NOTES

THE POWER OF THE PREAMBLE AND THE NINTH AMENDMENT: THE RESTORATION OF THE PEOPLE'S UNENUMERATED RIGHTS

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> *Enumerate all the rights of men! I am sure, sir, that no gentleman in the late convention would have attempted such a thing.*[1]

> *To discover the spirit of the Constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the following words, viz, "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic*

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[1] JAMES WILSON, SPEECH AT THE PENNSYLVANIA RATIFICATION CONVENTION (Dec. 4, 1787), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 648 (Neil H. Cogan ed., 1997).

tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution."[2]

I. Introduction

The United States Constitution makes no mention of the fact that a person is innocent until proven guilty.[3] Nor does that cherished document declare that one's right of privacy is protected from unreasonable invasion.[4] From where, then, do these well-known guarantees derive? Might there also be a constitutional right not to be subjected to unreasonable drug testing?[5] Answers to these questions require a discussion of the Constitution and the political atmosphere that existed at the time of its formation. While the text of the Constitution enumerates some rights, and amendments provide other rights, many scholars and judges have noted that these rights are not exhaustive, and that additional "unenumerated" rights also exist.[6]

Relevant to these unenumerated rights, a federal court recently ruled that a doorman, suspected of trying to steal from an apartment in which he was employed, may proceed with his civil lawsuit against New York City for allegedly violating his constitutional right of privacy by having him suffer through a "perp walk."[7] A perp

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2 Brutus, *Essay XII*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 300 (Ralph Ketcham ed., 1986). Although "Brutus" (pseudonym of, it is believed, Judge Robert Yates of New York) wrote this reflection as part of an essay to urge those at the ratification conventions to reject the proposed Constitution, the quotation nevertheless is a good description of the value given to the Preamble by the framers.

3 *See generally* Estelle v. Williams, 425 U.S. 501 (1976).

4 *See* Griswold v. State of Connecticut, 381 U.S. 479, 483 (1965).

5 *See generally* Michael J. Hudock, III, *Behind the Hysteria of Compulsory Drug Screening In Employment: Urinalysis Can Be a Legitimate Tool For Helping Resolve the Nation's Drug Problem If Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597 (1987).

6 *See generally* Gilbert Paul Carrasco and Congressman Peter W. Rodino Jr., *"Unalienable Rights," the Preamble and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL L. REV. 498 (1990).

7 *See* Benjamin Weiser, *Judge Criticizes Policy of Parading Suspects Past Cameras*, N.Y. TIMES, Feb. 26, 1999, at B1 [hereinafter *Judge's Criticism*]. Judge

walk occurs when police officers "walk" suspected "perpetrators" past media cameras to increase public awareness of the suspect.[8] The framers of the Constitution obviously did not explicitly state that citizens suspected of a criminal offense shall not be subjected to the disgrace of having to walk past camera crews for the sole

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Allen G. Schwartz ruled against the city's motion to end Lauro's suit against the city, which sought compensatory and punitive damages for embarrassment and harm to his reputation (Lauro subsequently lost his job) that accompanied his September 1995 "perp walk." *See id.* A tenant in Lauro's apartment building asked Lauro to look after his apartment while he was away. *See id.* A videotape showed Lauro opening closet doors, and the police consequently arrested him for attempted petit larceny. *See id.* Because no evidence of theft was established, the charges were soon dropped on the condition that Lauro take part in community service for one day. *See id.* Judge Schwartz noted that a police detective organized Lauro's walk after learning of the news media's interest in the crime. *See id.* According to the judge, a detective led Lauro out of the station, in handcuffs, put him in a police cruiser, drove him around the block, and then returned him to the police station, for no purpose other than presenting him to the media. *See id.* Judge Schwartz believed That the police arranged for a perp walk of a person merely accused of a small crime, Judge Schwartz believed, violated Lauro's constitutional rights. *See id.*

