¹ In response, Bork offered his now-famous “inkblot” analogy:

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot²²

Recognizing the deficiencies of this “inkblot” response, originalist constitutional scholars began the process of researching the Amendment’s historical background in an effort to arrive at a defensible interpretation consistent with the Amendment’s original linguistic meaning and the intentions of its framers and ratifiers.²³ Almost from the beginning, efforts at such “originalist” excavations focused on uncovering the meaning of the Amendment’s reference to “other[]” rights “retained by the people.”²⁴ Given the context against which such scholarship was

18. Subsequent cases involving “unenumerated” constitutional rights have generally identified such rights as aspects of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. E.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Roe v. Wade*, 410 U.S. 113 (1973).

19. For a brief overview of the historical development and evolution of modern originalist theories of constitutional interpretation, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1134–48 (2003).

20. See, e.g., Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *Chi.-Kent L. Rev.* 131, 141–43 (1988) (“Those who emphasize text and history . . . seem to be hoist on their own petard: they can no longer claim that adherents of the constitutional right to privacy are unwilling to apply textual or historical modes of argument”); Lawrence E. Mitchell, *The Ninth Amendment and the “Jurisprudence of Original Intention,”* 74 *Geo. L.J.* 1719, 1719–20 (1986) (“Examination of the . . . ninth amendment demonstrates the fallacy of attempting to discern the Framers’ original intentions . . . [and] that adaptability, at least in protecting individual rights, is intrinsic to the Constitution.”).

21. Bork Nomination Hearings, *supra* note 1, at 248.

22. *Id.* at 249.

23. See Barnett, *What It Says*, *supra* note 3, at 10–17 (summarizing evolution of originalist theories of Ninth Amendment in wake of Bork hearings).

24. *Id.*

written, this focus is unsurprising. Both Justice Goldberg's reliance on the Amendment in *Griswold* and the invocations of the Amendment in critiques of originalist interpretation focused on the significance of the Amendment's reference to "retained" rights for the possibility of judicial recognition and enforcement of "unenumerated" constitutional rights. It was only natural that research seeking to uncover the Amendment's original meaning would approach the inquiry with this specific question in mind.

Though these originalist inquiries have resulted in a significant amount of diversity and nuance in various scholars' descriptions of what the "other[]" rights referred to in the Amendment were originally understood to encompass,²⁵ these theories can generally be classified into two broad families of interpretations: (1) individual natural rights interpretations and (2) federalism interpretations.²⁶

The individual natural rights interpretations understand the Ninth Amendment's reference to "other[] retained" rights to refer to individual natural rights that existed before the creation of the state and national governments and that were "retained" by individuals upon entering into those governments. According to the interpretation's leading proponent, Professor Randy Barnett, the reference to these "other rights" was included in the Constitution in order to ensure that such rights would be "as enforceable *after* the enactment of the Bill of Rights as the retained [natural] rights of freedom of speech, press, assembly, and free exercise of religion," that were specifically enumerated in the Constitution.²⁷ "In other words," according to Barnett, "the purpose of the Ninth Amendment was to ensure the equal protection of unenumerated

25. Professor Barnett has identified five distinct interpretive "models" reflected in the literature discussing the Ninth Amendment's original meaning, each of which focuses on a particular understanding of the phrase "others retained by the people": (1) the "state law rights model," which interprets the phrase to refer to positive rights that existed under state law prior to the Amendment's enactment; (2) the "residual rights model," which interprets the phrase to encompass only rights defined residually from the powers granted to the federal government; (3) the "individual natural rights model," which interprets the phrase to refer to individual natural rights; (4) the "collective rights model," which interprets the phrase to refer to "the rights that the people possess as a collective political body, as distinct from the rights they possess as individuals"; and (5) the "federalism model," which interprets the phrase to "justif[y] a narrow or strict construction of enumerated federal powers, especially powers implied under the Necessary and Proper Clause." *Id.* at 10–21.

26. See, e.g., Lash, *Lost Original Meaning*, *supra* note 3, at 343–47 (classifying interpretations of the Ninth Amendment as either "libertarian" or "federalist"); Seidman, *supra* note 8, at 3–4 ("At the risk of eliding some subtle distinctions and unfairly dismissing some approaches, the list can be reduced to two primary contenders: the federalism approach . . . and the individual natural rights approach . . .").

27. Barnett, *What It Says*, *supra* note 3, at 13–14. For similar "natural-rights-based" interpretations of the Amendment, see, e.g., Farber, *Retained by the People*, *supra* note 3, at 1–17; Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 *Chi.-Kent. L. Rev.* 1001, 1002–14 (1988); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *Emory L.J.* 967, 979–80 (1993); Kyle Alexander Casazza, Note, *Inkblots:*

ated individual natural rights on a par with those individual natural rights that came to be listed ‘for greater caution’ in the Bill of Rights.”²⁸ Barnett thus argues that *any* legal rule that would accord greater legal effect to enumerated natural rights, such as freedom of speech, press or religion, than is given to “unenumerated” retained rights violates the Ninth Amendment’s interpretive command.²⁹

The federalism interpretations come in two forms, one narrow and one broad.³⁰ The narrow federalism interpretation views the Ninth Amendment as a targeted response to the danger that the fact of enumeration might be used to infer the existence of federal powers beyond those expressly enumerated in the Constitution.³¹ Thus, for example, absent the Ninth Amendment, the government might try to use the enumeration of a right to a free press to argue that it possessed a general power to regulate the press, or the fact that a bill of rights was included in the Constitution to argue for the existence of a general federal police power.³² According to the narrow version of the federalism interpretation, the sole function of the Ninth Amendment was to preclude such arguments and to make clear that the enumeration of rights was not intended to broaden federal power.³³ In recent years, Professor Kurt Lash has argued for a broader federalism interpretation that would allow the

How the Ninth Amendment and the Privileges or Immunities Clause Protect Unenumerated Constitutional Rights, 80 S. Cal. L. Rev. 1383, 1387–99 (2007).

28. Barnett, *What It Says*, supra note 3, at 14.

29. *Id.*; see also Barnett, *Lost Constitution*, supra note 3, at 254 (“The Ninth Amendment mandates that unenumerated natural rights be treated the same as those that were enumerated.”). Barnett’s principal example of such a forbidden construction is the doctrine of “*Carolene Products* Footnote Four” under which the “presumption of constitutionality” that the Supreme Court generally applies in reviewing claims that legislation infringes particular “liberty” interests protected by the Fourteenth Amendment Due Process Clause is accorded a “narrower scope for operation . . . when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.” *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); see Barnett, *Lost Constitution*, supra note 3, at 229–31, 253–54; see also Barnett, *What It Says*, supra note 3, at 13–15 (“[T]he Ninth Amendment has the important function of negating any construction of the Constitution that would protect only enumerated rights and leave unenumerated rights unprotected.”).

30. The distinction is borrowed from Professor Lash, who uses the terms “passive” and “active,” rather than “narrow” and “broad.” See Lash, *Lost Original Meaning*, supra note 3, at 346–47.

31. See, e.g., Caplan, supra note 3, at 227–28 (arguing that Ninth Amendment “simply provides that the individual rights contained in state law are to continue in force under the Constitution”); Philip A. Hamburger, *Trivial Rights*, 70 *Notre Dame L. Rev.* 1, 31 (1994) (“Although many modern scholars have understood the unenumerated rights of the Ninth Amendment to be vague, unwritten rights, the unenumerated rights were none other than those reserved by the grant of powers in the U.S. Constitution.”); McAfee, *Original Meaning*, supra note 3, at 1306–07 (noting that Ninth Amendment “state[s] explicitly that the enumeration of rights [the framers] provided neither exhausted the rights held by the people nor undermined the system of enumerated powers”).

32. McAfee, *Original Meaning*, supra note 3, at 1307.

33. *Id.* at 1226.

Ninth Amendment to serve “as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government.”³⁴ Much like Professor Barnett’s individual natural rights interpretation, Professor Lash’s broad federalism interpretation, which is currently the most prominent federalism-based model of the Amendment’s original meaning,³⁵ views the Ninth Amendment as compelling the same level of judicial recognition for the “retained” right of self government as is accorded to the enumerated individual rights set forth in the Bill of Rights.³⁶

Though important differences exist between the leading accounts of Professors Barnett and Lash regarding the precise nature and content of “other [] retained” rights,³⁷ their respective readings of the historical evidence on this question share a surprising amount in common.³⁸ For example, both Professor Barnett and Professor Lash agree that the Ninth Amendment can be plausibly understood as protecting both federalism *and* individual rights.³⁹ The distinction between their respective theories relates primarily to the mechanism by which the Amendment is thought to protect these two respective values and the implications of the Amendment for situations in which the two values conflict.⁴⁰ Professor Barnett believes that the Amendment warrants broad protection for individual natural rights even when such rights are placed in conflict with the majoritarian right to local self government; Professor Lash, on the other hand, believes that the Amendment leaves the protection of such individual rights to the control of the states and precludes federal interference with state governance even where the expressed purpose of such interference is to protect individual rights.⁴¹

34. Lash, *Lost Original Meaning*, supra note 3, at 346, 394–99.

35. See Seidman, supra note 8, at 3–4 (noting that “the federalism approach” to interpreting the Amendment is “associated primarily with the work of Kurt Lash”).

36. See Lash, *Textual-Historical*, supra note 3, at 919 (“Embedded in the text of the Ninth [Amendment] . . . are two separate forbidden rules of construction: First, the fact of enumeration must not be read to imply the *necessity* of enumeration. Second, the fact of enumeration must not be read to suggest the *superiority* of enumeration.”).

37. See supra notes 27–36 and accompanying text (summarizing interpretations proposed by Professors Barnett and Lash).

38. See Barnett, *Majoritarian Difficulty*, supra note 3, at 937 (“When it comes to interpreting the Ninth Amendment, Kurt Lash and I agree about many important issues . . .”).

39. See Barnett, *What It Says*, supra note 3, at 20–21 (“[A]n active federalism reading of the Ninth Amendment . . . would serve to protect *both* the natural rights of individuals and any collective right of the people to self-government”); Lash, *Lost Original Meaning*, supra note 3, at 399–400 (“[T]he Ninth [Amendment] simultaneously limited federal power as it secured the retained rights of the people.”).

40. See, e.g., Barnett, *Majoritarian Difficulty*, supra note 3, at 963–67 (summarizing disagreement with Lash); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 *Iowa L. Rev.* 801, 808–11 (2008) [hereinafter Lash, *Inescapable Federalism*] (contrasting his own “federalist account” with Barnett’s “libertarian account”).

41. The distinction between the two models is illustrated most starkly in the context of the disagreement between Professors Barnett and Lash regarding the implications of the

II. REFOCUSING THE DEBATE: THE HISTORICAL AND TEXTUAL SUPPORT
FOR INTERPRETING THE NINTH AMENDMENT AS A LIMITED
RULE OF CONSTRUCTION

The key distinction between the limited rule of construction model defended in this Article and both the individual natural rights model defended by Professor Barnett and the broad federalism model defended by Professor Lash is that the limited rule of construction model does not view the Ninth Amendment as a generalized source of judicial authority to protect rights that are not specifically enumerated in the Constitution.⁴² Instead, the limited rule of construction model views the Ninth Amendment's sole function as providing a response to a very specific form of argument—namely, that the enumeration of rights in the Constitution might be used as a basis for limiting or denying other claimed rights. As this section will show, both the preenactment history leading up to the Amendment's drafting and ratification and the text of the Amendment itself support this more limited reading of the Amendment's interpretive command.⁴³

Ninth Amendment for interpreting the Fourteenth Amendment. Professor Barnett argues that the Ninth Amendment precludes a narrow reading of the Fourteenth Amendment that would limit the rights it protects to those explicitly mentioned elsewhere in the Constitution. Barnett, *Lost Constitution*, *supra* note 3, at 254. By contrast, Professor Lash argues that the Ninth Amendment precludes a construction of the Fourteenth Amendment that would “unduly extend[]” the rights protected by that Amendment “in a manner that intrudes upon the people’s retained right to local self government.” Lash, *Textual-Historical*, *supra* note 3, at 924.

42. Professors Barnett and Lash both acknowledge the Ninth Amendment's rule of construction function, but both view the interpretive rule articulated by the Amendment as having a significantly different and broader scope than the interpretation defended in this Article. See, e.g., Barnett, *What It Says*, *supra* note 3, at 15 (“[T]he individual natural rights model can be viewed as justifying a rule of construction by which claims of federal power can be adjudicated, rather than as an independent source of rights that automatically trumps any exercise of governmental power.”); Lash, *Lost Original Meaning*, *supra* note 3, at 346 (arguing for model treating Ninth Amendment as “a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government”); see also *infra* notes 117–119 and accompanying text (discussing their respective interpretations of Amendment's “deny or disparage” language). Additionally, both argue that the Amendment carries an implied secondary meaning warranting enforcement of unenumerated rights in circumstances where the Amendment's express rule of construction is not implicated. See *infra* text accompanying notes 151–153 (discussing role of implied meanings in their respective interpretations). Their respective arguments concerning the Amendment's putatively implied meaning are addressed *infra* in Part III.

43. The remainder of this Article proceeds on the assumption that “original meaning originalism” is the appropriate methodology for determining the meaning that should be accorded to the Ninth Amendment by modern interpreters. See generally Barnett, *Lost Constitution*, *supra* note 3, at 89–117 (describing theoretical and methodological premises of original meaning originalism). Even if one is skeptical about originalist theories in general, there may nonetheless be strong reasons for considering such an approach in seeking to understand the contemporary significance of the Ninth Amendment in particular.

A. The Ninth Amendment's Background Historical Context

In order to gain a proper understanding of the rule of construction that the Ninth Amendment would have been understood to prescribe at the time of its enactment, it is necessary to first understand the background political context against which the Amendment was drafted and the particular arguments and concerns it was designed to address. The historical evidence bearing on the Ninth Amendment's original meaning has been extensively examined in the prior literature.⁴⁴ I will therefore focus my discussion in this section on the key facts regarding the Amendment's preenactment history that illustrate the particular concerns and interpretive arguments the Amendment was designed to address.

1. *Antifederalist Objections Based on the Omission of a Bill of Rights and the Federalists' Response.* — Most accounts of the Ninth Amendment's original meaning begin with the debates in 1787 and 1788 between Federalist supporters of the proposed Constitution and their Antifederalist opponents.⁴⁵ The omission of a bill of rights quickly became a rallying point

First, most modern academic discussions of the Amendment's meaning have approached the question through an "originalist" lens, focusing principally upon the original meaning of the provision's text, the background purposes it was designed to advance, and the views of its framers and ratifiers. E.g., Barnett, *What It Says*, supra note 3, at 5–7; Lash, *Lost Original Meaning*, supra note 3, at 339–40; McAfee, *Original Meaning*, supra note 3, at 1225–27; cf. Seidman, supra note 8, at 3 (noting author's use of "originalist methodology" as part of "internal critique" of leading academic theories). Second, unlike most other provisions of the Bill of Rights, the Ninth Amendment has not been the subject of a well-developed body of authoritative judicial interpretations, thus minimizing the stare decisis and reliance interests that might arguably counsel against construing the Amendment in a strictly originalist fashion. Cf. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. Pa. J. Const. L. 155, 195–96 (2006) (describing formalist justifications for respecting nonoriginalist precedent). Third, as Professor Michael Dorf has observed, a proper understanding of original meaning may be of assistance even under nonoriginalist interpretive theories because "knowledge of [a provision's] original meaning . . . will enable the nonoriginalist interpreter to construct the best, most coherent account of the provision." Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1798–99 (1997). Thus, even if one rejects originalism as the one "true" method of constitutional interpretation, it may nonetheless be useful to consider the interpretation of the Ninth Amendment that would result from a proper application of originalist methodology before deciding whether some alternative nonoriginalist understanding should be preferred.

44. As Professor Barnett has observed, "[a]lthough there is much that is controversial about the Ninth Amendment, the story of its enactment . . . is not." Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, 26 Val. U. L. Rev. 419, 422 (1991). In addition to the sources cited above in note 3, useful discussions of the debates leading up to the Ninth Amendment's enactment can be found in, among other sources, Richard Labunski, *James Madison and the Struggle for the Bill of Rights 178–255* (2006); Leonard W. Levy, *Origins of the Bill of Rights 241–61* (1999); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution 288–338* (1996).

45. E.g., Barnett, *Lost Constitution*, supra note 3, at 55–57; Lash, *Lost Original Meaning*, supra note 3, at 348–50; McAfee, *Original Meaning*, supra note 3, at 1227–37.

for Antifederalist opposition to the proposed Constitution. One of the central themes in the Antifederalists' arguments was resort to a putative rule of construction providing that all rights not expressly reserved by the people to themselves in forming a government were deemed surrendered to the control of that government.⁴⁶

Federalists quickly cohered around two related defenses of the omission of a bill of rights. First, they argued that a bill of rights would be *unnecessary* because rights would be sufficiently protected by the enumerated federal powers scheme envisioned by the proposed Constitution.⁴⁷ Second, they argued that inclusion of a bill of rights could be affirmatively *dangerous* because it might provide a basis for inferring the existence of additional federal powers beyond those specifically enumerated in the Constitution. For example, in a widely publicized speech, Philadelphia attorney (and future Supreme Court Justice) James Wilson argued that the "very declaration" of a right to freedom of the press in the Constitution "might have been construed to imply that some degree of power was given," with respect to the press "since we undertook to define its extent."⁴⁸

46. See, e.g., Patrick Henry, Speech in the Virginia Ratifying Convention (June 14, 1788), in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 410, 445 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1861) [hereinafter *Elliot's Debates*] ("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."); Letter from Agrippa XVIII (Jan. 29, 1788), in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 510, 515 (1971) ("[W]hen people institute government, they of course delegate all rights not expressly reserved.").

47. See, e.g., James Iredell, Speech in the North Carolina Ratifying Convention (July 28, 1788), in 4 *Elliot's Debates*, supra note 46, at 144, 148 ("Of what use . . . can a bill of rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?"); George Nicholas, Speech in the Virginia Ratifying Convention (June 14, 1788), in 3 *Elliot's Debates*, supra note 46, at 442, 444 ("It is agreed upon by all that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? . . . If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred?").

48. James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), in *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution* 166, 167–68 (John P. Kaminski & Richard Leffler eds., 2d ed. 1998). Wilson offered a more completely articulated statement of the potential danger posed by inclusion of a bill of rights during the debates in the Pennsylvania ratifying convention:

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

James Wilson, Speech in the Pennsylvania Convention (Oct. 28, 1787), in 2 *Elliot's Debates*, supra note 46, at 434, 436.

This “argument of danger,” as one Antifederalist critic derisively referred to it,⁴⁹ soon became a common theme in Federalist defenses of the proposed Constitution.⁵⁰ Antifederalists quickly seized upon a potentially embarrassing inconsistency in the Federalists’ “danger” argument: Because the Constitution already placed certain limitations on federal power with respect to individual rights, including the guarantee of jury trials in federal criminal cases and bans on religious tests, bills of attainder, and *ex post facto* laws, the Federalists’ “danger” argument seemed to imply that the proposed Constitution *already* posed a danger to unenumerated rights by selectively protecting a very limited number of rights and leaving the rest unprotected.⁵¹ Federalist supporters of the Constitution never mustered a cogent response that would reconcile their “danger” argument with the limited enumeration that already appeared in the original Constitution.⁵²

2. *State Ratifying Conventions’ Proposals for a Bill of Rights.* — The debate over the absence of a bill of rights also played a prominent role in the state ratifying conventions. In Pennsylvania, supporters of ratification defeated a proposal by a minority faction opposed to ratification seeking to condition the state’s agreement to ratify on approval of a proposed bill of rights. Undeterred, the Pennsylvania minority faction prepared a separate report demanding adoption of their proposed bill of rights as amendments to the Constitution.⁵³ In Massachusetts, Federalist supporters of ratification were forced to compromise with those who opposed the omission of a bill of rights by agreeing to submit to Congress, along with the state’s ratification, a separate list of proposed amendments.⁵⁴ Other states followed Massachusetts’s model as a mechanism for defusing Antifederalist objections based on the omission of a bill of rights.⁵⁵

49. Robert Whitehill, Speech in the Pennsylvania State Ratification Convention (Nov. 30, 1787), *in* 2 *Birth of the Bill of Rights: Encyclopedia of the Antifederalists* 25, 27 (Jon L. Wakelyn ed., 2004).

50. McAfee, *Original Meaning*, *supra* note 3, at 1232–34.

51. For example, in a speech in the Virginia ratifying convention, Patrick Henry observed that while the restrictions on Congress set forth in Article I, Section 9 “are in the shape of a bill of rights,” the restraints set forth in that provision were “so feeble and few, that it would have been infinitely better to have said nothing about it. The fair implication is, that [Congress] can do every thing they are not forbidden to do.” Henry, Speech in the Virginia Ratifying Convention, *supra* note 46, at 452, 461. Henry further argued that the limited set of restrictions set forth in Section 9 “reverses the position of the friends of this Constitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved.” *Id.*; see also, e.g., Levy, *supra* note 44, at 28–30 (“The protection of some rights opened the Federalists to devastating rebuttal.”); Rakove, *supra* note 44, at 318–25 (“Within days Anti-Federalists were gleefully exposing the embarrassing contradiction that [the danger argument] left open to attack.”).

52. See Levy, *supra* note 44, at 30–31 (“[The Federalists’] arguments justifying the omission of a bill of rights were impolitic and unconvincing.”).

53. McAfee, *Original Meaning*, *supra* note 3, at 1235.

54. *Id.*

55. In addition to Massachusetts and the proposal of the minority faction of the Pennsylvania ratifying convention, the ratifying conventions of Maryland, New Hampshire,

Several of the state proposals for a bill of rights called for an amendment that would explicitly address the Federalists' "danger" argument. For example, the amendments proposed by New York's ratifying convention included a provision declaring:

[T]hat those Clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.⁵⁶

Similarly, the seventeenth article proposed by Virginia's ratifying convention declared:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; But that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.⁵⁷

These proposals spoke in terms of "powers" denied to the federal government rather than "rights" granted to individuals or to the states. But to the founding generation, the two concepts were closely linked, as a denial of power to one body was often viewed as equivalent to a grant of a right to those against whom such power might otherwise have been exercised.⁵⁸

Certain of the state ratifying conventions also proposed express declarations recognizing the existence of individual natural rights. For example, the Virginia ratifying convention, which, as noted above, had proposed a provision expressly addressing the so-called "argument of danger,"⁵⁹ also proposed a separate provision declaring that "there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."⁶⁰ These

Virginia, New York, and North Carolina also submitted lists of recommended amendments to Congress. Levy, *supra* note 44, at 31.

56. Amendments Proposed by the New York Convention (July 26, 1788), *in* 1 Elliot's Debates, *supra* note 46, at 327, 327.

57. Amendments Proposed by the Virginia Convention (June 27, 1788), *in* 3 Elliot's Debates, *supra* note 46, at 657, 661.

58. See Lash, Textual-Historical, *supra* note 3, at 908–09 (discussing conception of "rights" in 1791); McConnell, *supra* note 8, at 14 ("Individual rights and governmental powers were understood to be reciprocal—two sides of the same coin.").

59. See *supra* text accompanying note 57.

60. Amendments Proposed by the Virginia Convention (June 27, 1788), *in* 3 Elliot's Debates, *supra* note 46, at 657, 657; see also Amendments Proposed by the New York Convention (July 25, 1788), *in* 1 Elliot's Debates, *supra* note 46, at 327, 327 (declaring that "the enjoyment of life, liberty, and the pursuit of happiness, are essential rights, which every government ought to respect and preserve"); Amendments Proposed by the North

provisions borrowed from similar explicit natural rights guarantees found in certain of the existing state constitutions.⁶¹

3. *Madison's Initial Proposal for a Bill of Rights.* — The debate between Federalists and Antifederalists did not end with the Constitution's ratification. The calls from the state ratifying conventions for a bill of rights posed a continuing threat that a second constitutional convention might be called, reopening the carefully negotiated bargains that had emerged from the debates in Philadelphia.

In order to defuse calls for a second convention and to keep a promise he had made to his constituents in Virginia,⁶² James Madison introduced a draft of a proposed bill of rights in the House of Representatives on June 8, 1789.⁶³ Madison's proposed bill borrowed heavily from the proposed amendments suggested by the state ratifying conventions, including a corollary to the provisions suggested by the state conventions addressing the Federalists' "danger" argument. Madison's initial proposal for what would eventually become the Ninth Amendment read as follows:

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.⁶⁴

In support of his proposal, Madison delivered a much-discussed speech in which he explained his reasons for including such a rule of construction in the list of proposed amendments. Employing language that would later be incorporated into the text of the Amendment itself, Madison identified the objection the proposal was designed to address as being that "enumerating particular exceptions" in the Constitution might "*disparage*" the rights that were not enumerated and observed that "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,

Carolina Convention (Aug. 1, 1788), in 4 Elliot's Debates, *supra* note 46, at 240, 243 (copying "natural rights" language approved by Virginia Convention).

61. See, e.g., Pa. Const. of 1776, art. I, Declaration of Rights ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."); Va. Bill of Rights of 1776, § 1 ("That all men . . . have certain inherent rights [that] cannot, by any compact, deprive or devest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.").

62. See, e.g., Levy, *supra* note 44, at 32–34 (describing Madison's pledge to support bill of rights); Kenneth R. Bowling, "A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights, 8 J. Early Republic 223, 231–34 (1988) ("The fact that [Madison] had given his word during the campaign underlies all the reasons he later gave for supporting amendments.").

63. 1 Annals of Cong. 431–42 (1789) (Joseph Gales ed., 1834).

64. *Id.* at 435.

and were consequently insecure.”⁶⁵ In a nod to his Federalist allies who had fashioned this argument and repeatedly deployed it in the ratification debates, Madison characterized the objection as “one of the most plausible arguments” he had heard urged against the inclusion of a bill of rights but expressed his belief “that it may be guarded against” and pointed to this provision as his “attempt[]” to address the argument.⁶⁶

At the same time he acknowledged the potential dangers that enumeration might pose, Madison also recognized that enumerating particular rights might carry certain benefits, including inducing greater confidence in the judiciary to protect such rights:

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.⁶⁷

Although this passage does not necessarily support the proposition that rights omitted from the enumeration were expected to be legally unenforceable,⁶⁸ it does suggest the possibility that Madison, and perhaps other members of the First Congress, recognized that enumerating rights might place those rights on a different legal footing than unenumerated rights by providing judges with a textual foundation for extending protection to such rights. In this way, enumeration would avoid certain of the most powerful objections that might otherwise be leveled at judicial efforts to protect particular rights.⁶⁹

4. *The Bill of Rights and the Ninth Amendment Before Congress.* — Despite multiple calls from the state ratifying conventions for the inclusion of a declaration of rights in the Constitution, support in the First Congress for amendments that would address this concern was far from unanimous. When Madison rose to present his initial proposal for a bill of rights on June 8, 1789, multiple members objected to the timing of the proposal, insisting that the consideration of amendments should wait until after more pressing business, particularly a bill for raising revenue, had been completed.⁷⁰ Several congressmen also objected to the very idea of

65. *Id.* at 439 (emphasis added).

66. *Id.*

67. *Id.* (emphasis added).

68. Though some have interpreted his remarks to carry such an implication. See, e.g., Claus, *supra* note 8, at 609 (contending Madison’s “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” that were not enumerated).

69. Cf. *infra* note 313 (quoting remarks of Justice Iredell contesting authority of federal courts to invalidate legislation absent clear conflict with Constitution).

70. See, e.g., 1 *Annals of Cong.* 424–25 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Smith) (characterizing proposal as “premature” and suggesting consideration of

amending the Constitution at such an early stage, preferring to wait until experience had revealed particular defects that required correction.⁷¹

On July 21, 1789, a few weeks after Madison's speech introducing his proposal for a bill of rights, the proposal was referred to a Select Committee of the House tasked with "tak[ing] the subject of amendments . . . generally into their consideration, and . . . report[ing] thereupon to the House."⁷² Among the members appointed to this Select Committee were Madison and Roger Sherman of Connecticut, one of the congressmen who had questioned the need for taking up the question of a bill of rights.⁷³ A key piece of evidence referred to in nearly all modern discussions of the Ninth Amendment's original meaning is a draft proposal for a bill of rights that emerged from the Select Committee, which was written in Sherman's handwriting and which differed markedly from both Madison's initial proposal and from the final list of amendments approved by the Select Committee.⁷⁴ The proposed second amendment set forth in the Sherman draft provided as follows:

The people have certain natural rights which are retained by them when they enter into Society, Such are the rights of

Amendments be either referred to a Select Committee or "taken up for discussion at a future day"); *id.* at 426 (remarks of Rep. Goodhue) (expressing support for amendments but recommending they be taken up at later time); *id.* (remarks of Rep. Burke) (same).

71. See, e.g., *id.* at 425 (remarks of Rep. Jackson) ("I am against taking up the subject at present, and shall therefore be totally against the amendments, if the Government is not [first] organized, that I may see whether it is grievous or not."); *id.* at 429–30 (remarks of Rep. Vining) (expressing objection based upon "the uncertainty with which we must decide on questions of amendment, founded merely on speculative theory"); *id.* at 444–47 (remarks of Rep. Gerry) (expressing agreement with Jackson and Vining while indicating willingness to consider amendments "when the proper time arrives"); *id.* at 447–48 (remarks of Rep. Sherman) (questioning how those states that had not proposed amendments would be persuaded of their need when "they know of no defect from experience").

72. *Id.* at 665.

73. *Id.*; see *supra* note 71 (quoting Rep. Sherman); see also 1 *Annals of Cong.* 661 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Sherman) (asserting that Article V "was intended to facilitate the adoption of those [amendments] which experience should point out to be necessary" and expressing doubt that proposed amendments would secure support necessary for ratification). The Select Committee consisted of eleven members, with one representative from each state that had ratified the Constitution. *Id.* at 665. In addition to Madison and Sherman, the Select Committee included John Vining of Delaware, who served as the Committee's chair, George Clymer of Pennsylvania, Elias Boudinot of New Jersey, Aedenus Burke of South Carolina, Egbert Benson of New York, Robert Goodhue of Massachusetts, George Gale of Maryland, Nicholas Gilman of New Hampshire, and Abraham Baldwin of Georgia. *Id.*

74. Although there is general agreement that the draft bill was written in Sherman's handwriting, some have raised doubts about whether the draft reflects Sherman's own proposals based on the apparent inconsistency between the proposals and Sherman's own expressed views, including his outspoken opposition to considering a bill of rights. E.g., Barnett, *What It Says*, *supra* note 3, at 38 n.157. It is possible that the draft reflected either an interim report that Sherman prepared on behalf of the Select Committee or Sherman's own personal notes concerning the proposed amendments that were then under consideration.

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 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.⁷⁵

Proponents of the individual natural rights interpretation of the Ninth Amendment have viewed this proposed amendment, which refers to “natural rights” that are “retained” by the “people,” as fairly strong evidence that the “other” rights referred to in the Ninth Amendment are individual natural rights.⁷⁶ In response, proponents of the federalism interpretation point to a separate provision in the same document that appears to track the state ratifying conventions’ calls for a rule of construction addressing the Federalists’ “danger” argument:

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 . . . 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.⁷⁷

The draft bill of rights penned by Sherman thus offers something to both sides of the modern debate over the Ninth Amendment’s original meaning. On the one hand, the “natural rights” provision clearly shows that the language of “retained” rights could be used to refer to individual natural rights. On the other hand, the provision paralleling the rule of construction language that had been called for by both the state ratifying conventions and by Madison’s initial proposal, reflected a principal concern with the effect of enumeration on the scope of federal power rather than its effect on individual natural rights.

The final version of the proposed Ninth Amendment, reported by the Select Committee on July 28, 1789, differed from both Madison’s initial proposal and the two Sherman proposals, providing that “[t]he enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”⁷⁸ This language is nearly identical to the language that was ultimately ratified as the Ninth

75. Roger Sherman’s Draft of the Bill of Rights, reprinted in 1 *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* app. A, at 351, 351 (Randy E. Barnett ed., 1989).

76. See, e.g., Barnett, *What It Says*, supra note 3, at 38–40 (citing Sherman’s Bill of Rights in support of individual natural rights interpretation of Ninth Amendment).

77. Roger Sherman’s Draft of the Bill of Rights, supra note 75, at 352; see also, e.g., Lash, *Lost Original Meaning*, supra note 3, at 365–66 (“Sherman’s draft links the rule of the Ninth Amendment with the retained powers of the states . . .”).

78. House Committee Report (July 28, 1789), reprinted in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 29, 31 (Helen E. Veit et al. eds., 1991) (footnote omitted).

Amendment,⁷⁹ which will be examined in closer detail in the next section.⁸⁰ The language approved by the Select Committee attracted relatively little subsequent legislative debate in the House apart from an unsuccessful proposal by Representative Gerry to replace the word “disparage” with “impair” on the ground that the former word “was not of plain import.”⁸¹

5. *The Ninth Amendment Before the States.* — Though the records of the Bill of Rights’ ratification are notoriously sparse,⁸² the surviving records of certain objections raised to the proposed amendments in the Virginia legislature have been considered illuminating by advocates of both the individual natural rights and federalism models of the Ninth Amendment.⁸³

In a November 28, 1789 letter to Madison, Hardin Burnley, a member of Virginia’s House of Delegates, reported that while the Virginia House had voted to ratify the first ten of the proposed amendments submitted to the states, the final two—the provisions we now know as the Ninth and Tenth Amendments⁸⁴—had been rejected.⁸⁵ In explaining the Assembly’s failure to approve the final two proposed amendments, Burnley described an objection that had been raised to the two provisions by the state’s former governor, Edmund Randolph, who had been a prominent supporter of ratification during the earlier debates surrounding the original Constitution of 1787.⁸⁶ As described in Burnley’s letter:

[Randolph’s] principal objection was pointed against the word retained in the eleventh proposed amendment [i.e., the Ninth Amendment], and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free people would re-

79. Two minor changes to the proposed language were subsequently made prior to approval of the Amendment by the full House, which involved replacing the reference to “this Constitution” with the words “the Constitution” and inserting a comma. McAfee, *Original Meaning*, supra note 3, at 1237 n.88. Neither of these changes seems likely to have affected the Amendment’s substantive meaning in any way.

80. See infra Part II.B (analyzing Ninth Amendment’s text).

81. 1 *Annals of Cong.* 754–55 (1789) (Joseph Gales ed., 1834).

82. See, e.g., Levy, supra note 44, at 43 (“We know almost nothing about what the state legislatures thought concerning the meanings of the various amendments, and the press was perfunctory in its reports, if not altogether silent.”).

83. See, e.g., Barnett, *What It Says*, supra note 3, at 46–55 (analyzing objections as support for individual natural rights model); Lash, *Lost Original Meaning*, supra note 3, at 371–84 (analyzing objections as support for federalism model).

84. The Ninth Amendment was frequently referred to during the ratification period and for some time thereafter as the “eleventh” based on its placement on the initial list of twelve proposed Amendments approved by Congress and submitted to the states for ratification, the first two of which received an insufficient number of state ratifications to be included in the Constitution. Lash, *Lost Original Meaning*, supra note 3, at 422–23.

85. Letter from Hardin Burnley to James Madison (Nov. 28, 1789), in 5 *Documentary History of the Constitution of the United States of America, 1786–1870*, at 219, 219–20 (Dep’t of State ed., 1905) [hereinafter 5 *Documentary History*].

86. Lash, *Lost Original Meaning*, supra note 3, at 375–76.

quire the exercise of; and that as there was no criterion by which it could be determined whither any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st & 17th amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.⁸⁷

As noted above, Virginia's proposed seventeenth amendment, which was referred to in Burnley's letter to Madison, sought a rule of construction providing "[t]hat those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress" but instead had been included either to "mak[e] exceptions to the specified powers" or "merely for greater caution."⁸⁸ According to Burnley, Randolph's objection was premised on the inherent uncertainty that would arise from phrasing the provision to refer to ill-defined "retained" rights rather than to "exten[sions of] the powers of Congress," which Randolph believed would provide "more safe[ty]" to the rights sought to be protected.⁸⁹ Burnley himself saw no "force of the distinction" pressed by Randolph for "by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain."⁹⁰

In a December 6, 1789 letter to George Washington, Randolph explained his reasons for objecting to the proposed amendment as being that it might "giv[e] a handle" to opponents of the Constitution "to say, that congress have endeavoured to administer an opiate, by an alteration, which is merely plausible."⁹¹ In other words, Randolph's concern appears to have been that Antifederalists would argue that Congress was attempting to avoid any actual restrictions on the scope of its power by using a "merely plausible" interpretation of an ambiguous proposal to argue that it had adequately addressed the state ratifying conventions' calls for a rule against broad constructions of federal powers.

Though the Virginia House eventually reconsidered and voted to approve the amendments,⁹² Randolph's concerns proved prescient. The Virginia Senate, which was controlled by Antifederalists, refused to ratify the proposed Ninth Amendment, declaring it to be "greatly defective" if "meant to guard against the extension of the powers of Congress by implication" and stating that it "does by no means comprehend the idea expressed" in the Virginia ratifying convention's call for a rule of construc-

87. Letter from Hardin Burnley to James Madison, *supra* note 85, at 219.

88. Amendments Proposed by the Virginia Convention, *supra* note 57, at 661; *supra* note 57 and accompanying text.

89. Letter from Hardin Burnley to James Madison, *supra* note 85, at 219.

90. *Id.*

91. Letter from Edmund Randolph to George Washington (Dec. 6, 1789), *in* 5 *Documentary History*, *supra* note 85, at 222, 223.

92. Lash, *Lost Original Meaning*, *supra* note 3, at 379.

tion.⁹³ The Virginia Senate's majority report further declared that to the extent the proposed amendment was addressed to "personal rights," the proposal

might be dangerous, because, should the rights of the people be invaded or called in question, they might be required to shew by the constitution what rights they have retained; and such as could not from that instrument be proved to be retained by them, they might be denied to possess.⁹⁴

In a December 5, 1789 letter to George Washington reporting his "last information from Richmond," Madison lamented the opposition the proposed amendment had provoked "from a friend to the Constitution" (i.e., Randolph) and echoed Burnley's disagreement with Randolph's distinction between the rights-protective language of the proposed amendment and the power-limiting language that had been proposed by Virginia's ratifying convention:

[T]he distinction . . . appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended.⁹⁵

Madison's correspondence with Burnley and Washington and the Virginia Senate report have been claimed by proponents of both the individual natural rights interpretation and the federalism interpretation as support for their respective positions. For example, Professor Barnett contends that objections articulated by Randolph and the Virginia Senate demonstrate that the Amendment's rights-focused language was not generally understood to address the types of federalism concerns that were the focus of the amendment proposed by the Virginia ratifying convention and was instead understood as relating to the protection of individual natural rights.⁹⁶ Proponents of the federalism interpretation, however, point to the statements by Madison and Burnley suggesting that the Amendment would have the same effect as the Virginia proposal as evidence of a federalist understanding of the Amendment's language.⁹⁷

B. *The Ninth Amendment's Text*

Though the Ninth Amendment's background history is important to understanding its context and the concerns it was designed to address, no examination of the provision's original meaning would be complete with-

93. *Id.* at 380–81 (quoting Entry of Dec. 12, 1789, *in* Journal of the Senate of the Commonwealth of Virginia 63, 63–64 (Richmond, Thomas W. White 1827)).

94. *Id.* at 381.

95. Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 Documental History, *supra* note 85, at 221, 221–22.

96. Barnett, *What It Says*, *supra* note 3, at 46–53.

97. E.g., Lash, *Lost Original Meaning*, *supra* note 3, at 382–83; McAfee, *Original Meaning*, *supra* note 3, at 1289–90.

out close examination of the text of the provision itself. While a proper understanding of background context and underlying purposes may assist in resolving ambiguous or otherwise uncertain language, such background understandings cannot trump the plain and unambiguous language of a provision.⁹⁸ Somewhat more controversially, this Article argues in Part III that a provision's apparent background purpose should not be used to imply a broader scope for the provision than is fairly inferable from the explicit semantic meaning of its text and the obvious and noncontroversial implications that would have been generally recognized and accepted as following from that text at the time of its enactment.⁹⁹ With these preliminaries in mind, this Part now turns to a consideration of the specific wording of the Ninth Amendment itself.

1. *"The enumeration in the Constitution, of certain rights."* — At the very outset, the Ninth Amendment identifies itself with the principal focus of both the Federalists' "argument of danger" and the Antifederalist rejoinder to that argument, i.e., the consequences that might follow from the constitutional "enumeration" of certain rights.¹⁰⁰ As Professor Lash observes, "the meaning of 'enumeration'" in 1789 "was no different than that commonly understood today: to enumerate meant 'to number' and an enumeration was simply 'a numbering or count.'"¹⁰¹ Given the background of the Antifederalists' expressed concerns with the effect of the limited enumeration of rights in the original Constitution of 1787,¹⁰² it seems reasonable to interpret the Amendment's reference to the "enumeration . . . of certain rights" as encompassing not only the rights set forth in the immediately preceding Bill of Rights provisions but to *all* rights listed "in the Constitution," regardless of placement.¹⁰³

Less obviously, because the Amendment does not address itself specifically to those enumerated rights that existed at the time of its enactment, the best reading of the Amendment would seem to be that the interpretive rule it commands addresses the effect of subsequent amendments as well.¹⁰⁴ Thus, unless a subsequent rights-declarative amend-

98. See, e.g., Randy E. Barnett, *Underlying Principles*, 24 *Const. Comment.* 405, 412 (2007) ("[A] resort to underlying principles is sometimes needed to discern the original meaning of the text but cannot be used to contradict or change that meaning.").

99. See *infra* Part III.A.2.

100. See *supra* notes 48–52 and accompanying text.

101. Lash, *Textual-Historical*, *supra* note 3, at 901.

102. See *supra* notes 48–58 and accompanying text.

103. See Lash, *Textual-Historical*, *supra* note 3, at 901 ("It also seems likely that the reference [to 'certain rights'] includes the rights numbered in Article I, Section 9 . . ."); McAfee, *Original Meaning*, *supra* note 3, at 1240 ("The ninth amendment[] . . . uses the term 'others' to refer back to the rights enumerated in the Constitution, whether in the bill of rights or the body of the Constitution . . .").