Supporters of perp walks contend that, in addition to relaying police success to the public, the walks deter others from committing crimes because of the disgrace that accompanies such walks. *See id.* Schwartz premised his decision on the reasoning of a Supreme Court decision that recognized that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). A more recent decision, authored by Chief Justice Burger, again announced this important right: "[t]he presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503 (1976). An example of how a judge could frustrate this presumption, Burger noted, would be to have a defendant in a criminal trial appear in prison garb. *See id.* at 508. Judge Schwartz, in reaching the same conclusion regarding Lauro's apparently staged walk, reasoned that having Lauro's face depicted on televisions and newspapers also frustrated the presumption. *See Judge's Criticism*, *supra*, at B1; *see also* Benjamin Weiser, *Journalists Fear Ruling Could Hinder Coverage of the Police*, N.Y. TIMES, Feb. 27, 1999, at B3; Lauro v. City of New York, 39 F. Supp. 2d 351, 363 (S.D.N.Y. 1999) (holding that the cops' seizure of Lauro and the publishing of Lauro's image during the staged perp walk invaded his privacy interests in a way that violated his Fourth Amendments rights). The *Lauro* court added that because there was found to be a Fourth Amendment violation, there was no need to address any possible Fourteenth Amendment violation. *See id.* at 365 n.10. One purpose of this Note is to demonstrate that some jurists would make *Lauro*-type analyses by simply citing the Ninth Amendment and Preamble as authorities to prevent violations of privacy and other rights not expressly mentioned in the Constitution.

[8] *See Judge's Criticism*, *supra* note 7, at B1. Memorable perp walks of the past include Lee Harvey Oswald (who was fatally shot by Jack Ruby during his walk), Timothy J. McVeigh, and John Gotti. *See id.*; *see also* John Tierney, *Even Perps May Prefer Walk of Fame*, N.Y. TIMES, MAR. 4, 1999, at B5.

purpose of showing that the police force is, indeed, doing their job.[9] Because the framers could not have foreseen the need for such a specific guarantee, neither the Constitution nor the Bill of Rights (and not even the amendments that have followed) assert that such a right exists.

Courts, however, have recognized unenumerated rights for many years.[10] Despite this recognition, many scholars have debated whether unenumerated rights emanate from natural law, the common law, the Declaration of Independence, the Preamble, the Bill of Rights, or the Fourteenth Amendment, or whether such rights simply do not exist.[11] Political leaders, however, have suggested that an interpretation of those various provisions ought to be guided by the Constitution's opening paragraph: the Preamble.[12] Although confined to fifty-two words, these leaders believe that the Preamble represents the country's personality: that we are an aspiring people attempting to truly make the nation "a more perfect union."[13]

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9 *See Judge's Criticism*, *supra* note 7, at B1.

10 *See* Interview by Brian C. Padgett with Congressman Peter W. Rodino Jr., Professor of Law, Seton Hall University School of Law, in Newark, NJ (Nov. 10, 1998) (on record with the Seton Hall Legislative Journal) [hereinafter *Interview*].

11 *See Interview*, *supra* note 10.

12 *See Interview*, *supra* note 10.

13 *See* U.S. CONST. preamble. *See generally* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). For example, Congressman Peter W. Rodino Jr., previous Chairman of the Judiciary Committee during the tumultuous 1970s and 1980s, has urged leaders to reexamine legislation in light of the various clauses of the Preamble. *See Interview*, *supra* note 10. Congressman Rodino feels strongly that leaders must apply the various clauses of the Preamble to modern problems. *See id.* Thus, the phrases, "ensuring blessings of liberty" and "promote the general welfare," need not remain ethereal thoughts, written down by the framers over 200 years ago, and wholly void of any current meaning. *See id.* Rodino instead feels that lawmakers must consider the Preamble's 52 words when enacting legislation that may infringe on the rights of the people. *See id.* "Because the blessings [alluded to in the Preamble] are not enumerated, we need leaders who are men of vision, who are not chained to what is prescribed." *Id.* Another commentator has stated the following:

> The Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all people were equal before all authority. In all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact. But we are an aspiring people, a people with faith in progress.

Brennan, *supra*, at 433.

This Note will explore the various ways legislators and courts can apply the Constitution's unenumerated rights to modern-day issues. The Note will discuss the Preamble's significance, both today and historically.[14] In addition, it will consider the possibility of applying the Ninth Amendment to restore these "lost" rights, particularly the right of privacy.[15] Finally, the Note will discuss both the ratification of the Constitution and the adoption of the Bill of Rights and how the period's discussion of unenumerated rights could be better understood.[16]

II. The Preamble as an Independent Source of Rights

Although the Preamble, at first glance, seems to be another source of the unwritten Constitution, courts have nevertheless gleaned few substantive rights out of the Constitution's opening paragraph.[17] Elected officials and commentators, however, have

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14 *See infra* Part II.

15 *See infra* Part III.

16 *See infra* Parts IV, V.