104. See Claus, *supra* note 8, at 615 n.94 (observing that Ninth Amendment establishes "a prospective interpretive rule" that subsequent amendments "could have changed but did not"); Lash, *Textual-Historical*, *supra* note 3, at 901–02 ("The general language of the Ninth . . . prohibit[s] erroneous inferences from the enumeration of any right in the Constitution, including those added after the adoption of the Ninth itself.").

ment expressly and unambiguously narrows the scope of some preexisting “retained” right, the Ninth Amendment’s interpretive command would appear to prevent such effect from being read into the amendment through the process of interpretation.¹⁰⁵

2. “[S]hall [N]ot [B]e [C]onstrued.” — These four words, which contain the Ninth Amendment’s operative command, clearly and unambiguously identify the provision as a rule of construction.¹⁰⁶ The Amendment’s rule of construction function also further identifies the provision with the state ratifying conventions’ calls for an interpretive rule to address the Federalists’ “danger” argument, which related specifically to the effect of enumeration on how the Constitution might be interpreted.¹⁰⁷ This language also tracks very closely the language of the only provision of the original Constitution of 1787 addressed to how the Constitution should be interpreted, the provision in Article IV, Section 3 providing that “nothing in this Constitution *shall be so construed* as to Prejudice any Claims of the United States, or of any particular State.”¹⁰⁸ It is difficult to read this provision, which Madison also had a hand in drafting,¹⁰⁹ as anything other than a “hold harmless” provision, making clear that the legal status of land claims asserted by both the United States and by the respective state governments would remain unaffected by the Constitution’s adoption.¹¹⁰

Because the Ninth Amendment is framed as a rule of construction, the Amendment itself neither confers rights directly nor places any direct limits on the scope of federal power.¹¹¹ Rather, the Amendment merely addresses the interpretive consequences that follow from the fact that

105. See *infra* notes 148–149 and accompanying text.

106. See, e.g., Claus, *supra* note 8, at 621 (“The Ninth Amendment is a rule of construction. Its operative verb makes that clear . . .”); Lash, *Textual-Historical*, *supra* note 3, at 903 (“As a matter of semantic meaning, *all* the Ninth demands is that the enumeration of rights not be construed in a particular way.”).

107. See *supra* notes 48–58 and accompanying text.

108. U.S. Const. art. IV, § 3, cl. 2 (emphasis added). The significance of this earlier provision is often overlooked in modern discussions of the Amendment’s original meaning. See, e.g., Barnett, *What It Says*, *supra* note 3, at 78 (asserting that “the Ninth Amendment provides the only explicit rule of construction in the text of the Constitution”); Lash, *Lost Original Meaning*, *supra* note 3, at 340 n.34 (asserting that Ninth and Eleventh Amendments are the “only two provisions in the Constitution solely concerned with issues of interpretation”). But see Paulsen, *Prescribe Rules*, *supra* note 6, at 891 (drawing connection between this provision and Ninth Amendment as rules of construction).

109. See Jeffrey Sikkenga, *Claims*, in *Heritage Guide to the Constitution* 281, 281–82 (Edwin Meese et al. eds., 2005).

110. See *id.*; see also, e.g., Paulsen, *Prescribe Rules*, *supra* note 6, at 885 n.85 (observing that provision “functions as a rule of nonpreemption (or nonextinguishing) of existing state and national claims to territory”).

111. See, e.g., Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988) (“It is a common error, but an error nonetheless, to talk of ‘ninth amendment rights.’ The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.”).

particular rights have been enumerated in the Constitution.¹¹² Recognizing the force of this textual limitation, the leading modern interpretations of the Amendment, including those that view the Amendment as a judicially enforceable means of protecting natural or federalism-based rights, acknowledge the Amendment's principal rule of construction function and describe the effects of the Amendment's express command in terms of an interpretive rule.¹¹³ The dispute among the leading theories thus relates solely to the scope of the Amendment's interpretive command and to the potential implied secondary meanings that might be inferred from its reference to "other[] retained" rights.¹¹⁴

3. "[T]o [D]eny or [D]isparage." — As noted above, most modern discussions of the Ninth Amendment's original meaning have focused on attempting to discern the meaning of the Amendment's reference to "others retained by the people."¹¹⁵ But equally critical to understanding the Amendment's scope and modern significance is a proper understanding of what it means "to deny or disparage" such "retained" rights. This important question has received far less sustained critical attention.¹¹⁶

A major reason for the relative inattention to the meaning of this crucial phrase is that the two leading contemporary theories of the Amendment's original meaning, i.e., Professor Barnett's individual natural rights model and Professor Lash's broad federalism model, essentially agree on what it means (and would have meant) to "deny or disparage" a right. According to both Professor Barnett and Professor Lash, an "unenumerated" right is denied or disparaged if the fact of enumeration is used to accord enumerated rights a greater degree of protection or respect than is accorded the "other[]" rights referred to in the Amendment's concluding phrase.¹¹⁷ In Professor Barnett's memorable

112. See, e.g., Paulsen, *Prescribe Rules*, supra note 6, at 884 ("The Ninth Amendment is, in explicit terms, a straightforward rule of construction concerning the legal effect of the specific enumeration of rights elsewhere in the Constitution . . .").

113. See supra note 42 (describing Barnett's and Lash's interpretations). But see Yoo, supra note 27, at 979–80 (asserting that "we should not read the Ninth Amendment's 'to be construed' language merely as a rule of construction").

114. See supra notes 26–41 and accompanying text (summarizing leading theories of the Amendment's original meaning); see also infra Part III (describing relationship between express semantic meaning and implied secondary meaning in interpreting Ninth Amendment).

115. See supra Part I (discussing modern interpretations of Ninth Amendment).

116. But cf. Claus, supra note 8, at 589–91 (questioning interpretation of Amendment's "deny or disparage" language in leading academic discussions of its original meaning); Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 Chi.-Kent L. Rev. 177, 182–85 (1988) (same).

117. See, e.g., Barnett, *What It Says*, supra note 3, at 13–15 ("[T]he Ninth Amendment has the important function of negating any construction of the Constitution that would protect only enumerated rights and leave unenumerated rights unprotected."); Lash, *Textual-Historical*, supra note 3, at 904–06 ("The Disparagement Clause thus prevents an unwarranted diminishment of retained rights because of their lack of enumeration.").

phrase, by prohibiting the “denial” or “disparagement” of retained rights, the Ninth Amendment sought “to ensure the equal protection of unenumerated . . . rights on a par with those” rights that were enumerated.¹¹⁸ Under this “equal protection” reading, refusing to enforce judicially the “other[]” rights referred to in the Amendment (whatever those rights may be) effectively “denies” or “disparages” such rights by treating them differently based solely on their unenumerated status.¹¹⁹

The conventional meaning of “deny” in 1789, as reflected in founding era dictionaries, was, for all practical purposes, identical to its modern meaning.¹²⁰ The Ninth Amendment’s interpretive command thus clearly prohibits using the fact that certain rights have been enumerated to claim that other “retained” rights do not exist.¹²¹ But the fact that a particular claimed right is not judicially enforced does not warrant the further inference that the right does not exist. Even today, rights of unquestionable constitutional status, such as the Article IV right to a republican form of government,¹²² are held to be nonjusticiable, depending for their protection solely upon the elected branches of government.¹²³ The argument for inferring “denial” from judicial nonenforcement would have been, if anything, far weaker during the founding era, when judicial review was in its infancy and the authority of judges to strike down legislation remained at least somewhat uncertain.¹²⁴

In view of this potential difficulty with trying to base an inference of judicial enforceability on the Amendment’s reference to “deny[ing]”

118. Barnett, *What It Says*, supra note 3, at 14.

119. See *id.* (“[T]he Ninth Amendment . . . requires that all natural rights be protected equally—not be ‘disparaged’—whether or not they are enumerated.”); Lash, *Textual-Historical*, supra note 3, at 906 (asserting that Ninth Amendment’s nondisparagement command “prevents treating enumerated rights as superior to nonenumerated rights”).

120. See, e.g., Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) (defining relevant sense of “deny” as “[t]o refuse; not to grant”); Noah Webster, *An American Dictionary of the English Language* 235 (4th ed. 1830) (providing various senses of term, including “[t]o refuse to grant,” “[n]ot to afford; to withhold,” and “[n]ot to afford or yield”).

121. Cf. Lash, *Textual-Historical*, supra note 3, at 904 (arguing that Ninth Amendment commands that “the *fact* of enumeration shall not imply the *necessity* of enumeration”).

122. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . .”).

123. See, e.g., *Baker v. Carr*, 369 U.S. 186, 218–32 (1962) (listing cases in which Guaranty Clause was held to be nonjusticiable); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“Under [Article IV] it rests with Congress to decide what government is the established one in a State. . . . [T]he right to decide is placed there, and not in the courts.”).

124. On the uncertain status of judicial review during the period prior to the Constitution’s adoption, see, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 35–72 (2004); Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 *Geo. Wash. L. Rev.* 51, 62–85 (2003); William Michael Treanor, *Judicial Review Before Marbury*, 58 *Stan. L. Rev.* 455, 473–96 (2005).

rights, proponents of the “equal protection” interpretation have tended to place greater emphasis on the term “disparage.”¹²⁵ The “equal protection” interpretation assumes that according enumerated rights greater legal protection than unenumerated rights would necessarily “disparage” the unenumerated rights by placing them in a position of relative inferiority.¹²⁶

But as Professor Lash observes, the term “disparage” in 1789 had several related senses, each of which carried the connotation of “diminishment.”¹²⁷ If “disparage” was conventionally understood to connote “diminishment,” the appropriate baseline for determining whether or not a particular right has been “disparaged” is not the legal status accorded to some other enumerated right but rather the legal status that the particular unenumerated right in question *would have had* in the absence of *any* enumeration.¹²⁸

To see the distinction, consider the following two arguments:

Argument #1: In the absence of an enumeration of rights, the judiciary would have had to decide on a case-by-case basis which particular unenumerated rights were judicially enforceable and which were not. But, the fact that certain rights *were* enumerated warrants an inference that those particular rights, and only those rights, are within the scope of judicial protection.

Argument #2: In the absence of an enumeration of rights, *no* unenumerated rights would have been judicially enforceable. But, the fact that certain rights *were* enumerated warrants an inference that those particular rights, and only those rights, are within the scope of judicial protection.

Argument #1 plainly diminishes (i.e., disparages) the legal status of unenumerated rights by foreclosing an inquiry into judicial enforceability that would have been necessary in the absence of enumeration. Argument #2, however, does not “diminish” the legal status of unenumerated

125. See, e.g., Barnett, *What It Says*, supra note 3, at 14 (arguing Ninth Amendment’s use of “disparaged” requires “equal protection” reading); Lash, *Textual-Historical*, supra note 3, at 904–06 (same); Massey, supra note 3, at 318 (same).

126. See, e.g., Lash, *Textual-Historical*, supra note 3, at 905 (asserting “Disparagement Clause” of Ninth Amendment “declar[es] that the fact of enumeration shall not imply the *superiority* of enumeration”); Massey, supra note 3, at 318 (asserting that if concept of “disparagement” is not understood to prevent interpretation of Ninth Amendment under which “only the enumerated rights may be judicially enforced,” then “the concept has been drained of all meaning”).

127. Lash, *Textual-Historical*, supra note 3, at 905 n.39.

128. See, e.g., Claus, supra note 8, at 591 (“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.”); see also Akhil Reed Amar, *America’s Constitution: A Biography* 328 n.* (2005) (noting Ninth Amendment’s “denied or disparaged” language “obviously presupposed a baseline, namely, what would the status of a given right have been in the absence of the Bill of Rights?”).

rights in any way. Rather, this argument recognizes that such rights would have been judicially unenforceable regardless of the enumeration of other rights and that only the fact of those other rights' enumeration gives rise to a judicial duty to recognize and enforce such rights. Though both arguments result in enumerated rights receiving greater legal protection based on the fact of their enumeration, only the former can plausibly be characterized as "disparaging" the preexisting legal status that unenumerated rights would have had in the absence of enumeration.¹²⁹

4. "[O]thers [R]etained by the [P]eople." — Here, at last, is the phrase that has provoked the most interpretive controversy in modern debates regarding the Ninth Amendment's original meaning. Despite the diversity of modern views on the original meaning of this phrase (discussed in Part I above),¹³⁰ there is one point on which nearly all modern commentators agree—that the phrase refers exclusively to rights that are not, themselves, enumerated in the Constitution.¹³¹

But the Amendment itself does not specifically limit its scope to "unenumerated" rights. Rather, the Amendment's text refers to "rights" in two separate contexts, the "enumeration . . . of certain rights" and "others," i.e., other rights, "retained by the people." Most modern interpretations assume that these two phrases were meant to divide rights into separate and mutually exclusive categories: (1) "enumerat[ed]" rights, and (2) "other[] retained" rights. But what if a right were both "enumerated" and "retained"? For example, Professor Barnett has argued that certain of the rights protected by the First Amendment, including "freedom of speech" and "freedom of religion," were themselves "retained natural rights" that would have been legally enforceable even if the Bill of Rights had not been adopted.¹³² It seems odd to suggest that such "retained" rights should receive *less* protection against diminishment by im-

129. See Claus, *supra* note 8, at 591 ("To be denied or disparaged is to be made worse off than before, not merely to miss out on being made better off.").

130. See *supra* notes 25–36 and accompanying text.

131. See, e.g., Lash, *Textual-Historical*, *supra* note 3, at 906 ("[T]he Ninth has nothing to say about how enumerated rights ought to be construed beyond forbidding a construction that denies or disparages *nonenumerated* rights."); Seidman, *supra* note 8, at 23 (interpreting "other" rights to mean rights "other than the rights enumerated in the Constitution"). The only exception I am aware of is Professor Akhil Amar, who has argued that:

[T]he plain words of the Ninth Amendment" command "that the expression of some [enumerated] rights (such as "the accused's" [Sixth Amendment] 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 [under Article III]).

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 105 (1998); *id.* at 111.

132. Barnett, *What It Says*, *supra* note 3, at 13–15. Professor Barnett has not made clear whether he believes the Ninth Amendment's reference to "others retained by the people" encompasses "retained" rights that are also "enumerated" rights or whether he believes that phrase to be limited to the "retained" rights that were omitted from the constitutional enumeration.

plication when new rights are added to the Constitution than would have been the case if such rights had been wholly omitted from the constitutional enumeration. But this is precisely the effect that interpreting the Ninth Amendment's reference to "other[]" rights as limited to unenumerated rights would seem to demand.

Fortunately, there is another, equally plausible reading of the Ninth Amendment's text that avoids this unusual result. Instead of reading the Amendment as dividing the world into separate and mutually exclusive categories of "enumerated" rights and "other" rights, the Amendment's reference to "the enumeration . . . of certain rights" can be read to refer to each distinct enumerated right set forth in the Constitution individually, rather than to the collective set of all enumerated rights. The reference to "others" can then be read not as referring to the collective set of unenumerated "retained" rights, but rather as referring to *each and every* "retained" right, regardless of whether or not any particular "retained" right is also enumerated.¹³³ Interpreting the Amendment in this way would direct interpreters to decide on a case-by-case basis whether a particular claimed right is a "retained" right and, if so, whether an argument is being made that some *other* enumerated right should cause the "retained" right in question, which might also be an enumerated right itself, to be either denied or disparaged.¹³⁴

Of course, the scope of the Amendment's rule of construction, including the determination of whether it prohibits "deny[ing] or disparag[ing]" any particular enumerated rights, hinges upon what the phrase "others retained by the people" was originally understood to encompass. For purposes of this Article, I would like to refrain from taking a position on the meaning of this important phrase, which has been extensively examined by other scholars.¹³⁵ For present purposes, I simply observe that identifying the content of such "other[]" rights with precision is significantly *less* important under the "hold harmless" interpretation of the Amendment's "deny or disparage" language than would be

133. To illustrate the distinction, consider the following alternative ways in which the Amendment's references to "certain rights" and "others" might have been rephrased:

(1) The enumeration in the Constitution of [*the collective set of enumerated*] rights shall not be construed to deny or disparage [*the collective set of all other rights that are*] retained by the people.

(2) The enumeration in the Constitution of [*any particular*] rights shall not be construed to deny or disparage [*any other rights that are*] retained by the people.

The first alternative seems to clearly limit the Amendment's effect to attempts to deny or disparage rights that are *outside* the constitutional enumeration. The second alternative, however, does not exclude the possibility that certain "retained" rights might also be enumerated, allowing the Amendment's interpretive command to extend to those rights as well. The text of the Amendment provides no grounds for preferring the former understanding over the latter.

134. See *infra* Part IV.A (offering three specific examples of this interpretive method).

135. See *supra* Part I (describing positions taken by other scholars).

the case under the “equal protection” interpretation endorsed by both Professors Barnett and Lash.

As noted above, the “equal protection” interpretation requires that “other[] retained” rights be placed on a par with the rights actually enumerated such that greater legal effect could not be accorded the latter set of rights based solely on the fact that they were enumerated.¹³⁶ Thus, for example, if courts were to determine that “strict scrutiny” is the appropriate standard for reviewing claimed infringements of enumerated rights, such as the freedom of speech, the “equal protection” interpretation demands that strict scrutiny apply to infringements of analogous unenumerated “retained” rights as well.¹³⁷ The “equal protection” interpretation thus makes proper identification of “retained” rights very important because, once identified, such rights are effectively entitled to the same strong level of protection accorded to enumerated constitutional rights with no distinction in treatment allowed based on the fact of the latter’s enumeration.

The “hold harmless” interpretation, on the other hand, makes the legal status of enumerated rights irrelevant to determining the proper legal status of “other[]” rights, demanding only that the fact that certain rights have been enumerated not be used to the detriment of such status. Thus, if particular “retained” rights would have been entitled to strong legal protection under a “strict scrutiny” standard in the absence of any constitutional enumeration, the “hold harmless” interpretation would demand that they not receive a lower level of protection merely because other rights have been enumerated. But if such rights would have been either legally unenforceable or enforceable only as a matter of state law, then giving enumerated rights a much stronger level of protection would be perfectly consistent with the Ninth Amendment’s express command.

Before leaving the subject, one additional possibility deserves mention. Recall that when the Ninth Amendment was submitted for ratification along with other provisions of the Bill of Rights, Edmund Randolph and other members of the Virginia legislature expressed concern that the Amendment’s vague reference to “retained” rights might be subject to greater uncertainty than an express limitation on broad constructions of federal powers.¹³⁸ These statements suggest that members of the founding generation may *themselves* have been uncertain regarding the precise scope of the Amendment’s reference to “others retained by the people.”¹³⁹ If the Amendment were understood as effectively constitutionalizing such “other[]” rights by placing their legal status on a par with that

136. See *supra* text accompanying notes 117–119 (describing “equal protection” interpretation).

137. Lash, *Textual-Historical*, *supra* note 3, at 905–06.

138. See *supra* Part II.A.5 (discussing views of the Amendment expressed by participants in Virginia ratification debates).

139. See, e.g., Lash, *Lost Original Meaning*, *supra* note 3, at 382 (conceding that interpretive disagreement within Virginia legislature at least raises possibility “that the

of enumerated rights, such uncertainty would likely have been considered problematic because it would have left the scope of federal authority significantly underspecified. Yet, despite Federalist objections that much more specific rights-protective provisions of the Bill of Rights might unduly inhibit federal lawmaking power,¹⁴⁰ no surviving record of the legislative debates records a similar objection having been raised with respect to the Ninth Amendment.¹⁴¹

If, on the other hand, the Ninth Amendment were understood as a narrow rule of construction, which merely ensured that “other[] retained” rights would have the same legal status they would have had in the absence of enumerated rights, the relative paucity of debate on the Amendment seems much more understandable. On this interpretation, a failure to specify the precise content of “other[] retained” rights could present interpretive difficulties only on those relatively rare occasions where the fact of enumeration was being used as a basis for attempting to “deny” or “disparage” some other claimed right. Given the limited scope of the Ninth Amendment’s interpretive command, those who participated in its drafting and ratification may have seen little difficulty in approving language of somewhat uncertain scope, trusting that future interpreters would be able to resolve its inherent ambiguities in the context of particular disputes.¹⁴²

If the Amendment’s reference to “retained rights” was, in fact, widely viewed by members of the ratifying public as either vague or ambiguous, modern interpreters would be forced to look to some criteria other than original meaning to determine which “other[]” rights should be understood as subject to the Amendment’s interpretive rule for purposes of modern constitutional decisionmaking.¹⁴³ Again, however, for purposes

Select Committee’s alteration of the text may have rendered the [Ninth Amendment] without any clearly identifiable meaning”).

140. See *infra* notes 256–258.

141. To the contrary, contemporary assessments of the Ninth Amendment and the other provisions of the Bill of Rights tended to view the amendments as relatively innocuous and largely symbolic. See Mark Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. Pa. J. Const. L. 357, 382–83 (2007) (collecting sources).

142. Cf. Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 455 (2007) (arguing that original Constitution of 1787 “contain[ed] many artful silences and decisions by its framers to agree to disagree” and “[t]hese ambiguities were necessary to its ratification”).

143. Several originalist theorists, including Professor Barnett, have proposed a distinction between “constitutional interpretation,” which can be roughly described as the process of ascertaining the original meaning of the constitutional text, and “constitutional construction,” which involves formulating rules of decision consistent with the meaning discovered through interpretation where such meanings are too vague, ambiguous, or otherwise underdeterminate to serve as rules of decision themselves. E.g., Barnett, *Lost Constitution*, *supra* note 3, at 118–30; Lawrence B. Solum, *Semantic Originalism* 68–75 (Ill. Pub. Law & Legal Theory Research Papers Series, Working Paper No. 07-24, 2008) [hereinafter Solum, *Semantic Originalism*], available at <http://ssrn.com/abstract=1120244> (on file with the *Columbia Law Review*).

of this Article, I would like to simply flag the possibility of such vagueness or ambiguity without attempting to conclusively prove that the original meaning of the Amendment's reference to "retained" rights was, in fact, either vague or ambiguous.¹⁴⁴

C. Conclusion

The historical and textual evidence bearing on the Ninth Amendment's original meaning strongly suggests that the Amendment was targeted at addressing a very specific form of interpretive argument—i.e., the danger that enumerating particular rights in the Constitution might give rise to an inference that the rights omitted from the enumeration had been either repealed by implication or surrendered to the federal government's control. This basic point is largely uncontroversial among modern commentators on the Amendment's original meaning.¹⁴⁵ Where these commentators diverge is with regard to the scope of the rule of construction the Amendment adopted, the meaning of the Amendment's reference to "other[] retained" rights, and the Amendment's significance for the legal status of unenumerated rights.¹⁴⁶

My reading of the Amendment's express command differs from the leading interpretations of the Amendment in two significant ways. First, unlike the accounts of Professors Barnett and Lash, the leading proponents of the individual natural rights interpretation and the federalist interpretation respectively, my reading of the Amendment's "deny or disparage" language does not compel equal treatment of enumerated rights and "other[] retained" rights but rather merely requires that enumeration not be used to diminish the preexisting legal status of such "other[]" rights, whatever that status might be. Second, unlike most readings of the Amendment, which assume that it refers to two distinct and mutually exclusive categories of rights—i.e., "enumerated" rights and "other[] retained" rights—the reading proposed in this Article allows for the possibility that at least some "enumerated" rights might also be "retained" rights within the scope of the Amendment's protection. If this reading is

144. See *supra* text accompanying note 135 (explaining that this Article does not take a position on original meaning of phrase "others retained by the people").

145. See, e.g., Barnett, *What It Says*, *supra* note 3, at 25 (observing that Madison proposed Ninth Amendment in order "to avoid any implication that those rights that were not enumerated were surrendered up to the general government and were consequently insecure"); McAfee, *Original Meaning*, *supra* note 3, at 1248 ("The text of the ninth amendment can only be understood against the backdrop of the Federalist objection to a bill of rights that led to proposals for a provision clarifying the impact of an enumeration of specific rights on the rights retained by the people."); cf. Lash, *Inescapable Federalism*, *supra* note 40, at 815 (acknowledging one purpose of Ninth Amendment "was to address concerns about adding a Bill of Rights" but arguing second purpose of Amendment was to prevent constructive enlargement of federal powers).

146. See *supra* notes 26–41 and accompanying text (summarizing leading theories of Ninth Amendment's original meaning); see also *infra* Part III (examining role of implied meanings in interpreting the Amendment).

correct, the Ninth Amendment's rule of construction may have significance beyond the "unenumerated" rights debate as a legally enforceable rule of construction preventing certain unduly narrow readings of *enumerated* constitutional rights as well.¹⁴⁷

Of course, understanding the original semantic meaning of the Amendment does not necessarily tell us all we need to know to determine how it should apply in any particular case. Like most rules of construction, the Ninth Amendment is best understood as establishing a default presumption that may be trumped by suitably clear and unambiguous constitutional language rather than as an inexorable command.¹⁴⁸ But nothing in the text of the Amendment tells us precisely how clear a subsequent Amendment must be in order to overcome the presumption against denying or disparaging "retained" rights.¹⁴⁹

The Ninth Amendment's literal semantic meaning also provides little guidance concerning the resolution of genuine conflicts between enumerated constitutional rights (properly construed) and "other[] retained" rights in any particular case. To take an example suggested by Professor Claus, the First Amendment right to freedom of speech may be brought into conflict with arguably "retained" state law rights, such as the right of public figures to the protection of their reputations, raising questions regarding which right should be privileged and which should yield in particular contexts.¹⁵⁰ The original meaning of the Ninth Amendment does not supply an answer as to how questions involving such competing rights claims should be resolved.

Notwithstanding these interpretive difficulties, the original meaning of the Amendment is sufficiently clear to allow for at least two conclusions to be stated with a reasonable degree of confidence. First, nothing

147. See *infra* Part IV.A (providing examples of modern arguments potentially foreclosed by Ninth Amendment's rule of construction).

148. Cf. *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 661–62 (1829) ("Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature.").

149. For example, the Thirteenth and Fourteenth Amendments expressly and unambiguously "denied" to slaveholders continued recognition of their preexisting property interests without payment of the "just compensation" to which they would otherwise have been entitled under the Fifth Amendment's Takings Clause. U.S. Const. amend. XIII; *id.* amend. XIV, § 4. Reasonable disagreement was possible, however, as to whether those Amendments abrogated rights that had been acquired under slave contracts entered into before the amendments were adopted. The Supreme Court ultimately resolved this issue in a manner consistent with the Ninth Amendment's interpretive command (though without mentioning that Amendment) by refusing to interpret the Thirteenth Amendment to abrogate such private, contractual rights. See *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654, 662 (1871) ("The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. . . . There is nothing in the language of the [Thirteenth] [A]mendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect.").

150. Claus, *supra* note 8, at 616–21.

in the express semantic meaning of the Amendment either requires courts to treat unenumerated “retained” rights as if they were constitutional rights or precludes them from according enumerated constitutional rights more favorable treatment than is accorded unenumerated rights. At the same time, however, the Amendment’s express command is equally clear that the mere fact that a particular right has been enumerated in the Constitution cannot be used as an argument for according some other “retained” right a narrower scope or lesser protection than it would have received if the enumerated right in question had not been included in the Constitution. The significance of these two propositions will be explored further in Part IV.

III. THE NINTH AMENDMENT AND THE LIMITS OF CONSTITUTIONAL IMPLICATURE

The discussion in Part II focused exclusively upon identifying the express semantic meaning conveyed by the Ninth Amendment’s text when read in the context of the particular historical events that led to its enactment. In recent writings, both Professor Barnett and Professor Lash have helpfully clarified their respective positions by arguing that the judicial obligation to recognize and enforce “unenumerated” rights they identify in the Amendment does not arise from the Amendment’s express semantic meaning but rather from a putatively implied secondary meaning they associate with the Amendment.

For example, in a 2009 article, Professor Barnett acknowledged that the Ninth Amendment “expressly enjoins one, and only one, particular constitutional construction,” i.e., “that, because some rights have been enumerated, another unenumerated right may be denied or disparaged.”¹⁵¹ Despite this limited express meaning, however, Professor Barnett believes that the Amendment carries two significantly broader implied commands:

The original meaning of the Ninth Amendment also implies more than what it expressly says. In particular, it implies (1) that there are natural rights that are retained by the people and (2) that these rights should not be denied or disparaged. Taken together, these two implied propositions enjoin the denial or disparagement of natural rights, even where such a denial is not being justified on the grounds that other rights were enumerated.¹⁵²

151. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 *Nw. U. L. Rev.* 615, 622–23 (2009) [hereinafter Barnett, *Assumptions*].

152. *Id.* at 622–24; see also Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 *Drake L. Rev.* 897, 900 (2008) (“[T]he Ninth Amendment expressly says only that one cannot use the lack of enumeration to claim that a right should not be protected. . . . But . . . the Ninth Amendment also implies, as part of its original meaning, [that] there are, in fact, natural rights and these rights shall not be denied or disparaged.”).

Similarly, in a 2008 article, Professor Lash recognized that the judicial enforceability of “retained” rights will, in most cases, depend upon the Ninth Amendment’s implied secondary meaning rather than its express command:

[I]f limited to its semantic meaning, judicial enforcement of the Ninth is fairly straightforward. . . . The only time the semantic meaning comes into play is when a court or government official insists that the fact of enumeration suggests the necessity or superiority of enumeration. The underlying principle of the Ninth, however, implies the existence of retained rights beyond those expressly enumerated in the Constitution. . . . Put another way, the text of the Ninth Amendment suggests a preexisting limitation on federal power—a limitation enforceable by courts in situations beyond those triggered by the primary semantic meaning of the Ninth Amendment.¹⁵³

In view of this significant focus by the two leading theorists of the Ninth Amendment’s original meaning on implied secondary meanings, any attempt to address the original meaning of the Amendment must address what, if any, implications can and should be drawn from the Amendment’s prohibition of denying or disparaging “other[] retained” rights. This section addresses those questions by reviewing insights from linguistic philosophy regarding the relationship between express semantic meaning and implied secondary meaning and considers some particular problems in recognizing such implied meanings in the context of legal communication. This section then applies these insights to the specific text and historical background of the Ninth Amendment to determine what, if any, implied secondary meaning can reasonably be understood to follow from the Amendment’s reference to “other[] retained” rights.¹⁵⁴

153. Lash, *Textual-Historical*, *supra* note 3, at 929.

154. The arguments in this section have been heavily influenced by the writings of Professors Andrei Marmor and Jeffrey Goldsworthy on the relationship between implications and legal language. See generally Jeffrey Goldsworthy, *Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donoghue*, 23 *Monash U. L. Rev.* 362 (1997); Jeffrey Goldsworthy, *Implications in Language, Law and the Constitution*, in *Future Directions in Australian Constitutional Law 150* (Geoffrey Lindell ed., 1994); Andrei Marmor, *What Does the Law Say? Semantics and Pragmatics in Statutory Language*, in *Interpretation and Legal Theory: A Debate 127* (D. Canale and G. Tuzet eds., 2007) [hereinafter Marmor, *What Does the Law Say?*]; Andrei Marmor, *Can the Law Imply More than It Says? On Some Pragmatic Aspects of Strategic Speech* (Univ. S. Cal. Legal Studies Research Paper No. 09-43, 2009) [hereinafter Marmor, *Imply*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517883 (on file with the *Columbia Law Review*); Andrei Marmor, *The Pragmatics of Legal Language* (Univ. S. Cal. Legal Studies Research Paper No. 08-11, 2008) [hereinafter Marmor, *Pragmatics*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130863 (on file with the *Columbia Law Review*).

A. *Implied Meaning and Legal Communication: An Overview*

1. *The Relationship Between Express Meaning and Implied Meaning in Ordinary Conversation.* — Consider the following sentence: “Do you have the time?” On its surface, the meaning of this sentence seems relatively clear. At the same time, it seems almost impossible to know how one should respond without additional contextual information. For example, if posed by a friend in the context of a request to meet for lunch, a natural understanding of the sentence might be “Will you have time to meet for lunch?” But if posed by a stranger passing on the street, it would be more natural to understand the sentence as asking “Do you know what time it is?” Moreover, although the sentence is clearly phrased as seeking a “yes” or “no” answer, answering “yes” in the latter context would be considered surprising (and more than a bit rude) because in this context the question is conventionally understood as inquiring what the time actually is.¹⁵⁵

The manner in which context contributes to the meaning of particular expressions, as illustrated in the example above, is the principal focus of the branch of linguistic philosophy known as pragmatics.¹⁵⁶ A major subject of inquiry in this field is the concept of “implicature,” which refers to something that is meant, implied, or suggested by a particular communication but that is distinct from what is actually said.¹⁵⁷

The foundational work in the field of conversational implicature is that of linguistic philosopher Paul Grice.¹⁵⁸ The central insight upon which Grice’s theory of conversational implicature draws is that communication is usually a cooperative endeavor:

Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction.¹⁵⁹

155. See Marmor, *Pragmatics*, *supra* note 154, at 15–16 (“[Such expressions] conventionally mean something that differs somewhat from the literal meaning of the words used.”); see also Michael L. Geis, *On Meaning: The Meaning of Meaning in the Law*, 73 *Wash. U. L.Q.* 1125, 1126 (1995) (using “Can you reach the salt?” to illustrate similar points).

156. See, e.g., Solum, *Semantic Originalism*, *supra* note 143, at 31–33 (distinguishing and defining semantics and pragmatics); Kepa Korta & John Perry, *Pragmatics*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2006), at <http://plato.stanford.edu/entries/pragmatics> (on file with the *Columbia Law Review*) (defining pragmatics and examining classical and contemporary pragmatic theory).

157. Wayne Davis, *Implicature*, in *Stanford Encyclopedia of Philosophy*, *supra* note 156, at <http://plato.stanford.edu/entries/implicature> (on file with the *Columbia Law Review*).

158. Paul Grice, *Studies in the Way of Words* 24–40, 269–82 (1989).

159. *Id.* at 26.

Expanding upon this “Cooperative Principle,”¹⁶⁰ Grice identified the following “maxims” of ordinary conversation, the observance of which tends to facilitate the cooperative exchange of information:

a. *Maxims of quantity*—make your contribution to the conversation as informative as required under the circumstances and do not contribute more or less than is required;

b. *Maxims of quality*—do not say something you believe is false, or something for which you lack adequate evidence;

c. *Maxim of relation*—make your contribution relevant to the conversation;

d. *Maxims of manner*—be perspicuous, avoid obscurity of expression and ambiguity, be brief and orderly, and avoid unnecessary prolixity.¹⁶¹

Grice argued that the presumption that these maxims are observed in most conversational settings allows speakers to implicate more than is explicitly conveyed by the semantic content of their communications and for listeners to recognize and understand such implicated content.¹⁶²

Two examples suggested by Grice illustrate how the presumption that conversational maxims are being observed allows for the identification of conversational implicatures:

Example #1: Person A states: “I am out of gas,” to which Person B responds, “There is a garage around the corner.”¹⁶³

B’s response does not directly state either that the garage is open or that it has any gasoline to sell. But the assumption that B is observing the maxim of *relation* allows A to interpret B’s communication as implicating both of these facts.¹⁶⁴

Example #2: A and B are talking about a mutual friend, C, who is now working in a bank. A asks B how C is getting on in his job, and B replies, “Oh quite well, I think; he likes his colleagues and he hasn’t been to prison yet.”¹⁶⁵

On its surface, B’s volunteering the fact that C “hasn’t been to prison yet” would appear to flout at least two of Grice’s maxims—the maxim of *relation*, by saying something with no obvious relevance to the topic of conversation, and the maxim of *quantity*, by contributing more information than circumstances require. It would therefore be natural for A to interpret B’s statement as implying something more than was said explicitly.

Grice noted that not all apparent violations of the conversational maxims give rise to implicatures because participants may choose to “opt

160. *Id.* Grice formally specified the “Cooperative Principle” in the following terms: “Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.” *Id.*

161. *Id.* at 26–28.

162. *Id.* at 28–31.

163. *Id.* at 32.

164. *Id.*

165. *Id.* at 24.

out” from the operation of particular maxims or from the Cooperative Principle in general on particular occasions.¹⁶⁶ For example, if one were to respond to the question posed in Example #1 by saying, “There is a garage around the corner, and that’s all the information I can share with you at this time,” the listener would be alerted to the fact that the speaker may have additional, relevant information that she is not willing to share and that therefore her statement does not necessarily implicate either that the garage will be open or that it has gas to sell.¹⁶⁷

This feature of “cancelability” distinguishes “conversational implicatures,” like those discussed in the examples above, from what Grice described as “conventional implicatures,” which depend upon the conventional meaning of particular terms or phrases used in the sentence rather than surrounding context.¹⁶⁸ For example, the statement “She was poor *but* honest” commits the speaker to the implicated view that there is something exceptional or surprising about a person being both poor and honest.¹⁶⁹ Similarly, the statement “He is an Englishman *therefore* he is brave” commits the speaker to the implicated view that the fact of the person’s bravery follows logically or naturally from the fact that he is an Englishman.¹⁷⁰ In cases such as these, the implicated content follows logically from the semantic content of the statements, and the speaker could not “opt out” of such implicated content without uttering something self-contradictory or nonsensical (e.g., “She was poor but honest, like all poor people” or “He is an Englishman therefore he is brave, unlike many Englishmen”).

In addition to conversational and conventional implicatures, implied content may also be derived from a particular statement by reference to the “presuppositions” that underlie the statement.¹⁷¹ As described by Professor Andrei Marmor, “presupposition consists in content that is not actually asserted, but would need to be taken for granted in order to make sense of the asserted content.”¹⁷² Presuppositional content may reflect either background understandings that are already shared by the

166. *Id.* at 30.

167. See *id.* at 39 (“[An implicature] may be explicitly canceled, by the addition of a clause that states . . . that the speaker has opted out, or it may be contextually canceled, if the form of utterance that usually carries it is used in a context that makes it clear that the speaker is opting out.”).

168. *Id.* at 25–26.

169. H.P. Grice & Alan R. White, *The Causal Theory of Perception*, 35 *Procs. Aristotelian Soc’y* 121, 127–28 (Supp. 1961).

170. Grice, *supra* note 158, at 25–26.

171. E.g., *id.* at 269–82.

172. Marmor, *Pragmatics*, *supra* note 154, at 35. A more formal definition of “presupposition” is offered by philosopher Scott Soames in the following terms:

An utterance U presupposes P (at [time] t) if one can reasonably infer from U that the speaker S accepts P and regards it as uncontroversial, either because
 (a) S thinks that P is already part of the conversational context at t; or because
 (b) S thinks that the audience is prepared to add it, without objection, to the context against which U is evaluated.

participants to the talk exchange or content that hearers can be expected to readily accommodate for the purpose of the conversation.¹⁷³ For example, if I were to state that “my wife and I went to dinner last night,” my statement would not explicitly state that I was married, but competent speakers would readily recognize that my statement presupposes that fact and be willing to accept it as true for purposes of the conversation.¹⁷⁴

Like implicatures, presuppositions may be either cancellable or non-cancellable depending on the particular form of locution used.¹⁷⁵ Unlike the distinction between conventional and conversational implicatures, however, there does not appear to be any clear and easily identifiable dividing line separating cancellable from noncancellable presuppositions.¹⁷⁶

Before turning to the special problems that implicature may pose in the context of legal communication, a few observations are in order regarding factors that may complicate efforts to recognize and understand the implied content conveyed by such mechanisms in the context of ordinary conversation. First, the Gricean maxims of conversation that contribute to implicature do not operate as rigid and precise rules in the manner of the conventional rules of syntax and punctuation.¹⁷⁷ Rather, the Gricean maxims are broad principles that apply “more or less” in particular cases and may, in certain circumstances, directly conflict with one another.¹⁷⁸ In cases involving such apparent conflict, it will not always be

Scott Soames, *How Presuppositions Are Inherited: A Solution to the Projection Problem*, in 4 *Pragmatics: Critical Concepts* 69, 72 (Asa Kasher ed., 2000).

173. Marmor, *Pragmatics*, supra note 154, at 35–36.

174. Cf. Grice, supra note 158, at 274 (“I do not expect, when I tell someone that my aunt’s cousin went to a concert, to be questioned whether I have an aunt and, if so, whether my aunt has a cousin. This is the sort of thing that I would expect him . . . to take my word for.”).

175. See Marmor, *Pragmatics*, supra note 154, at 36–37 (providing examples of cancellable presuppositions).

176. See, e.g., 1 Scott Soames, *Presupposition*, in *Philosophical Essays: Natural Language: What It Means and How We Use It* 73, 124–25 (2009) (identifying need for “a careful separation of cancellable and noncancellable presuppositions, and principled explanations of each” as among “unresolved issues” in pragmatic theory).

177. See, e.g., M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 *U. Pitt. L. Rev.* 373, 382–83 (1985) (“Whereas the rules of syntax and semantics apply quite precisely . . . the [Gricean] conversational maxims apply ‘more or less.’ We can and do violate them, deliberately or otherwise, and it is a matter of judgment how well they are being observed in any given conversation.”); see also Geoffrey Leech, *Principles of Pragmatics* 19–45 (1983) (noting flexibility of principles of pragmatics).

178. See, e.g., Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 *Va. L. Rev.* 565, 603 (2006) (“[A]s many pragmatists have pointed out, Grice’s maxims are often vague, and could be contradictory as applied to any given case.”); see also Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition* 36–38 (1995) (contending that pragmatic theories grounded in Gricean maxims are “almost entirely *ex post facto*” in that they are capable of explaining how a particular implicature could be arrived at “based on the context, the utterance and general expectations about the behavior of speakers” but

apparent whether or not an implicature has been intended and, if so, what precisely has been implicated.¹⁷⁹

Second, in many circumstances, including those involving no direct conflict between the Gricean maxims, the maxims themselves and the Cooperative Principle in general will not be specific enough to allow a particular implicature to be identified with precision.¹⁸⁰ Consider again the example discussed above regarding a conversation between two people discussing their mutual friend's new job at a bank.¹⁸¹ The speaker who contributes the information that the friend "hasn't been to prison yet" may have in mind a particular intended implicature, but the combination of the Cooperative Principle, the background context of the conversation, and the shared knowledge of the participants may not be such as to allow the listener to know exactly what was intended. For example, the listener may be confused as to whether the statement is intended to refer to the friend's dishonesty or some form of criminality going on at the institution where the friend works.¹⁸²

Third, in the context of presuppositions, it may not always be clear whether a particular statement truly presupposes particular assertive content that may arguably be implied by the statement and, if so, what that presupposed content actually is. Consider a statement that "Mary regretted breaking the vase." This statement could arguably be understood to presuppose all of the following content: (1) that the vase was broken, (2) that someone broke the vase, and (3) that the person who broke the vase was Mary.¹⁸³ But suppose one or more of these presuppositions is false. Would the statement that "Mary regretted breaking the vase" then be nonsensical? Not necessarily. For example, it could be the case that someone else broke the vase and that Mary mistakenly believed that it was her fault. Or it could be the case that the vase was not actually broken at

incapable of explaining why "on the same basis, an equally convincing justification could not have been given for some other interpretation that was not in fact chosen"); Jerrold M. Sadock, *On Testing for Conversational Implicature*, in *Pragmatics: Critical Concepts*, supra note 172, at 315, 318–21 (contending that Grice's maxims are so vague that almost any implicature can be "worked out" through their application).

179. See, e.g., Davis, supra note 157 ("When the Gricean maxims conflict, there is no way to determine what is required for conformity to the Cooperative Principle.")

180. See, e.g., Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 *Wis. L. Rev.* 1179, 1194 ("Perhaps the leading criticism . . . [of] the Gricean maxims [is that they] are 'so vague and general that they allow the prediction of any implication whatever.'" (quoting Ruth M. Kempson, *Presupposition and the Delimitation of Semantics* 146 (1975))); see also, e.g., Sadock, supra note 178, at 329 (observing that "[t]here are no sufficient tests for conversational implicature and no group of tests that together are sufficient").

181. See supra text accompanying note 165.

182. Grice himself acknowledged as much, observing that in this context, "A might well inquire what B was implying, what he was suggesting, or even what he meant by saying that C had not yet been to prison." Grice, supra note 158, at 24.