17 *See generally* Raymond B. Marcin, *"Posterity" in the Preamble and a Positivist Pro-Life Position*, 38 AM. J. JURIS. 273 (1993). Mr. Marcin's study revealed that courts, over the years, have given varying weight to preambles for legislative interpretation purposes. *See id.* at 282. While an early English court ruled that preambles are extremely important for statutory interpretation, eighteenth century courts held that preambles can be used to explain legislation, but not as a separate source of positive powers. *See id.* (citing Stowel v. Lord Zouch, 1 Plowd. 353, 369, 75 Eng. Rep. 536 (C.B. 1569); Copeman v. Gallant, 1 P. Wms. 314, 24 Eng. Rep. 404 (Ch. 1716)). The latter case best represents contemporary thought on preamble interpretation. *See id.* at 282. Another case states: "it is to the Preamble more especially that we look for the reason, or spirit, of every statute; rehearsing. . .as it ordinarily does. . .in the best and most satisfactory manner, the object or intention of the legislature." *Id.* at 282-83 (quoting Brett v. Brett, 3 Add. 210, 216, 162 Eng. Rep. 456 (Ch. 1716)). Although not controlling, the case law demonstrates that when a conflict with the text arises, preambles can be used to reveal the reason of the text where ambiguities exist. *See id.* at 283.

The Congressional debates surrounding the Preamble to the Constitution do not clearly explain its intended purpose. *See id.* (citing JOHN SUTHERLAND, 2A STATUTORY CONSTRUCTION § 47.04 (1984)). For example, a proposal was made to insert the clause "Government being intended for the benefit of the people and the rightful establishment thereof being denied from their authority alone" before "We the People." *See id.* at 283 n.34. Prior to the proposal's rejection, one delegate asserted that the Preamble was not a part of the Constitution, while others reasoned the addition to be unnecessary because the remainder of the Constitution sufficiently self-identified

frequently remarked on the Preamble's efficacy in explaining the goals of the Constitution.[18] William Winslow Crosskey, for example, wrote extensively on the utility of the Preamble, stressing the fact that the framers carefully and deliberately planned the Preamble.[19] The courts, however, have rarely cited the Preamble's

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its purposes. *See id.* An early draft of the Preamble focused more on the states than the people: "We the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the government of ourselves and our posterity." *Id.* at 284 n.37. Although the delegates at the Constitutional Convention agreed on that version on August 7, 1787, with little or no debate, the delegates passed a motion to assign the task of revising the Preamble to the Committee on Style on September 10, 1787. *See id.* That committee presented the final version on September 12, 1787, with Pennsylvania's Gouverneur Morris generally credited with making the revisions. *See id.* at 285.

18 *See* WALTER E. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION: PRIVACY, PERSONHOOD AND PERSONAL LIBERTY 1237 (1995). Congressman Peter W. Rodino Jr., past Chairman of the Judiciary Committee during the Watergate period and current Professor of Law at Seton Hall University School of Law, strongly feels that the Preamble is the spirit of the entire Constitution and thus must be read together with the provisions of the Constitution to best understand the intricacies of the system. *See Interview*, *supra* note 10. In reference to the time when the federal government forced Japanese-Americans, some being third or fourth generation Americans, into internment camps during World War II, and the subsequent ruling by the United States Supreme Court upholding the action of the government as being necessary in Korematsu v. United States, 323 U.S. 214 (1944), Rodino cited the purpose of the Constitution: "The Preamble of the Constitution speaks eloquently about the blessings of liberty, the most basic and fundamental of our civil rights. All American citizens enjoy these rights and they expect to be protected from arbitrary imprisonment by the federal government." 133 CONG. REC. H7559 (daily ed. Sept. 17, 1987) (statement of Cogressman Peter W. Rodino Jr.).

Congressman Rodino views the purpose of the Constitution primarily as a means of improving the welfare of the people, with the Preamble identifying the aspiring goals of Americans. *See* Congressman Peter W. Rodino Jr., *The Compact with the People*, 27 SANTA CLARA L. REV. 471, 473 (1987). Illustrative of Rodino's position is the following Congressional statement he made regarding the Constitution:

> [A] constitution must do more than provide for restraints against the illegal use of power. It must also give the people a means of dealing with their day-to-day problems, continually correcting the injustices that arise in our society. A constitution that is not adaptable-that constrains the government from acting for the general welfare of the people-will not survive. As the oldest written Constitution in continuous operation, our Constitution has survived because it offers the means to remedying present ills without sacrificing past gains.

Congressman Peter W. Rodino Jr., "Foreword" to *The Constitution of the United States of America*, H.R. DOC. NO. 100-94, at v-vi (1987).