183. Cf. Robert C. Stalnaker, *Pragmatic Presuppositions*, in *Pragmatics: Critical Concepts*, supra note 172, at 16, 24 ("If I assert . . . that Jones regrets . . . that Nixon won the election, then I presuppose that Nixon did in fact win.")

all and that Mary merely believed that it had been. The only condition truly necessary for the statement to make sense is that Mary *believed* she broke the vase, and this meaning is thus the only truly noncancellable presupposition the statement can be fairly understood to convey.¹⁸⁴

Each of these difficulties relates to a fundamental feature of the reasoning process by which implicatures are recognized and understood. As Professor Goldsworthy observes, “[t]he process of reasoning by which implicatures are inferred is probabilistic and non-demonstrative, a matter of forming hypotheses concerning the speaker’s most probable meaning on the basis of evidence available to the hearer.”¹⁸⁵ Thus, while the presumption that the Gricean maxims are being observed provides a useful first step in the inferential process leading to the recognition of implicatures, those maxims cannot be used to demonstrate by a formal process of deductive logic that a conversational implicature or cancellable presupposition actually exists in any particular instance. Rather, such recognition must depend upon a process of inductive reasoning that draws upon evidence of the speaker’s most probable intended meaning in order to form hypotheses regarding what the speaker must have intended by his or her use of particular language in a particular context.¹⁸⁶

2. *Implied Meaning and Legal Communication.* — In addition to the general problems with identifying implied content that may arise in the course of ordinary conversation, there are several additional factors that complicate efforts to identify implied content in the context of a legal communication such as a statute or constitutional provision. Scholars have identified several critical differences between legislative communications and ordinary conversations that tend to limit the usefulness of the Gricean maxims in the legislative context. Among the most important differences that have been noted are that legal communications typically

184. See Marmor, *Pragmatics*, supra note 154, at 36 n.38 (“I take it that it is possible for an agent to regret that P, even if P has not actually occurred; it is impossible for an agent to regret that P, however, if the agent does not *believe* that P occurred.”).

185. Goldsworthy, supra note 154, at 156; see also Leech, supra note 177, at 30–31 (arguing that process by which implicatures are arrived at by listeners “is not a formalized deductive logic, but an informal rational problem-solving strategy”).

186. This is not to say that nonsemantically encoded implicatures and presuppositions are necessarily reducible to the implicatures that speakers actually intend to convey. It may be possible to reasonably associate an implicature or presupposition with a particular statement even if the speaker had no conscious intention to communicate the implicated content. See, e.g., Goldsworthy, supra note 154, at 156–57 (discussing “process of reasoning by which implications are inferred”). But the process of reasoning by which listeners will identify such implied content necessarily depends upon their ability to draw inferences about the speaker’s *most likely* intended meaning based on the available evidence of such intentions (including the words used and the surrounding context) even if such inferences fail to align with the speaker’s actual subjective intentions. See *id.* at 157 (observing that “cases in which an utterance conveys an implication not intended by the speaker ‘are in a sense secondary; the implicature arises only through a misunderstanding; what gives rise to it are the hearer’s expectations about what the speaker must *intend*’” (quoting Ralph C.S. Walker, *Conversational Implicatures*, in *Meaning, Reference and Necessity* 133, 154–55 (Simon Blackburn ed., 1975))).

consist of one-way directives rather than two-way exchanges of information;¹⁸⁷ that legal communications usually emerge from an extensive process of deliberation and negotiation, rather than through the largely extemporaneous processes through which ordinary conversations emerge;¹⁸⁸ and that certain forms of implicature that feature prominently in ordinary conversation, such as irony, sarcasm, and metaphor, are generally absent in the legislative context.¹⁸⁹

One particular difficulty with recognizing implied meanings in the context of legal language relates to the importance of Grice's Cooperative Principle in identifying conversational implicatures.¹⁹⁰ Due to the often noncooperative and strategic nature of communication within and produced by a legislature or similar lawmaking body, speech exchanges in the legislative context may frequently diverge from the idealized cooperative exchange of information that Grice's conversational maxims envision, rendering those maxims of questionable utility in attempting to identify putatively implied legislative meanings.¹⁹¹

As has been well documented in the statutory interpretation literature, legislation is often the result of a highly complex and nontransparent process featuring carefully negotiated, and often unrecorded, bargains among competing interests.¹⁹² Because any particular piece of proposed legislation must run the gamut of the legislative process, including "many diverse, and frequently nontransparent, veto gates" that stand

187. Sinclair, *supra* note 177, at 386.

188. See, e.g., Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 *Geo. Wash. L. Rev.* 309, 347 (2001) ("In making statements in ordinary conversation, I do not ponder for weeks, months, or years before making each utterance; I do not subject my statements to the advance scrutiny of committees and the public . . .").

189. Sinclair, *supra* note 177, at 390.

190. See *supra* notes 158–162 and accompanying text (discussing role of Cooperative Principle in Grice's theory of conversational implicature).

191. See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2462 n.274 (2003) [hereinafter Manning, *Absurdity Doctrine*] ("[T]he [Gricean] maxim of quality does not readily translate from the conversational setting to the complex, multilateral bargaining process of framing a statute."); Marmor, *What Does the Law Say?*, *supra* note 154, at 139 ("Generally, due to the strategic nature of legislative acts, we do not have conversational maxims that are sufficiently determinate to allow us to infer that a certain implicature forms part of what the law says.").

192. See, e.g., Manning, *Absurdity Doctrine*, *supra* note 191, at 2389–90 ("[T]he precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision."); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. Rev.* 575, 614–16 (2002) (reporting results of empirical examination of congressional drafting process suggesting that drafting process involves "a complex work of negotiation among a variety of players, including staffers, lobbyists, and professional drafters"); cf. William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 633–34 (1990) (acknowledging that "[m]any statutes reflect carefully crafted compromises among . . . various [interest] groups" but suggesting that "documentary records of such compromises" may provide valuable aid to interpreters).

between proposal and enactment, there may often be little ground for confidence that the particular pattern of bargaining and interest group negotiation that contributed to the legislation's final form can be accurately reconstructed by later interpreters.¹⁹³ For example, the ultimate form a particular statute takes may be influenced by such diverse factors as the order in which particular proposals are brought to the floor,¹⁹⁴ strategic voting (including logrolling),¹⁹⁵ unsuccessful attempts to "kill the bill,"¹⁹⁶ or unrecorded compromises among legislators, outside interests, or other political actors key to the legislation's success.¹⁹⁷ Given the complexity and opacity of the legislative process, proponents of New Textualist theories of statutory interpretation¹⁹⁸ have argued "that the only safe course for a faithful agent" seeking to interpret the resulting legislation is "to enforce the clear terms of the statutes that have emerged from that process" rather than attempting "to get inside Congress's 'mind.'"¹⁹⁹

193. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1715 (2004) [hereinafter Manning, *Precise Texts*].

194. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533, 547 (1983) ("Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made. . . . It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support."); Manning, *Absurdity Doctrine*, *supra* note 191, at 2412–13 ("[S]ocial choice theory predicts that, in the face of cycling, legislative outcomes will largely depend on the sequence in which alternatives are presented, so that those who control the legislative agenda will have significant influence over the legislation's final shape." (footnote omitted)).

195. See, e.g., Easterbrook, *supra* note 194, at 548 ("[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the [b]ody's design. A successful logrolling process yields unanimity on every recorded vote and indeterminacy on all issues for which there is no recorded vote." (footnote omitted)).

196. One particularly famous example involves the addition of "sex" as a protected class under Title VII of the Civil Rights Act of 1964, which was offered "by opponents in a last-minute attempt to block the bill which became the Act." *Barnes v. Costle*, 561 F.2d 983, 986–87 (D.C. Cir. 1977); Charles Whalen & Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 115–17 (1985).

197. See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) ("[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions.").

198. See Eskridge, *supra* note 192, at 640–66 (discussing interpretive premises of "New Textualist" theories of statutory interpretation and their impact on Supreme Court decisionmaking).

199. Manning, *Absurdity Doctrine*, *supra* note 191, at 2390. To be sure, textualist theories of statutory interpretation are not uncontroversial, and many theorists continue to insist upon intentionalist or purposivist approaches to statutory interpretation on either conceptual or normative grounds. See, e.g., Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 *San Diego L. Rev.* 967, 972–82 (2004) (arguing "intention free" textualism is conceptually impossible); Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *Harv. L. Rev.* 16, 83 (2002)

As Professor John Manning has persuasively argued, there is little ground for believing that these well-documented problems with reconstructing legislative “intent” and “purpose” are less significant in the context of constitutional amendments.²⁰⁰ If anything, these difficulties are likely to be exacerbated by the additional supermajority and ratification requirements of Article V, which are likely to make legislative negotiation and compromise even more essential to the ultimate success of a constitutional amendment than an ordinary statute.²⁰¹ Even if certain identifiable purposes underlying a particular proposed amendment enjoy an overwhelming degree of public support, it would not necessarily follow that such underlying purposes can be translated directly into law via the Article V amendment process without modification.²⁰² The supermajority processes prescribed by Article V place an inordinate amount of political power in the hands of legislative minorities who may “insist upon compromise as the price of [their] assent.”²⁰³ And the requirement of ratification by a supermajority of state legislatures may create internal incentives on the part of supporters to “self edit” in order to avoid potential objections that might be used to defeat ratification.²⁰⁴

In view of the complex, opaque, and path-dependent nature of the legislative process in general and the Article V amendment process in particular, interpreters have little reason for confidence that the highly cooperative communicative context envisioned by the Gricean maxims will have been present in the context of any particular legislative enactment. Consider, for example, the maxim of *relation*. In ordinary conversation, the interjection of seemingly irrelevant content by one party into a speech exchange will ordinarily cause the other party to search for potentially implicated content as a means of understanding why the seemingly

(“Honoring authorial intent in giving meaning to a text upholds the formal democratic value of constitutional and legislative supremacy.”). Nonetheless, even proponents of “purposive” theories have internalized, to some extent, the New Textualists’ arguments concerning the difficulties with identifying a clear and determinate legislative “purpose” or “intent.” See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1, 3 (2006) (observing that “textualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text”).

200. Manning, *Precise Texts*, *supra* note 193, at 1716.

201. *Id.* at 1716–20.

202. *Id.* at 1720 (“[B]y unmistakable design, the Article V process does not seamlessly translate social sentiment, even widespread social sentiment, into constitutional law.”).

203. *Id.* at 1671 (“By design, th[e] [Article V amendment] process seeks to ensure that a small minority of society or, more accurately, several distinct small minorities have the right to veto constitutional change or to insist upon compromise as the price of assent.”); see also *id.* at 1718 (“The deliberately cumbersome amendment process, with its steep and multitiered supermajority requirements, quite clearly establishes a set of safeguards for political minorities much stronger than the legislative process created by Article I, Section 7.”).

204. See *id.* at 1735–36 (suggesting “lines actually drawn” in particular amendment may reflect “some unrecorded concession . . . offered preemptively by the majority as part of the price of assent”).

irrelevant information was contributed.²⁰⁵ But in the legislative context, a seemingly incongruous provision may simply have been inserted as the price demanded by a minority faction whose support was necessary for the provision's enactment.²⁰⁶ Similarly, a provision that appears to flout the conversational maxim of *quality* by violating some relevant background legislative purpose may simply reflect that the proposing faction lacked sufficient votes to secure an enactment more consistent with the background purpose and decided that "half a loaf" was better than nothing.²⁰⁷

Given these difficulties in identifying the "implied" content of law, it may be tempting to take the position that implied content should never be understood to form part of what a legal provision says unless it is semantically encoded in the provision itself (by virtue of either a conventional implicature or a noncancellable presupposition). But this position is likely too extreme.²⁰⁸ Legislators often do not speak with precision, and a strong case can be made that refusing to understand their language in a manner consistent with its obvious and noncontroversial implications would be unduly harsh and perhaps even impracticable.²⁰⁹ Consider, for example, John Marshall's observation in *McCulloch v. Maryland* that the constitutional power "to establish post offices and post roads" carries with it an implied power "of carrying the mail along the post road, from one post office to another."²¹⁰ Even without the Necessary and Proper Clause,²¹¹ the implication of such a power would likely have struck most

205. See Grice, *supra* note 158, at 31 (describing reasoning process by which existence of conversational implicature arising from contribution of seemingly irrelevant information can be "worked out" in ordinary conversation).

206. Cf. *Hadden v. The Collector*, 72 U.S. (5 Wall.) 107, 110–11 (1866) ("Every one who has had occasion to examine [the acts of Congress] has found the most incongruous provisions, having no reference to the matter specified in the title. . . . The words 'for other purposes,' frequently added to the title in acts of Congress, are considered as covering every possible subject of legislation.").

207. See, e.g., Manning, *Absurdity Doctrine*, *supra* note 191, at 2411 ("Legislators may compromise on language that does not perfectly correspond to a perceived mischief, accepting half a loaf to facilitate a law's passage.").

208. Cf. Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. Cin. L. Rev. 25, 67 (2006) (arguing that "[t]extualists are right to exclude many of the implied meanings and purposes that characterize language used in conversational settings" but that "[i]t does not follow that textualists must exclude every instance of implied meaning" in legislative context).

209. See, e.g., Goldsworthy, *supra* note 154, at 158 ("The full meaning of almost every utterance probably depends partly on assumptions which are so elementary they are not even noticed."); Siegel, *supra* note 188, at 342 ("[T]here is simply no drafting process that can adequately anticipate everything that will happen once a statute is actually passed.").

210. 17 U.S. (4 Wheat.) 316, 417 (1819).

211. U.S. Const. art. I, § 8, cl. 18 ("Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

observers as so natural and obvious that a narrower interpretation denying such a power would have seemed absurd.

I would therefore like to propose a more modest two-part test for recognizing constitutional implicatures that takes into account the particular distinctions between communications made in the context of ordinary conversations and communications that emerge as the end result of a complex and nontransparent legislative process. *First*, interpreters should question whether the putatively implied content arises as a matter of logical necessity due to a noncancellable, semantically encoded formulation (e.g., a conventional implicature or noncancellable presupposition). If so, there appears to be little difficulty with recognizing the implied content as part of the law itself, just as if it had been expressly set forth in the provision's text.²¹²

Second, if the implied content is not semantically encoded in the text, interpreters should inquire whether a reasonable member of the ratifying public at the time of enactment would have recognized the implied content as following obviously and noncontroversially from the choice of the particular language used in the provision and the relevant background context.²¹³ This second implication test is similar to the concept of a "necessary implication" that is often invoked in the context of statutory interpretation.²¹⁴ Though courts have not always been consistent in their use of the "necessary implication" label,²¹⁵ the classic articulation of the standard was provided by Lord Eldon of the British High Court of Chancery in 1813: A "necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that, which is imputed . . . cannot be supposed."²¹⁶ A more recent articulation of the standard was offered by Lord Hobhouse of the British House of Lords:

212. See, e.g., Marmor, *What Does the Law Say?*, *supra* note 154, at 138–39 ("If by saying P, in circumstances C, the legislature semantically implies that Q, then Q is part of what the legislature has expressed. That is so, because this is a . . . commitment that follows from the words used An attempt to cancel the commitment would have been disingenuous or perplexing.")

213. Cf. Goldsworthy, *supra* note 154, at 169–72 (endorsing similar "obviousness test" for recognition of implicatures in constitutional language).

214. See generally Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 *Alb. L. Rev.* 9, 29–37 (2000) (describing invocation of "necessary implication" concept by various U.S. courts).

215. See *id.* at 36–37 (describing "[t]he range of 'implications' that courts loosely have referred to in connection with 'necessary implications'" ranging from implications essential to making textual sense of statutes to implications that merely seem consistent with legislative intent).

216. *Wilkinson v. Adam*, (1813) 35 *Eng. Rep.* 163 (Ch.) 180; 1 *V.&B.* 422, 466. Though Lord Eldon articulated this standard in the context of will interpretation, it has been endorsed by courts and commentators as a standard for statutory interpretation as well. See, e.g., *United States v. Jones*, 204 *F.2d* 745, 754 (7th Cir. 1953) (applying same standard in determining scope of search and seizure power); 2 J.G. Sutherland & John Lewis, *Statutes and Statutory Construction* 938–39 (2d ed. 1904) (applying *Wilkinson* principle to statutory interpretation generally).

A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included.²¹⁷

Although the United States Supreme Court has been less explicit in its own articulation of the “necessary implication” concept, the requirement of a clear, obvious, and noncontroversial implication seems consistent with late eighteenth- and early nineteenth-century principles of American constitutional interpretation, which rejected “doubtful” or “slight” implications as a basis for finding legislative enactments unconstitutional.²¹⁸

This second implication test is likely to be considerably more open-ended than the first and will depend upon the exercise of judgment on the part of the interpreter. Among considerations relevant to this second inquiry are possible alternative formulations that may have expressed the putatively implied content more directly, the degree of opposition the implied content may have provoked had it been communicated expressly rather than left to implication, and the likelihood that some significant portion of the public may have been uncertain regarding the implied content communicated by the provision or failed to recognize the implied content altogether.

In general, if it would have been reasonable for a member of the ratifying public to either miss the putative implicature completely or to wonder “What did the drafters mean by that?,” the case for recognizing the putative implicature as encompassed within the provision’s original meaning is likely to be quite weak. If, however, the implicature would have been understood as so obvious that members of the ratifying public may not even have recognized the meaning as depending upon implied, rather than express, content without having the fact called to their attention, a fairly strong argument could be made for considering the implicated content as comprised within the provision’s meaning.

217. *R v. Special Comm’r of Income Tax*, [2002] UKHL 21, [2003] 1 A.C. 563 (H.L.) [45] (appeal taken from Eng.). Professor Goldsworthy rightly observes that the use of “necessity” in this context is somewhat inapt and suggests that “[o]bviousness” is a more accurate term than ‘necessity’ for what is required.” Goldsworthy, *supra* note 154, at 168.

218. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) (“[I]t is not on *slight implication* and vague conjecture that the legislature is to be pronounced to have transcended its powers The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.” (emphasis added)); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.) (“[T]o authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, *not a doubtful and argumentative implication.*” (emphasis added)).

B. *Does the Ninth Amendment Imply the Existence of Judicially Enforceable “Other” Rights?*

As previewed in the preceding subsection, the answer to the question of whether the implied meaning of the Ninth Amendment either compels or allows for judicial recognition and enforcement of unenumerated “other[]” rights hinges upon the answers to two subsidiary questions. First, is the judicial enforceability of such “other[]” rights semantically encoded in the Amendment’s text, either as a result of a conventional implicature or a noncancellable presupposition? If the answer to this first question is “yes,” we can end the inquiry confident that the requirement of judicial enforceability is part of the provision’s original meaning. But if the answer to this first question is “no,” we must proceed to the more difficult second inquiry into whether the Amendment would have nonetheless been understood by a reasonable member of the ratifying public as carrying with it a clear and obvious implied meaning that either required or allowed for judicial enforcement of unenumerated rights. For the reasons explained below, I believe that both of these questions must be answered in the negative.

1. *Was Judicial Enforceability of Unenumerated Rights Semantically Encoded in the Language of the Ninth Amendment?* — While he acknowledges that the Ninth Amendment “does not expressly call for the affirmative protection of [unenumerated natural] rights,” Professor Barnett nonetheless contends that “the rule of construction it proposes *would make absolutely no sense if there were no such other rights*.”²¹⁹ Professor Barnett appears to view the Amendment’s reference to “other[]” rights as a semantically encoded presupposition that would be logically inconsistent with the nonexistence of such “other[]” rights.²²⁰ On the basis of this apparent presupposition and his belief that the Amendment’s reference to “other[] retained” rights was meant to refer to individual natural rights, Barnett argues that “the existence of background natural rights retained by the people is a constitutional assumption that is hard-wired into the meaning of the Constitution itself.”²²¹ He thus views the Amendment’s original meaning as being effectively indistinguishable from the “natural rights” provision proposed in the draft bill of rights penned by Roger Sherman.²²²

219. Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 Va. L. Rev. 1729, 1750 (2007) [hereinafter, Barnett, *Chisholm*] (emphasis added); see also *id.* (“Why else would an entire amendment have been added to the Constitution barring a construction of enumerated rights that would deny or disparage these other rights?”).

220. See *supra* notes 171–176 and accompanying text (discussing cancellable and noncancellable presuppositions).

221. Barnett, *Assumptions*, *supra* note 151, at 652–53.

222. *Id.* at 623 (asserting that “Sherman’s proposal is part of the original—implied-in-fact—meaning of the Ninth Amendment”).

Though one might contest Barnett's argument by challenging his interpretation of the Amendment's "retained" rights language,²²³ such a move is not critical to assessing his characterization of the existence of natural rights as a logically compelled implication of the Amendment's language. For purposes of this subsection, I will therefore accept Professor Barnett's contention that the Amendment's reference to "retained" rights would have been generally understood at the time of enactment as if it referred to individual natural rights. To concretize this assumption, we can substitute the natural rights language from Sherman's draft bill of rights for the Ninth Amendment's more oblique reference to "other[] retained" rights—i.e., "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage *the natural rights, which are retained by the people when they enter into Society.*"²²⁴

Had the Amendment been phrased in this way, would one be forced to accept Professor Barnett's characterization of the existence of individual natural rights as a "hard-wired" assumption built into the Amendment's original meaning? On a surface level, the existence of such rights might very well seem like a noncancellable presupposition that could not be "opted out" of without self-contradiction. It would make little sense, for example, to say that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage the natural rights, which are retained by the people when they enter into Society, *but no such natural rights exist.*"

But consider a second strategy someone seeking to "opt out" of the apparent presupposition of the existence of unenumerated natural rights might choose to pursue: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage the natural rights, which are retained by the people when they enter into Society, *if any.*" This second formulation, unlike the example suggested above, does not run into the problem of self-contradiction. Indeed, on certain assumptions, this phrasing would be quite sensible—for example, if there were societal disagreement concerning whether or not legally enforceable natural rights should be recognized. In this circumstance, the competing sides might wish to preserve their respective positions for future resolution while ensuring that the present act of enumerating rights would not jeopardize their respective claims. This is a familiar function of "hold harmless" provisions, such as the provision respecting federal and state land claims in Article IV, Section 3.²²⁵

As this example illustrates, even accepting Professor Barnett's argument that the "other[]" rights referred to in the Amendment are individ-

223. See *supra* Part I (discussing alternative interpretations of this phrase).

224. Cf. *supra* text accompanying note 75 (quoting Sherman's draft "natural rights" provision).

225. U.S. Const. art. IV, § 3, cl. 2; see Paulsen, *Prescribe Rules*, *supra* note 6, at 891 (comparing Ninth Amendment's interpretive command to the interpretive rule respecting federal land claims in Article IV); *supra* text accompanying notes 108–110.

ual natural rights, it would not follow that the existence of such natural rights would be a noncancellable presupposition of the Amendment's text. Rather, as in the "broken vase" example discussed in Part III.A.1,²²⁶ all that would be required for the Amendment to make logical sense would be that *certain people believed* in the existence of such rights at the time of the Amendment's enactment.²²⁷ But *this* presupposition, unlike the presupposition Professor Barnett suggests, would be perfectly consistent with a current refusal to recognize and enforce such rights. Suppose, for example, that at some point after the Ninth Amendment's enactment, public views about the existence of natural rights changed such that an overwhelming consensus existed that the only rights that are legally protectable are those enshrined in positive law. Honoring the Amendment's "non-disparagement" command in this circumstance would not compel contemporary interpreters to act *as if* the natural rights referred to in the Amendment actually exist because the basis for "denying" such rights in this circumstance, i.e., their assumed nonexistence, would have nothing whatsoever to do with the fact that other rights have been "enumerated" in the Constitution.²²⁸

2. *Was Judicial Enforceability of Unenumerated Rights an Obvious Implication of the Ninth Amendment?* — Because the judicial enforceability of unenumerated rights is not logically compelled by the Ninth Amendment's reference to "other[] retained" rights, it is necessary to turn to the more difficult second question of whether, in view of the Amendment's text and background context, it would have been obvious to an observer in 1791 that the Amendment implicated the existence of such rights. Professor Lash has suggested this more modest approach to interpreting the provision, arguing that the "underlying principle" of the

226. See *supra* text accompanying notes 183–184.

227. Additional scenarios might be imagined under which the Ninth Amendment's rule of construction might make sense even if *no one* believed that "unenumerated" rights actually existed—for example, if the drafters mistakenly *believed* that some people held such a belief and, out of an abundance of caution, inserted the Amendment to preempt anticipated objections. As a matter of historical fact, there seems to have been relatively widespread belief in the existence of natural rights among members of the founding generation. See, e.g., Lash, *Lost Original Meaning*, *supra* note 3, at 401 ("[E]vidence that many Founders embraced the idea of natural rights is broad and deep."). It is far from clear, however, that a proposal to constitutionalize such rights in a judicially enforceable provision could have attracted similarly broad-based support. See *infra* notes 256–258 and accompanying text (discussing concern that broad declarations of rights could undermine Congress's ability to legislate). All that is important for present purposes is that the existence of such natural rights need not be assumed in order to make logical sense of the Amendment's text.

228. See Seidman, *supra* note 8, at 25 ("[O]ne might easily accept the proposition that enumeration of some rights does nothing to change the status of putative unenumerated rights, but still insist that these rights do not exist or should not be constitutionally enforced.").

Amendment implies a broader application than is required by its express command.²²⁹

Lash's purposive approach to identifying the Amendment's putatively implied secondary meaning bears some resemblance to the work of scholars who have invoked Grice's theory of conversational implicature as support for a strongly purposive approach to statutory interpretation.²³⁰ According to these theories, the Gricean maxim of *quality*, which demands that parties to a speech exchange neither say anything false nor say anything for which they lack adequate evidence,²³¹ when adapted to the legislative context, warrants a presumption that the legislature has not enacted a statute that would disserve its apparent background purpose.²³² Similarly, Professor Lash's argument appears to be that because the limited rule of construction set forth in the Ninth Amendment would not fully serve the apparent background purposes for which the Amendment was enacted, the Amendment should be understood to carry an implied secondary meaning more consonant with its apparent "underlying principle."

This approach to identifying the putatively implied meaning of the Amendment is subject to the same objections that have been leveled against strongly purposivist theories of interpretation in general.²³³ As described above, given the highly opaque and path-dependent nature of the legislative process, accurate identification of the particular underlying "purpose" of a constitutional provision will usually be extremely difficult, even if one or more particular "purposes" can be shown to have enjoyed relatively widespread public support.²³⁴

Moreover, even if one believes that textualist arguments concerning the difficulties of identifying underlying legislative purposes are over-

229. Lash, *Textual-Historical*, supra note 3, at 929.

230. See, e.g., Miller, supra note 180, at 1210–11 (invoking Grice's maxim of *quality* as support for a purposive approach to so-called "absurdity" canon); Sinclair, supra note 177, at 397–99 (invoking maxim of *quality* as support for purposivist interpretation more generally).

231. See supra text accompanying notes 159–162.

232. See, e.g., Miller, supra note 180, at 1209–12 (applying maxim of quality to statutory interpretation); Sinclair, supra note 177, at 398 (discussing presumption "that a connection between a statutory provision and the legislative purpose was established prior to the provision's enactment").

233. See supra notes 190–204 and accompanying text (discussing difficulties of purposivist approach raised by inherent complexity of legislative process); see also Gold, supra note 208, at 67 (arguing that "[t]extualists are right to exclude many of the implied meanings and purposes that characterize language used in conversational settings" because "[t]he pre-enactment bargaining process and complexities of legislation make it nearly impossible to accurately assess such implicit intentions"); Manning, *Absurdity Doctrine*, supra note 191, at 2462 n.274 (critiquing attempts to ground strongly purposive approach to "absurd results" canon in Gricean theories of conversational implicature).

234. See supra text accompanying notes 198–204.

stated as a general matter,²³⁵ there are nonetheless reasons to believe that such arguments might apply with particular force to attempts to identify the “underlying purposes” of the Ninth Amendment specifically. As an initial matter, the difficulties of accurately identifying the patterns of bargaining and negotiation that contributed to the final form of any provision are likely to be greatly exacerbated by the passage of time.²³⁶ In the case of a provision like the Ninth Amendment that was enacted more than two centuries ago, accurate identification of the particular political conditions and patterns of legislative bargaining that contributed to the provision’s final form will rarely be possible for any but the most diligent and skilled of historical researchers.²³⁷

Furthermore, even if it were theoretically possible to enter the minds of the historical legislators who participated in the Ninth Amendment’s framing through a process of imaginative reconstruction, the existing historical record is almost certainly insufficient, as a practical matter, to reveal the particular pattern of legislative negotiation and agenda setting that contributed to the Amendment’s final form. The Senate met in secret and no formal record of its deliberations was kept.²³⁸ And the surviving record of the House debates is sporadic and of only limited reliability.²³⁹ Moreover, apart from Madison’s initial Bill of Rights speech delivered on June 8, 1789, “the House deliberations include nothing of

235. Cf. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 *Geo. L.J.* 427, 428 (2005) (arguing that “[w]e routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play” and that “[t]he legislature is a prototypical example of the kind of group to which this process applies most naturally”).

236. As then Professor (and now Judge) Frank Easterbrook once put it: How many judges . . . know what clauses and provisos, capable of being enacted in 1923, would have been unthinkable in 1927 because of subtle changes in the composition of the dominant coalitions in Congress? It is hard enough to know this for the immediate past, yet who could deny that legislation that could have been passed in 1982 not only would fail but also could be repealed in 1983? Easterbrook, *supra* note 194, at 550.

237. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085, 1089 (1989) (acknowledging that “shared common culture” of framers “should be reflected in some degree of consensus about the meaning of texts” but cautioning that “discerning that consensus may require a deep knowledge of a historical period, which may be beyond the reach of anyone but historians specializing in the period”).

238. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 36 (1986).

239. The surviving records of the House debates in the First Congress consist primarily of contemporaneous reports prepared by Thomas Lloyd, based on his own shorthand transcriptions, which were subsequently edited by Joseph Gale and republished in 1834 under the title *The Debates and Proceedings in the Congress of the United States*, more commonly known today as the *Annals of Congress*. *Id.* Lloyd was a heavy drinker and known Federalist sympathizer, and doubts about the accuracy and objectivity of his reports have been raised by both Lloyd’s own contemporaries (including James Madison) and by modern historians. *Id.* at 36, 38.

substance about the amendment.”²⁴⁰ Most importantly, the Select Committee of the House, which placed the text of the Amendment in its near-final form and where many of the most important decisions affecting its text were likely made, did not keep a record of its deliberations.²⁴¹ Any attempt to impute concrete, legally enforceable “principles” to the Amendment must therefore depend upon a substantial degree of inference and conjecture regarding what the drafters “must have intended” by their choice of the particular language included in the Amendment.

To complicate matters further, the preenactment historical record that does exist suggests the possibility of a significant degree of unrecorded legislative negotiation and compromise that may have contributed to the Amendment’s final form. At least three members of the House Select Committee—Representatives Vining (the Committee’s Chair), Sherman, and Gerry—had expressed reservations about the need to amend the Constitution *at all*.²⁴² At least three other members—Representatives Goodhue, Gage, and Burke—had expressed concerns that taking up the question of amendments might detract from other important legislative priorities.²⁴³ In this context, it would have been important for Madison, as the leading proponent of the amendments in the Select Committee, to try to defuse potential objections and demonstrate to his colleagues that the amendments proposed would be capable of securing the necessary supermajority support required under Article V while causing minimal disruption to other important priorities. Madison himself recognized as much, writing in a private letter that his initial list of proposed amendments had been limited “to points on which least difficulty was apprehended”²⁴⁴ and subsequently cautioning his colleagues on the floor of the House of the need to avoid “[a]mendments of a doubtful nature,” which would “have a tendency to prejudice the whole system.”²⁴⁵

Professor Lash argues that “[t]he historical evidence” suggests two principal purposes for the Ninth Amendment: “(1) preventing the dis-

240. McAfee, *Original Meaning*, supra note 3, at 1237.

241. See Lash, *Inescapable Federalism*, supra note 40, at 823 (noting “no records [exist] of the . . . discussions or reasoning” of special committee that produced “what would be [the] final form” of Ninth Amendment).

242. See supra notes 71 and 73 (quoting statements of Representatives Vining, Sherman, and Gerry).

243. See supra note 70 (citing remarks of Representatives Goodhue, Smith, and Burke); see also Bowling, supra note 62, at 239 (observing that Select Committee’s members were generally “unsympathetic to amendments”).

244. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 5 *The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed* 405, 406 n.1 (Gaillard Hunt ed., 1904).

245. 1 *Annals of Cong.* 738 (1789) (Joseph Gales ed., 1834); see also Levy, supra note 44, at 249 (“The Ninth Amendment functioned as a sweep-it-under-the-rug means of disposing as swiftly as possible of a task embarrassing to both parties and delaying the organization of the government and providing for its revenues.”).

paragement of unenumerated rights and (2) limiting the construction of federal power.”²⁴⁶ But even if this analysis is correct, it is not clear how these two goals were balanced against either one another or against other competing policy goals that may have affected the Amendment’s ultimate content.

To begin with the first of the two putative purposes identified by Professor Lash, i.e., “preventing the disparagement of unenumerated rights,” the preratification history of the Ninth Amendment suggests that multiple alternatives were considered to address this concern. Madison, for example, believed that this goal could be achieved through a rule of construction, similar to that set forth in the final version of the Ninth Amendment, demanding that the enumeration of rights “shall not be so construed as to diminish the just importance of other rights retained by the people.”²⁴⁷ Some of the state ratifying conventions, however, believed that this goal should be pursued through a more direct and substantive provision explicitly affirming the existence of “natural” rights, as had been included in certain of the early state constitutions.²⁴⁸ Such a provision appears to have been considered during the deliberations of the House Select Committee (as reflected in the draft bill of rights penned by Roger Sherman) but was not ultimately approved by that body.²⁴⁹ The Journal of the Senate, where no record of debate on the amendments was kept, suggests that a similar provision was also proposed in that body but was similarly rejected.²⁵⁰ In view of this drafting history, there is substantial reason to doubt that the final version of the Amendment would have been generally understood as effectively equivalent to the explicit “natural rights” provisions proposed on multiple occasions but that the Amendment’s framers expressly chose not to adopt.

Turning to the second “purpose” identified by Professor Lash, i.e., “limiting the construction of federal power,” the historical record is, if anything, even less helpful. Though several of the state ratifying conventions had included calls for a provision addressing the constructive enlargement of federal powers, none of these provisions reflected the “re-

246. Lash, *Textual-Historical*, *supra* note 3, at 904 n.37.

247. 1 *Annals of Cong.* 435 (1789) (Joseph Gales ed., 1834).

248. See *supra* notes 59–61 and accompanying text (describing provision proposed by Virginia ratifying convention explicitly recognizing natural rights).

249. See *supra* text accompanying notes 74–75 (describing Sherman’s proposal directly referencing natural rights).

250. The Senate Journal for September 8, 1789 records the following vote:

On motion to add the following clause to the articles of amendment to the constitution of the United States . . . to wit: “That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting, property, and pursuing and obtaining happiness and safety.” It passed in the negative.

S. Journal, 1st Cong., 1st Sess. 73 (1789).

tained rights” language that was eventually incorporated into the Ninth Amendment.²⁵¹ Madison’s initial proposal for the Amendment did include such language but seemed to draw a distinction between “retained” rights and the “enlarge[ment] [of] powers” by addressing these two concepts separately.²⁵² The draft bill penned by Roger Sherman likewise separated the provision addressing the constructive enlargement of federal power from the provision addressed to the protection of “retained” rights.²⁵³ But in the final version of the Amendment, the specific reference to constructively enlarged federal powers dropped out completely and only the “retained” rights language remained.²⁵⁴

It is impossible to know, based on the limited surviving historical record, exactly why the text of the Ninth Amendment that emerged from the Select Committee took the form that it did. It is at least conceivable that the alterations made to Madison’s initial proposal reflected a mere stylistic change designed to avoid redundancy.²⁵⁵ But in view of the surrounding political context, the possibility that the Amendment’s final text reflected a carefully negotiated substantive compromise cannot be ruled out. A key concern expressed by several members in the House debates was that broad and nonspecific rights declarations might be used to prevent Congress from enacting needful legislation. For example, Representatives Smith and Livermore both objected to the Eighth Amendment’s proposed ban on “cruel and unusual punishments” and “excessive fines” as being “too indefinite,”²⁵⁶ and Livermore expressed concern that the Amendment might limit Congress’s ability to prescribe effective punishments.²⁵⁷ Representative Benson, a member of the Select Committee, similarly moved on the floor of the House to strike out lan-

251. See *supra* notes 56–58 and accompanying text (describing proposals by New York and Virginia ratifying conventions referencing “powers” not granted to federal government rather than “rights” retained by people).

252. See *supra* text accompanying note 64.

253. See *supra* text accompanying notes 75 and 77.

254. See *supra* text accompanying note 78.

255. See, e.g., Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment’s Forgotten Lessons*, in *The Bill of Rights: Original Meaning and Current Understanding* 419, 425 (Eugene W. Hickok, Jr. ed., 1991) (claiming one clause of Madison’s initial proposal was “entirely redundant” and “the meaning of the Ninth Amendment was not changed when Madison’s original proposal was amended by the House”); Lash, *Lost Original Meaning*, *supra* note 3, at 369 (explaining changes in final draft of Ninth Amendment by noting “the constructive enlargement of power language was redundant with language already contained in the Ninth”). But cf. Claus, *supra* note 8, at 623–24 (“The language of the Ninth Amendment would be an oddly backhanded way to do no more than preclude an inference about the breadth of federal powers.”).

256. 1 *Annals of Cong.* 754 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Smith); see *id.* (remarks of Rep. Livermore) (asking “[w]hat is understood by excessive fines?”).

257. Livermore argued that:

The clause seems to express a great deal of humanity . . . but as it seems to have no meaning in it, I do not think it necessary. . . . If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some

guage that had been approved by the Select Committee for inclusion in the Second Amendment, which would have exempted “religiously scrupulous” persons from militia service, arguing that “[i]f this stands [as] part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not.”²⁵⁸

Statements such as these, in addition to further indicating that enumerating particular rights might affect their judicial enforceability (as Madison himself had suggested in his Bill of Rights speech),²⁵⁹ also suggest that a broad and amorphous “natural rights” guarantee, such as the one proposed in Sherman’s draft bill or the one considered (and ultimately rejected) by the Senate, may have met with considerable opposition. While there is less direct evidence of congressional opposition to a provision explicitly addressing the constructive “enlargement” of federal powers, there also appears to have been relatively little obvious support for such a provision, at least to the extent it was not explicitly tied to the Federalists’ “danger” argument to which both Madison’s initial proposal and the proposals of the state ratifying conventions were addressed.²⁶⁰

A final consideration arguing against the existence of an obvious and noncontroversial implicature arising from the Ninth Amendment’s text is the reaction the provision provoked when presented for ratification in the Virginia legislature. Both Edmund Randolph (a supporter of the Constitution and of the proposed Bill of Rights in general) and the Antifederalist faction in the Virginia Senate expressed skepticism that the

security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

Id. (remarks of Rep. Livermore).

258. *Id.* at 751. Federalists had raised similar concerns in response to calls for a bill of rights during the original ratification debates of 1787 and 1788. See, e.g., James Bowdoin, Speech in the Massachusetts Ratification Convention (Jan. 22, 1788), in 2 Elliot’s Debates, *supra* note 46, at 81, 87 (arguing that “there was a clear impropriety in being very particular” in enumeration of individual rights in Constitution because “[b]y such a particularity the government might be embarrassed, and prevented from doing what the private, as well as the public and general, good of the citizens and states might require”).

259. See *supra* text accompanying note 67 (quoting Madison).

260. See *supra* notes 48–66 and accompanying text (discussing Federalists’ “danger” argument). A proposal by Representative Tucker of South Carolina that would have accomplished a somewhat similar restriction on implied federal power by inserting the word “expressly” into the Tenth Amendment was opposed by both Madison and Sherman on the grounds that it would deprive the federal government of incidental powers necessary to its effective operation. See 1 Annals of Cong. 761 (1789) (Joseph Gales ed., 1834) (remarks of Rep. Madison) (objecting that “it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae.”); *id.* (remarks of Rep. Sherman) (“[C]orporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed.”). The proposed revision was defeated by a vote of thirty-two to seventeen with only two members of the Select Committee, Representatives Burke and Gerry, voting in favor and the remaining nine members opposed. *Id.* at 768.

Amendment would be effective in limiting the constructive enlargement of federal powers.²⁶¹ Though both Burnley and Madison disagreed with Randolph's assessment,²⁶² the existence of this interpretive disagreement suggests that any supposedly "implied" content communicated by the Amendment was likely neither obvious nor noncontroversial.²⁶³ Madison and Burnley inferred from the provision a general rule against constructively enlarging federal powers while Randolph and the Antifederalist faction insisted upon language more directly and explicitly targeted toward achieving that goal and expressed doubts concerning the meaning of the Amendment's "retained" rights language.²⁶⁴ Even if the objections of the Virginia Antifederalist faction are discounted as possibly disingenuous,²⁶⁵ the interpretive disagreement among Madison and Burnley on the one hand and Randolph on the other, all of whom shared the twin goals of securing a bill of rights while at the same time preventing the constructive enlargement of federal powers, suggests that whatever putative implicature the Ninth Amendment might have been understood to carry with respect to the constructive enlargement of federal powers was far from obvious.²⁶⁶

In view of the Ninth Amendment's murky drafting history and evidence of interpretive disagreement as to its significance among at least some contemporary interpreters, it seems unreasonable to attribute a putative implicature to the Amendment that would expand its legal effect beyond its literal terms. Had the Ninth Amendment's framers wished to delegate authority to future interpreters to enforce directly the "principles" underlying the Amendment, they could have done so by using suitably broad and general "standard-like" language, as they did in other provisions of the Bill of Rights.²⁶⁷ The Ninth Amendment, by contrast,

261. See *supra* notes 87–93 and accompanying text.

262. See *supra* notes 90, 95, and accompanying text.

263. Cf. Lash, *Inescapable Federalism*, *supra* note 40, at 843 (observing that Ninth Amendment "did not track the language of any proposal submitted by the state conventions . . . [leaving] the [Virginia] Senate in the position of guessing at the purpose of the altered language").

264. See *supra* notes 87–95 and accompanying text (discussing this debate).

265. Cf. Lash, *Inescapable Federalism*, *supra* note 40, at 840–41 (noting that Antifederalist faction in Virginia Senate majority "wanted to derail ratification of the Bill of Rights in order to maintain the pressure for a second constitutional convention" and thus "had every reason to exaggerate their concerns about the proposed amendments").

266. This view is further supported by antebellum treatise writer Benjamin Lynde Oliver's observation in 1832 that the Amendment's meaning was "not wholly free from obscurity." Benjamin L. Oliver, *The Rights of an American Citizen: With a Commentary on State Rights, and on the Constitution and Policy of the United States* 157 (Boston, Marsh, Capen & Lyon 1832).

267. See, e.g., Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 58 (1992) ("A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimiting triggering facts. . . . A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."); see also Manning, *Precise Texts*, *supra* note 193, at 1705

employs relatively narrow and precise “rule-like” language, which limits its application to a very specific form of interpretive argument arising from the “enumeration” of particular constitutional rights.²⁶⁸ Any attempt to directly enforce the putative “principles” underlying the Amendment outside this narrow context would ignore this considered drafting choice.²⁶⁹

IV. THE CONTEMPORARY SIGNIFICANCE OF THE NINTH AMENDMENT’S RULE OF CONSTRUCTION

The discussion in Parts II and III above was addressed primarily to demonstrating that the original meaning of the Ninth Amendment does not support a reading as broad as the two leading modern accounts—Professor Barnett’s individual natural rights model and Professor Lash’s broad federalism model—would suggest. It remains to be considered what consequences for modern constitutional decisionmaking follow from the narrow rule of construction proposed in this Article. Many commentators have assumed that limiting the Amendment’s function to its literal terms as a response to the Federalists’ “danger” argument would deprive the Amendment of any practical significance in modern constitu-

(identifying Fourth Amendment’s ban on “unreasonable searches and seizures” and Eighth Amendment’s prohibition of “cruel and unusual” punishments as examples of “vague or open-ended” constitutional provisions that are “more in the nature of standards than rules”).

268. See, e.g., Lash, *Textual-Historical*, *supra* note 3, at 903 (“As a matter of semantic meaning, *all* the Ninth [Amendment] demands is that the enumeration of rights not be construed in a particular way.”); Solum, *Semantic Originalism*, *supra* note 143, at 57 (“The semantic content of the Ninth Amendment is quite limited. It states a prohibition, ‘shall not,’ the scope of which is limited by the syntax of the clause to forbidden constructions, that is, those constructions which deny or disparage rights retained by the people on the basis of the enumeration of certain rights in the Constitution.”).

269. As Judge Easterbrook explains:

A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X. Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gap-filling authority.

Easterbrook, *supra* note 194, at 546–47 (citations omitted); see also Manning, *Precise Texts*, *supra* note 193, at 1691 (“Because Congress legislates alternatively through open-ended standards or specific rules, shifting a statute’s level of generality to conform to its background purpose dishonors an evident congressional choice to legislate in broader or narrower terms.”).

tional adjudication.²⁷⁰ But even if the Amendment is not viewed as a source of substantive rights and its “non-disparagement” command is not read to require that enumerated and unenumerated rights be placed on an equal footing, the Amendment might still play a significant role in modern constitutional decisionmaking in at least two ways. First, the rule of construction prescribed by the Amendment may play a significant role in preventing the denial or disparagement of “retained” rights as a result of the enumeration of some other constitutional right (or rights). Second, even if the Ninth Amendment is not itself a source of judicially enforceable unenumerated rights, it may be the case that some *other* constitutional provision or provisions might support judicial recognition and enforcement of such rights. If so, the Ninth Amendment could play an important role in preventing the unwarranted “disparagement” of such rights and might also have a possible evidentiary role to play in identifying the types of unenumerated rights warranting judicial protection.

A. *Interpretive Arguments Potentially Foreclosed by the Ninth Amendment’s Rule of Construction*

As argued above, the Ninth Amendment, as a limited rule of construction, does not provide a sufficient textual basis for direct judicial enforcement of the “other[]” rights to which it refers.²⁷¹ It does not follow, however, that the Ninth Amendment *itself* is not judicially enforceable. The Ninth Amendment’s rule of construction remains legally binding on all official interpreters sworn to “support” the Constitution,²⁷² including federal and state judges, and this rule thus stands on the same legal footing as any other constitutional provision.

Of course, the significance of the Amendment is likely to hinge on the precise scope of the “other[] retained” rights to which it refers, identification of which is necessary to determine the types of claimed rights that trigger the Amendment’s nondisparagement command.²⁷³ Without committing to a determinate position regarding the original meaning of the Amendment’s “retained” rights language,²⁷⁴ this section examines three possible examples of contemporary constitutional arguments that might plausibly be foreclosed by a proper understanding and application of the Ninth Amendment’s rule of construction.

270. See, e.g., Massey, *supra* note 3, at 316 (“Construing the ninth amendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise.”); Rapaczynski, *supra* note 116, at 178 (“The ninth amendment . . . states a rule of construction which . . . is . . . incapable of doing any real work in the process of actual interpretation.”).

271. See *supra* Parts II–III.

272. See U.S. Const. art. VI, cl. 3.

273. See *supra* Parts I, II.B.4 (discussing various interpretations of this language).

274. See *supra* text accompanying note 135.

1. *The Fifth Amendment and Capital Punishment.* — One highly important and ongoing debate in contemporary constitutional law that might plausibly implicate the Ninth Amendment's interpretive command involves the extent to which the Eighth Amendment's ban on "cruel and unusual punishment" limits the authority of federal and state officials to prescribe the death penalty as a punishment for criminal offenses.²⁷⁵ Many prominent commentators, including Supreme Court Justices, have taken the position that the death penalty is inherently "cruel and unusual" and thus inconsistent with the Eighth Amendment's express command.²⁷⁶ One frequently invoked rejoinder to such arguments is that the text of the Fifth Amendment, which refers to capital punishment in three separate contexts,²⁷⁷ conclusively demonstrates that the Eighth Amendment cannot plausibly be read to prohibit such punishment.²⁷⁸ A stark example of this form of interpretive argument appears in Justice Scalia's concurring opinion in *Callins v. Collins*, where Scalia argued that the Fifth Amendment's threefold reference to capital punishment "clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the 'cruel and unusual punishments' prohibited by the Eighth Amendment."²⁷⁹

Though several scholars have challenged this textual argument on the ground that the Fifth Amendment's prohibitions do not expressly mandate or endorse the use of capital punishment,²⁸⁰ the potential inter-

275. Compare, e.g., *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("[D]eath is today a 'cruel and unusual' punishment . . ."), with *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed . . .").

276. E.g., *Baze v. Rees*, 553 U.S. 35, 71–86 (2008) (Stevens, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting from denial of certiorari); William J. Brennan, Jr., *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 *Harv. L. Rev.* 313, 323–31 (1986).

277. See U.S. Const. amend. V ("No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice *put in jeopardy of life or limb*; . . . nor be deprived of life, liberty, or property, without due process of law . . .") (emphasis added).

278. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 213–14 (1990) ("[T]he Bill of Rights . . . clearly showed that the death penalty itself was constitutionally acceptable."); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 46, 132, 145–47 (Amy Gutmann ed., 1997) ("No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, *even though its use is explicitly contemplated in the Constitution.*" (footnote omitted)); cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1225 n.184 (1987) (observing that language of Fifth Amendment "supports an argument from text that the death penalty cannot be per se unconstitutional," while withholding opinion on question of whether this textual argument might be overcome by other considerations).

279. 510 U.S. at 1141 (Scalia, J., concurring in denial of certiorari).

280. See, e.g., *Furman*, 408 U.S. at 283 (Brennan, J., concurring) (acknowledging Fifth Amendment as evidence "that the Framers recognized" death as "a common

pretive significance of the Ninth Amendment appears to have been totally overlooked in this debate. The proposition that a prohibition on “cruel and unusual punishments” might be one of the “retained” rights to which the Ninth Amendment refers is hardly implausible. The origins of the phrase can be traced to the 1689 English Bill of Rights, and prohibitions of cruel or unusual punishments appeared in the constitutions or statutes of at least seven of the original thirteen states.²⁸¹ The principle expressed in the Eighth Amendment could thus plausibly have been seen by many Americans as a right to which they were entitled as English subjects and which they “retained” to themselves both in forming their own respective state governments and in adopting the Federal Constitution.²⁸²

How would the “enumeration” of this particular right in the Eighth Amendment affect the potential applicability of the Ninth Amendment’s rule of construction? According to those who view the Ninth Amendment as dividing rights into two separate and mutually exclusive categories—i.e., “enumerated” rights and “other” rights²⁸³—the enumeration of the Eighth Amendment removed the prohibition on cruel and unusual punishments from the scope of the Ninth Amendment’s interpretive rule, leaving it vulnerable to implied repeal by the subsequent—or, in this case, contemporaneous—adoption of other rights-protective language. As discussed above, I believe that this is neither a necessary nor the best interpretation of the Ninth Amendment’s text.²⁸⁴ Rather, the better interpretation of the Amendment would instead allow for certain “enumerated” rights to also be “retained” rights, allowing for the possibility that the Eighth Amendment ban on cruel and unusual punishment should receive the same presumption against implied denial or disparagement that would be given to any other “retained” right.

Assuming for present purposes that the cruel and unusual punishment principle expressed in the Eighth Amendment is, in fact, a “retained” right within the scope of the Ninth Amendment’s protection, Justice Scalia’s *Callins* opinion appears to present a paradigmatic exam-

punishment” but arguing that “[w]e cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishment Clause”); Michael J. Perry, *The Constitution in the Courts: Law or Politics?* 46 (1994) (“The ratifiers’ expectation that reliance on the death penalty would persist into the future and their decision, given that expectation, to regulate imposition of the penalty do not constitute a decision . . . to exempt the death penalty from possible prohibition by the Eighth Amendment.”); John Hart Ely, *Interclausal Immunity*, 87 *Va. L. Rev.* 1185, 1188–90 (2001) (arguing that text of Fifth Amendment does not require upholding death penalty).

281. See Levy, *supra* note 44, at 236–38 (discussing treatment of “cruel and unusual punishments” in seventeenth-century England and American Colonies).

282. Cf. *supra* text accompanying notes 27–29 (discussing individual natural rights interpretation of Ninth Amendment’s “retained” rights language).

283. See *supra* notes 130–131 and accompanying text (discussing interpretations of the Amendment that interpret “other” rights to refer exclusively to unenumerated rights).

284. See *supra* notes 132–134 and accompanying text.

ple of the “denial” and/or “disparagement” that should be ruled out of bounds under a proper understanding of the Amendment’s rule of construction. According to Justice Scalia, the fact that “certain rights”—specifically, the Fifth Amendment’s Grand Jury, Double Jeopardy, and Due Process Clauses, all of which refer in some way to capital punishment—were enumerated in the Constitution warrants an inference that another claimed right (i.e., the right to be free from cruel and unusual punishments) should be narrowly construed so as to allow for the continued use of capital punishment.²⁸⁵ This form of negative inference from the enumeration of particular rights was the specific focus of the Federalists’ “argument of danger,” to which the Ninth Amendment responded.²⁸⁶

The interaction of the Fifth and Eighth Amendments also illustrates the limited nature of the Ninth Amendment’s rule of construction. The Ninth Amendment itself does not affirmatively prohibit cruel and unusual punishment, nor does it tell us all we need to know to determine how far the proper legal source for that prohibition extends. Nothing in the Ninth Amendment prevents proponents of capital punishment from arguing that a proper understanding of the Eighth Amendment does, in fact, allow for capital punishment, and courts remain perfectly free to adopt that construction.²⁸⁷ All the Ninth Amendment tells us is that the enumeration of other rights in the Constitution cannot be used to resolve this debate.

2. *The Fourteenth Amendment and Hate Speech.* — A second form of modern constitutional argument that might implicate the Ninth Amendment’s rule of construction relates to the First Amendment’s protection of the freedom of speech and efforts to prohibit abusive “hate speech” targeted at racial, ethnic, or other historically disadvantaged mi-

285. See *supra* note 279 and accompanying text (quoting Justice Scalia’s opinion in *Callins*).

286. See *supra* text accompanying notes 48–51. Of course, the mechanism by which Justice Scalia’s interpretation “disparages” the legal status of the right to be free from cruel and unusual punishment is somewhat different from the mechanism envisioned by the Federalists’ “danger” argument. But the language of the Amendment is broad enough to preclude “constru[ing]” enumerated rights in any way that would “deny or disparage” some other retained right, regardless of the mechanism through which such denial or disparagement is accomplished. Cf. Claus, *supra* note 8, at 615–16 (observing “[t]he 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” but that “they spoke with sufficient generality to cover the case”).

287. The references to capital punishment in the Fifth Amendment do tend to corroborate the view that the framers of the Eighth Amendment viewed capital punishment as a permissible punishment and therefore might play an evidentiary role in interpreting the Eighth Amendment. Ely, *supra* note 280, at 1189–90. But such evidentiary uses are significantly different from using the Fifth Amendment to argue that a narrow construction of the Eighth Amendment is affirmatively compelled by the constitutional text. *Id.* at 1190; see also *infra* text accompanying notes 336–337 (discussing distinction between using provision as evidence and using it as source of directly enforceable legal rule).

nority groups.²⁸⁸ Certain proponents of such restrictions have argued that the free speech values embodied in the First Amendment must be balanced against the competing equality values embodied in the Fourteenth Amendment.²⁸⁹

The case for considering such arguments as foreclosed by the Ninth Amendment's rule of construction largely mirrors the case against considering similar arguments for limiting the scope of the Eighth Amendment in the capital punishment context.²⁹⁰ The case for considering freedom of speech to be a "retained" right is, if anything, much stronger than the case for similar treatment of the Eighth Amendment's cruel and unusual punishment principle. Both the freedom of speech and the freedom of the press were frequently identified in the ratification debates as paradigmatic examples of individual natural rights,²⁹¹ and both Madison's private notes for his initial Bill of Rights speech in the House and Sherman's draft bill of rights specifically mentioned "speech" as being among the "retained" rights of citizens.²⁹²

Applying the Ninth Amendment's rule of construction to the First Amendment freedom of speech, it is clear that the scope of the First Amendment's protection cannot be diminished (i.e., "disparaged") by a broad construction of some other enumerated right (e.g., the Fourteenth Amendment's Equal Protection Clause). Though proponents of hate speech restrictions may be correct that such speech illustrates a potential latent conflict between two important constitutional values—the equality of persons and freedom of expression—the Constitution does not enact

288. See generally Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *Cardozo L. Rev.* 1523, 1525–41 (2003) (summarizing arguments for restricting hate speech and current treatment of hate speech restrictions under U.S. law).

289. See, e.g., Shannon Gilreath, "Tell Your Faggot Friend He Owes Me \$500 For My Broken Hand": Thoughts on a Substantive Equality Theory of Free Speech, 44 *Wake Forest L. Rev.* 557, 570–71 (2009) ("The Fourteenth Amendment marked a seismic shift in the ground on which First Amendment tradition rests. . . . The exercise of equality . . . depends on speech, both the right to speak . . . and the negative right to be free from speech that dehumanizes you."); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 *Wake Forest L. Rev.* 497, 497 (2009) ("The American tradition of free individual expression exists side-by-side with its Fourteenth Amendment commitment to equality. In the area of hate speech, the libertarian notion of free expression comes into tension with the aspiration of equal dignity.").

290. See *supra* text accompanying notes 286–287.

291. See, e.g., Henry, *Speech in the Virginia Ratifying Convention*, *supra* note 46, at 43, 44 (identifying "liberty of the press" as among "human rights and privileges" that would be rendered "insecure" by adoption of Constitution); Letter from the Hon. Richard Henry Lee, Esq., to His Excellency, Edmund Randolph, Esq. (Oct. 16, 1787), in 1 *Elliot's Debates*, *supra* note 46, at 503, 503 (objecting to omission of "bill of rights, to secure . . . that residuum of human rights which is not intended to be given up to society," including "rights of conscience" and "freedom of the press").

292. See Barnett, *What It Says, supra* note 3, at 33–38 (discussing and quoting Madison's notes for his Bill of Rights speech); *supra* text accompanying note 75 (quoting "natural rights" provision of Sherman's draft bill of rights).

these values in the abstract but rather in the context of particular and specifically worded provisions. By its express terms, the Fourteenth Amendment's Equal Protection Clause prohibits only discriminatory conduct by state actors, and a refusal to prohibit private discriminatory speech, no matter how hateful or abusive, does not constitute state action sufficient to give rise to a Fourteenth Amendment violation.²⁹³ Because the Equal Protection Clause neither expressly allows governmental limitations of private speech, "construing" that provision to limit the scope of the First Amendment's protection of free speech would be impermissible under the Ninth Amendment's express command.

Again, the Ninth Amendment does not tell us all we need to know to determine whether hate speech should be entitled to First Amendment protection. It might plausibly be argued that such speech is particularly "low value" and thus does not fall within the ambit of the First Amendment's protection or that such speech is particularly dangerous, such that laws restricting hate speech could withstand the rigorous review typically applied to speech restrictions.²⁹⁴ The Ninth Amendment says nothing about whether such arguments are correct. All the Ninth Amendment tells us is to presume that the people did not intend to surrender to the federal government greater control over private speech by virtue of their having adopted a separate provision protecting a different right (i.e., the right to be free from state discrimination) that did not, by its express terms, limit or alter the scope of the First Amendment's protections.

3. *The Eleventh Amendment and State Sovereign Immunity.* — Another contemporary constitutional controversy in which the Ninth Amendment's rule of construction might have a plausible role to play relates to the relationship between the Eleventh Amendment and principles of state sovereign immunity. Although the Eleventh Amendment itself is phrased quite narrowly to prohibit only "suit[s] in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State,"²⁹⁵ the Supreme Court has extrapolated from this Amendment a general rule prohibiting almost *all* suits against states in federal courts, including suits brought by the state's own citizens and suits authorized by federal law.²⁹⁶

293. See U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."); see also, e.g., Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 *Notre Dame L. Rev.* 503, 515–16 (1997) (critiquing arguments seeking to characterize government tolerance of racist speech as "state action" within scope of Fourteenth Amendment's prohibition).

294. For arguments along these lines that do not depend upon an expansive reading of the Fourteenth Amendment, see, e.g., Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 *B.U. L. Rev.* 1275, 1369–89 (1998).

295. U.S. Const. amend. XI.

296. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 57–73 (1996) ("[T]he Eleventh Amendment prevents congressional authorization of suits by private parties against

This line of cases has been widely criticized as reflecting both a textually and historically incorrect understanding of the Eleventh Amendment's command,²⁹⁷ prompting the Supreme Court and several commentators to identify an alternative rationale for the state sovereign immunity doctrine grounded in more abstract principles of federalism and state sovereignty that existed before the Eleventh Amendment's adoption.²⁹⁸

Professor Manning has argued, however, that the Eleventh Amendment not only provides an insufficient textual basis for the Court's state sovereign immunity doctrine but also that its adoption might reasonably be understood to *preclude* resort to the inherent-state-sovereignty rationale as an alternative basis for sovereign immunity.²⁹⁹ Although Manning concedes that "in the Amendment's absence, the Court might legitimately have generated a rather elaborate doctrine of state sovereign immunity based on general authority derived from Article III or the constitutional structure as a whole," he contends that by adopting the Eleventh Amendment, "eighteenth-century Americans" might reasonably be understood to have "explicitly confronted the question that Article III had left in the shadows" and "supplied a specific solution to the problem of state sovereign immunity from federal judicial action."³⁰⁰ Applying the "venerable maxim of construction hold[ing] that when a specific and a general provision address the same subject, the specific governs the general," Manning suggests that the Amendment might plausibly be read to have "displace[d] whatever general authority the Court had possessed to develop a jurisprudence of state sovereign immunity against federal jurisdiction under 'the judicial Power' of Article III."³⁰¹

Unlike the First Amendment freedom of speech and the Eighth Amendment's ban on cruel and unusual punishment, both of which fit comfortably within our modern individualistic conception of "rights," the

unconsenting States."); *Hans v. Louisiana*, 134 U.S. 1, 18–19 (1890) (holding Eleventh Amendment prevents suits against state by state's own citizens).

297. E.g., Barnett, *Chisholm*, supra note 219, at 1741–55; Manning, *Precise Texts*, supra note 193, at 1720–22; James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269, 1323–52 (1998). For a historical defense of the Court's modern state sovereign immunity jurisprudence focused specifically upon the text and original meaning of the Eleventh Amendment, see Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 *Wm. & Mary L. Rev.* 1577, 1685–91 (2009).

298. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, . . . [it] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . ."); see also Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 *Notre Dame L. Rev.* 1135, 1176 (2009) (arguing that background principle of state sovereign immunity "became part of the constitutional bargain" in course of ratification debates "and therefore qualifies Article III jurisdiction").

299. Manning, *Precise Texts*, supra note 193, at 1723.

300. *Id.*

301. *Id.* at 1723–24.

protection of state sovereign immunity may strike many modern observers as far afield from the rights-focused language of the Ninth Amendment. But as Professor Lash has convincingly argued, the founding-era conception of “rights” was broad enough to encompass the collective sovereign right of the people to local self-government.³⁰² While the question of whether such collective rights fall within the scope of the “retained” rights referred to in the Ninth Amendment remains a subject of intense debate,³⁰³ Professor Lash has produced sufficient evidence in support of his thesis to at least warrant consideration of the possibility that the types of “federalist” rights he associates with the Amendment fall within the scope of its protection.

If the “other[] retained” rights referred to in the Ninth Amendment do, in fact, encompass the types of federalist collective rights Professor Lash identifies, then application of the Ninth Amendment to Professor Manning’s argument seems reasonably straightforward. As Professor Manning himself observes, the “specificity canon” on which his argument relies is merely a “specialized version of the negative implication canon (*expressio unius est exclusio alterius*).”³⁰⁴ This “negative implication” canon was the specific target of the Federalists’ “danger” argument that the Ninth Amendment was adopted to guard against.³⁰⁵ If state immunity against individual lawsuits was widely viewed as an inherent aspect of sovereignty, which the people of the several states “retained” to themselves in their collective capacity when adopting the Constitution,³⁰⁶ it seems quite clear that the Ninth Amendment would preclude the type of negative implication Manning associates with the Eleventh Amendment, requiring opponents of the Supreme Court’s state sovereign immunity ju-

302. Lash, *Lost Original Meaning*, supra note 3, at 394–95; Lash, *Textual-Historical*, supra note 3, at 908–19.

303. Compare, e.g., Barnett, *Majoritarian Difficulty*, supra note 3, at 938–40 (contesting Lash’s majoritarian interpretation of Amendment’s “retained” rights language), with Kurt T. Lash, *On Federalism, Freedom, and the Founders’ View of Retained Rights: A Reply to Randy Barnett*, 60 *Stan. L. Rev.* 969, 977–86 (2008) (responding to Barnett’s critique).

304. Manning, *Precise Texts*, supra note 193, at 1724.

305. See supra text accompanying notes 48–52 (discussing Federalists’ “danger” argument); see also, e.g., 3 Joseph Story, *Commentaries on the Constitution of the United States* 751 (Boston, Hilliard, Gray & Co. 1833) (remarking that Ninth Amendment “was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others”). Manning himself acknowledges that “[i]t is widely believed . . . that the Ninth and Tenth Amendments were adopted in response to this concern” but appears not to have considered the Ninth Amendment’s potential applicability to his argument. See Manning, *Precise Texts*, supra note 193, at 1748 n.323 (considering and responding to potential objection that “restricting state sovereign immunity by negative implication is in tension with the preexisting rule of construction prescribed by the Tenth Amendment” but without considering potential applicability of Ninth Amendment).

306. Cf. Menashi, supra note 298, at 1157 (“[U]nder a system of popular sovereignty, suits against a state can be seen as suits against the sovereign people of the state in their collective capacity—making immunity appropriate.”).

risprudence to identify some other response to the inherent-state-sovereignty rationale.

B. *The Ninth Amendment and the Legal Status of “Unenumerated” Rights*

1. *Possible Alternative Textual Bases for Judicial Protection of Unenumerated Rights.* — The fact that the Ninth Amendment itself does not provide a sufficient textual basis for judicial recognition or enforcement of rights not explicitly set forth in the constitutional text does not necessarily preclude judicial enforcement of such rights. It does, however, require identification of some separate constitutional basis sufficient to support extending judicial protection to such rights.³⁰⁷

One obvious place to begin the search for judicial authority to recognize and enforce rights not specifically enumerated in the Constitution is the Vesting Clause of Article III, which declares that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³⁰⁸ Many scholars have argued that late eighteenth and early nineteenth-century Americans generally accepted the judiciary’s authority to recognize and enforce limits on legislative authority founded on common law or natural law principles, even if such principles were not explicitly embodied in a written constitution.³⁰⁹ According to these scholars, the widespread acceptance of such unwritten legal principles at the time of the Constitution’s enactment provides a basis for modern courts “to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals.”³¹⁰ If correct, these theories may provide a plausible basis for

307. The following examples of possible alternative textual bases for judicial recognition of unenumerated rights are intended to be illustrative rather than exhaustive. Other textual or extratextual arguments might exist that would support judicial invalidation of federal laws on the basis of rights not explicitly set forth in the constitutional text. This section also does not consider the separate question of the scope of judicial authority to invalidate *state* legislation on the authority of the Fourteenth Amendment’s Due Process or Privileges or Immunities Clauses. See U.S. Const. amend. XIV, § 1. As Professor Lash observes, the due process and privileges or immunities guarantees in the Fourteenth Amendment, regardless of how broadly or narrowly they might be interpreted, are themselves enumerated rights and thus raise issues that are distinct from those raised by questions concerning the legal status of rights that were omitted from the constitutional enumeration entirely. Lash, *Textual-Historical*, *supra* note 3, at 906–08.

308. U.S. Const. art. III, § 1.

309. E.g., Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 *Harv. J.L. & Pub. Pol’y* 965, 978–81 (1992); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *Stan. L. Rev.* 843, 854–56 (1978); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1128–32 (1987) [hereinafter Sherry, *Unwritten Constitution*].

310. Sherry, *Unwritten Constitution*, *supra* note 309, at 1127.

understanding the “judicial Power” to encompass an inherent power in the federal courts to engage in such higher-law decisionmaking.³¹¹

But such claims are hardly uncontroversial. An equally broad range of scholars have argued that there was no late eighteenth-century American consensus supporting the judicial invalidation of laws on the basis of unwritten higher-law principles and that such invalidation was only warranted in cases involving a clear conflict with a superior form of written law.³¹² Although this is not the place to rehearse the arguments of the competing sides in this debate,³¹³ the questions it raises are obviously important in determining the nature and scope of federal courts’ authority to set aside duly enacted legislation on the basis of rights not explicitly enumerated in the Constitution.

An alternative textual basis for judicial protection of unenumerated rights was suggested in a 1993 article by Professor Gary Lawson and Patricia Granger, which argued that such protection was required by the original meaning of the Necessary and Proper Clause of Article I, Section 8.³¹⁴ Lawson and Granger argued that late eighteenth-century Americans would have understood that clause’s use of the word “proper” to establish a “jurisdictional” limit on Congress’s power to pass executory laws.³¹⁵ According to Lawson and Granger, this jurisdictional limitation would have extended to prevent two general types of federal lawmaking: (1) laws that were structurally “improper” as a result of their interference with functions properly reserved to the states or to other coordinate depart-

311. Cf. Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. Ill. L. Rev. 1, 25 (“[B]ecause the Article III Vesting Clause refers generally to the ‘judicial Power’ rather than to the ‘judicial Power herein granted,’ the federal courts receive everything that would have fallen within an informed eighteenth-century understanding of judicial power.”).

312. E.g., Thomas B. McAfee, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders’ Understanding* 45–67 (2000); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907, 930–55 (1993); 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, 444–90 (1990).

313. A broad sense of the debate’s historical foundations can be glimpsed in the famous dueling opinions of Justices Chase and Iredell in *Calder v. Bull*, 3 U.S. (3 *Dall.*) 386 (1798), where the Justices expressed competing views (in dicta) regarding the existence of extratextual limits on legislative authority. Compare *id.* at 388 (opinion of Chase, J.) (“The Act of the Legislature (for I cannot call it a *law*) contrary to the *great first principles of the social compact*; cannot be considered a *rightful exercise of legislative authority*.”), with *id.* at 398 (opinion of Iredell, J.) (“It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think, that under [a government that imposed no constitutional limits on legislative power], any Court of Justice would possess a power to declare it so.”).

314. Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 271–72, 324–26 (1993).

315. *Id.* at 291–97.

ments of the federal government,³¹⁶ and (more significantly for the present inquiry) (2) laws that were “improper” as a result of their encroachment upon retained natural rights of individuals.³¹⁷

If Lawson and Granger are correct, the Necessary and Proper Clause may provide a judicially enforceable textual source for invalidation of federal laws that interfere with at least certain forms of unenumerated individual rights.³¹⁸ As with the higher-law theories of the judicial power discussed above, the interpretation of the Necessary and Proper Clause suggested by Lawson and Granger has drawn criticism from scholars who challenge its historical foundations, at least insofar as it relates to the protection of individual rights.³¹⁹

A final possible textual basis for the existence of judicially enforceable unenumerated rights might be found, not in the text of any particular constitutional provision, but rather in a combination of multiple provisions or in the overall structure of the Constitution as a whole. This more structural approach to protecting unenumerated rights can be seen in Justice Douglas’s majority opinion in *Griswold v. Connecticut*, which famously sought to ground an unenumerated constitutional “right to privacy” in “penumbras, formed by emanations from” certain textually specified provisions in the Bill of Rights.³²⁰ Though Douglas’s *Griswold* opinion has been widely criticized,³²¹ the general methodology through which he derived the existence of judicially enforceable unenumerated rights—i.e., inferring a larger constitutional principle from the combined

316. *Id.* at 330–34.

317. *Id.* at 326–30.

318. Lawson and Granger do not attempt to define the unenumerated rights meriting protection under the Necessary and Proper Clause and acknowledge that “[p]roponents of different interpretative theories will obviously have different methods for defining such rights.” *Id.* at 330.

319. See, e.g., Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 *Vill. L. Rev.* 17, 81–97 (1998) (observing that although Federalists’ denials of the necessity of a bill of rights during the ratification debates form key portion of evidence on which Lawson and Granger rely, Federalists themselves did not invoke Necessary and Proper Clause as limitation on federal lawmaking power). In a subsequent article, Professor Lawson, writing alone, conceded that Professor McAfee “ably demonstrates that few, if any, of the Founders subjectively understood the [Necessary and Proper] Clause to have all of the implications [he and Granger] claim for it” but nonetheless defended their interpretation as the best objective reading of the provision’s text. Gary Lawson, *Delegation and Original Meaning*, 88 *Va. L. Rev.* 327, 348 n.89 (2002). Professor Lawson acknowledged, however, that the portion of his and Ms. Granger’s article addressing the implications of their interpretation for the protection of individual rights reflected “the most problematic aspect of our argument.” *Id.* at 349.

320. 381 U.S. 479, 484–85 (1965).

321. See, e.g., Randy E. Barnett, *Scrutiny Land*, 106 *Mich. L. Rev.* 1479, 1485 (2008) (characterizing Justice Douglas’s “penumbra” reference as “one of the most ridiculed sentences in the annals of the Supreme Court”); Pierre Schlag, *Commentary, The Aesthetics of American Law*, 115 *Harv. L. Rev.* 1047, 1113 (2002) (“Justice Douglas’s opinion for the Court reads more like an amateur exercise in metaphysical poetry than law.”).

force of more limited constitutional provisions—is a familiar form of constitutional argument.³²²

The structural argument for unenumerated rights protection could proceed in at least two ways. First, it could be argued that the enumerated powers scheme of the original Constitution deprives the federal government of power to reach particular unenumerated rights because no power to interfere with such rights was expressly delegated to the federal government. This was the argument proffered by Federalist supporters of the Constitution in response to Antifederalist objections to the absence of a bill of rights.³²³ Second, following the example of Justice Douglas's *Griswold* opinion, it might be argued that recurring themes or patterns in the document's overall structure suggest the existence of rights beyond those expressly identified in the constitutional text.³²⁴

This particular method of structural argument is not, however, without its critics. Professor Manning has persuasively argued that appeals to “structural inference,” such as those upon which much of the Supreme Court's modern federalism jurisprudence relies, reflect an “underlying interpretive approach” characterized by “strong purposivism” and are thus subject to the same objections leveled at strongly purposivist interpretive theories in general.³²⁵ In particular, Manning argues that the Constitution “reflects the end result of hard-fought compromise” and that the document

defines “federalism” only through its adoption of a number of particular measures that collectively reflect the background aim of establishing a federal system. Treating that background aim as a freestanding legal norm devalues the [framers'] choice to bargain over, settle upon, and present to the ratifying conven-

322. For classic articulations of the role of structural argument in constitutional interpretation, see Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 3–32 (1969); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 74–92 (1982).

323. See *supra* notes 47–48 and accompanying text (discussing this argument); see also Barnett, *Lost Constitution*, *supra* note 3, at 245 (“Historical sources show beyond peradventure that the framers of the Constitution intended the structure of separate and enumerated powers to be the primary means of protecting the rights retained by the people . . .”). But cf. Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 *Const. Comment.* 25, 26–35 (2005) (arguing for rejection of enumerated powers doctrine on both originalist and pragmatic grounds).

324. See, e.g., Black, *supra* note 322, at 39 (arguing “that the nature of the federal government, and of the states’ relationship to it, compels the inference of some federal constitutional protection for free speech” independent of any express textual protection for such right); Nicholas J. Johnson, *Self Defense?*, 2 *J.L. Econ. & Pol’y* 187, 193–202 (2006) (arguing for unenumerated constitutional right to self-defense grounded in Second, Fourth, Eighth, and Ninth Amendments); Pamela S. Karlan, *Voting Rights and the Third Reconstruction*, in *The Constitution in 2020*, at 159, 164–65 (Jack M. Balkin & Reva B. Siegel eds., 2009) (arguing for substantive constitutional right to vote grounded in various constitutional provisions, including Fifteenth, Seventeenth, Nineteenth, and Twenty-Fourth Amendments).

325. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2006 (2009).

tions a cluster of relatively, even if imperfectly, specified means to achieve that aim.³²⁶

Professor Jeffrey Goldsworthy has raised similar objections to attempts by the High Court of Australia to identify implied structural “principles” in the Australian constitution:

It is difficult to justify respecting the framers’ intention to implement some general principle, but not their intention to do so only by particular means and to a limited extent. Loose talk about “structural implications” pays lip service to the structure actually designed by the framers, while in reality seeking to change it because it supposedly fails to achieve its intended purposes.³²⁷

Notwithstanding such objections, it is important not to overlook the possibility that a combination of particular constitutional provisions might give rise to a genuine constitutional implicature that might not be readily apparent from reading the separate provisions in isolation. For example, reading the Vesting Clauses of Articles I, II, and III, which assign the “legislative Power,” the “executive Power,” and the “judicial Power” of the United States to the Congress, the President, and the federal courts, respectively,³²⁸ together with one another and in light of the document as a whole gives rise to a reasonable implication that any power exercised by the federal government must fall within one of the three categories described in those provisions—an implication that would not be readily apparent from reading any of the provisions in isolation.³²⁹ Similarly, the collective set of various constitutional provisions, when read in the context of one another and the document as a whole, could give rise to a reasonable implication allowing for the judicial protection of some particular right (or rights) not explicitly mentioned in the constitutional text.³³⁰

2. *Unenumerated Rights and the Ninth Amendment.* — The fact that the Ninth Amendment does not directly support the judicial enforceability of unenumerated rights does not render the Amendment wholly irrelevant to the resolution of questions concerning such rights’ existence and enforceability. Even if the Ninth Amendment itself does not provide a basis

326. *Id.* at 2040.

327. Goldsworthy, *supra* note 154, at 180; see also, e.g., Terrance Sandalow, *Constitutional Interpretation*, 79 *Mich. L. Rev.* 1033, 1046 (1978) (“By wrenching the framers’ ‘larger purposes’ from the particular judgments that revealed them, we incur a loss of perspective, a perspective that might better enable us to see that the particular judgments they made were not imperfect expressions of a larger purpose but a particular accommodation of competing purposes.”).

328. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

329. See Solum, *Semantic Originalism*, *supra* note 143, at 74–75 (“[T]he conjunction of [the Vesting Clauses] has the necessary implication that each type of power must fall into one of the three categories—that they exhaust the ‘powers of the Government of the United States.’”).

330. *Cf.* *supra* note 324 (citing works claiming to identify legally enforceable extratextual rights in constitutional structure).

for judicial enforcement of unenumerated rights, the Amendment may lend indirect support to arguments seeking to ground such rights in some alternative textual source in at least two ways.

First, the rule of construction the Ninth Amendment prescribes may be relevant to the legal status of unenumerated rights by precluding certain interpretive moves that might be used to deny the existence of such rights or to diminish their scope or importance. For example, consider the above-described argument seeking to ground support for judicial protection of unenumerated rights in the Article III “judicial Power.”³³¹ Absent the Ninth Amendment’s rule of construction, someone seeking to respond to such an argument could point to the enumeration of rights in the Bill of Rights and elsewhere in the Constitution as proof that members of the ratifying generation had considered the issue and chosen to extend judicial protection to *only* those specific rights they chose to enumerate.³³² The Ninth Amendment’s rule of construction, however, instructs interpreters not to draw any such negative inference from the fact of enumeration, leaving unenumerated rights with the same legal status they would have had if no textually specified rights had been included in the Constitution. Similarly, the Ninth Amendment’s rule of construction ensures that the enumeration of particular rights in the Constitution cannot be used to argue that an executory law interfering with rights not specifically enumerated would necessarily be a “proper” law for purposes of the Necessary and Proper Clause.³³³

Second, the inclusion of the Ninth Amendment in the Constitution may serve a potential evidentiary function by illustrating the importance of unenumerated rights to members of the founding generation and (possibly) the types of rights they viewed as important and deserving of protection. For example, consider Professor Barnett’s claim that the Ninth Amendment’s reference to “other[] retained” rights was originally understood to refer to individual natural rights.³³⁴ If this claim is true, the Ninth Amendment would provide substantial indirect evidence that at least a substantial portion of those who participated in the Amendment’s framing *believed* in the existence of such rights and wished to preserve their status against the possible negative inference that might be drawn from the enumeration in the Constitution of other rights. Although insufficient to give rise to a directly enforceable legal obligation to protect such natural rights, such evidence may carry some interpretive weight in deciding how other provisions, such as the Article III “judicial Power” or the Necessary and Proper Clause should be construed. Simi-

331. See *supra* notes 308–313 and accompanying text.

332. Cf. Raoul Berger, Ely’s “Theory of Judicial Review,” 42 *Ohio St. L.J.* 87, 118 (1981) (asserting that adoption of Bill of Rights, along with Madison’s explanation of it, “reinforc[es] the conclusion that courts were not empowered to enforce . . . retained and undescribed rights”).

333. Lawson & Granger, *supra* note 314, at 326–30.

334. See *supra* notes 27–29 and accompanying text.

larly, if the Ninth Amendment was originally understood to protect the collective right of the people of the several states to local self-government, as proponents of the federalist interpretation have claimed,³³⁵ then the Amendment might be invoked as evidentiary support against arguments for broad constructions of federal powers.

The distinction between viewing the Ninth Amendment as evidence of a preexisting underlying principle and viewing the Amendment as a directly enforceable legal source for the principle itself is subtle and may be difficult to grasp. A useful analogy can be seen in the relationship between the preamble or title of a statute, on the one hand, and the statute's operative command on the other. Under the legal interpretive conventions of the founding era, only a statute's operative command carried directly enforceable legal significance and, in cases of apparent conflict with its title or preamble, the operative command was held to control.³³⁶ It did not follow, however, that the title and preamble were viewed as wholly irrelevant to the statute's interpretation. Rather, such sources served as an important source of evidence concerning the statute's intended purpose and, in cases of doubt arising from statutory vagueness or ambiguity, could serve as a useful guide concerning the statute's most probable intended meaning.³³⁷ Similarly, although the Ninth Amendment does not confer any legally enforceable rights directly, it may nonetheless provide useful evidence regarding widely shared background understandings that might inform how other provisions drafted and ratified at around the same time should be construed.

Ultimately, however, it is the original meaning of such other provisions, and not the original meaning of the Ninth Amendment, that must control the question of whether or not the Constitution allows for the judicial recognition and enforcement of rights not explicitly enumerated in the constitutional text. Though the Ninth Amendment and the background assumptions and understandings it reflects might serve as an important source of evidence regarding the meaning of other provisions adopted at or around the same time, including Article III and the

335. See *supra* notes 30–36 and accompanying text.

336. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 233 (1796) (“If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail on the principle that the legislature changed its intention.”); *R v. Marks*, (1802) 102 Eng. Rep. 557 (K.B.) 559; 3 East 157, 162–63 (treating operative text of statute as binding despite contradictory preamble); see also Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793, 808 n.51 (1998) (collecting additional sources).

337. See, e.g., 1 William Blackstone, *Commentaries* *60. Blackstone wrote:

[T]he proeme, or preamble, is often called in to aid the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject or that expressly relate to the same point.

Id.; see also 1 Zephaniah H. Swift, *A System of the Laws of the State of Connecticut* 48 (1795) (“When words are dubious, equivocal or intricate, it is proper to consider the preamble of the act, which will often explain the intent of it, or compare them to some other law made by the same legislator and relating to the same point.”).

Necessary and Proper Clause, this evidence must be balanced against other evidence bearing on the original meaning of those provisions, including evidence that may be far more relevant to their respective original meanings than the Ninth Amendment. It may well be the case, after careful consideration of all relevant historical and textual evidence, that none of the conceivable alternative textual sources for judicial enforcement of unenumerated rights will bear a construction capable of supporting such enforcement. If so, the only plausible originalist conclusion that can be drawn would be that the federal courts are without constitutional authority to enforce those rights notwithstanding the Ninth Amendment's oblique suggestion of the possible existence of "other[] retained" rights.

CONCLUSION

Both the language and preratification history of the Ninth Amendment strongly point to the conclusion that the Amendment was adopted to guard against misconstructions and unwarranted implications that might otherwise have been drawn from the fact that certain rights were enumerated in the Constitution. Ironically, such misconstructions and unwarranted implications have plagued modern attempts to interpret the Amendment itself since at least the time of Justice Goldberg's *Griswold* opinion.

Contrary to the leading modern accounts of the Amendment's original meaning, the plain language of the Amendment neither compels judicial enforcement of unenumerated rights nor prohibits courts from according such rights a lower level of protection than enumerated rights. All that the express language of the Ninth Amendment commands is that the fact that certain rights have been enumerated in the Constitution not be used as a basis for either denying the existence of other "retained" rights or according such rights a lower level of protection or respect than they would have received if the Constitution lacked an enumeration of rights. So long as no argument of this form is made, the Ninth Amendment's express command has no application.

Nor does the supposed "implied" content of the Ninth Amendment provide a basis for judicial enforcement of unenumerated rights. The language of the Ninth Amendment does not compel such implied content as a matter of formal logic. And the existing evidence of the Amendment's drafting and ratification provides insufficient grounds for confidence that the putatively "implied" meanings attributed to the Amendment by modern interpreters would have been recognized as either obvious or uncontroversial by reasonable members of the ratifying public at the time of its enactment.

It does not follow, however, that the Ninth Amendment has no role to play in modern constitutional decisionmaking. Depending upon the scope of the "other[]" rights referred to in the Amendment, the rule of construction it prescribes may well play an important role by precluding

arguments seeking to use the fact that certain rights have been enumerated as a basis for narrowing the scope of, or denying the existence of, other claimed rights—including, potentially, other enumerated constitutional rights. Nor does it follow that federal courts lack the authority to recognize and enforce the types of unenumerated rights that modern interpreters have sought to ground in the Ninth Amendment. It might well be the case that the judicial authority to protect such rights may be located in some other constitutional provision (or provisions). If so, the Ninth Amendment might play a supporting role in the protection of such rights, both by precluding arguments seeking to “deny or disparage” such rights on the basis of their unenumerated status and by showing the types of unenumerated rights members of the founding generation may have viewed as important.

Critically, none of the above conclusions is dependent upon assigning any particular meaning to the Amendment’s reference to “other[]” rights “retained by the people”—the principal focus of most modern scholarship addressing the original meaning of the Ninth Amendment. Although the meaning of this phrase is important to determining the proper scope of the Amendment’s application, determining such meaning is not critical to proper identification of the Amendment’s core function as a limited and precise rule of construction.