19 *See* WILLIAM WINSLOW CROSSKEY, 1 POLITICS AND THE CONSTITUTION IN THE

language in cases, and instead have based their arguments regarding liberty on other parts of the Constitution.[20]

Despite abundant commentary regarding the utility of the Preamble as a means of securing and interpreting rights,[21] the Preamble alone, according to the United States Supreme Court case, *Jacobson v. Commonwealth of Massachusetts*,[22] is an insufficient source of such rights.[23] The defendant's argument in *Jacobson* was

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HISTORY OF THE UNITED STATES 377 (1953). Crosskey analyzed the politics and philosophies of the nation at the time of the Preamble's drafting and concluded that the framers carefully proceeded in creating a preamble that was "unmisconstruably drawn." *See id.* Therefore, according to Crosskey, the drafters intended the Preamble to provide clear instruction as to how interpreters of the Constitution ought to resolve any ambiguities or doubts that may emanate from the text of the Constitution. *See id.* at 379.

20 *See* Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105-08 (1986). The Preamble states that:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish the Constitution for the United States of America.

U.S. CONST. preamble. One commentator has observed the following:

> If any human rights at all are shielded against denial or disparagement by the command of the ninth amendment then there could be no third place as good to begin a search for those grounds as in the Declaration of Independence or in the preamble. . . . The preamble declares that a purpose of the Constitution is to "promote the general Welfare." Then, in a phrasal echo that can hardly be accidental, means are furnished for serving this very purpose, in the article I, section 8 empowerment of Congress to tax and spend "for the . . . general Welfare." Do not these twinned phrases pick up and carry forward the very themes of the pursuit of happiness, and of the duty of government to aim at maximizing happiness, that are found in the Declaration? And does not the possession of the *power* to seek and to support the general welfare generate a resulting *duty* to do these very things-even without the Declaration, strongly corroborating though that document be?

Black, *supra*, at 1105-06.

21 *See, e.g.*, Charles H. Cosgrove, *The Declaration of Independence in Constiutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107 (1998); Carrasco and Rodino, *supra* note 6, at 498; *see also* Raymond B. Marcin, *"Posterity" in the Preamble and a Positivist Pro-Life Position*, 38 AM. J. JURIS. 273 (1993) (discussing the arguments concerning the use of the Preamble to protect the "lives" of unborn fetuses).

22 197 U.S. 11 (1905).

23 *See id.* at 22. The pertinent issue in *Jacobson v. Commonwealth of Massachusetts* was whether it was constitutional for the city of Cambridge to require all residents to receive either a smallpox vaccination or revaccination or face a five-

that the city had violated his constitutional rights by requiring him to either receive a small pox vaccination injection against his will or be subjected to a monetary penalty.[24] Jacobson unsuccessfully argued that the local government's actions violated the "spirit" of the Constitution, infringed on the rights "secured" by the Preamble, and were contrary to the purposes of the Constitution.[25] However, the

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dollar penalty. *See id.* at 12. A state statute empowered local boards of health, at their discretion, to institute such regulations if they believed "it [was] necessary for the public health or safety." *Id.* Because Jacobson refused to submit himself to the vaccination procedure, criminal charges were brought against him for the collection of the five-dollar fine. *See id.* at 13. Although one of the issues raised by Jacobson is wholly irrelevant today, that such vaccination was neither safe nor effective against the spread of smallpox (some scientists of the day doubted the effectiveness of the procedure and believed the vaccination to actually be harmful), another contention concerned his constitutional rights: "That [the state statute] was in derogation of the rights secured to the defendant by the [P]reamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its [P]reamble," and "[t]hat said section was opposed to the spirit of the Constitution." *Id.* at 13-14. The trial judge rejected his requests, and the jury returned a guilty verdict. *See id* at 21. On appeal, the United States Supreme Court, in a decision by Justice Harlan, quickly dismissed Jacobson's plea for protection under the Preamble, and affirmed. *See id.* at 22, 39. Adopting the approach to the Preamble previously proffered by Justice Story, the Court stated:

> We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question [] is in derogation of rights secured by the [P]reamble of the Constitution of the United States. Although that [P]reamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source for any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the [P]reamble, it be found in some express delegation of power, or in some power to be properly implied therefrom.

Id. at 22 (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833)).

24 *See Jacobson*, 197 U.S. at 11.

25 *See id.* at 22. The *Jacobson* Court acknowledged the importance of a constitution's "spirit," as urged by Jacobson, yet ruled that the plain meaning of the words of the Constitution controlled the Court's decision. *See id.* Regarding the spirit of the Constitution, the Court referred to an earlier remark by Chief Justice John Marshall: "[S]pirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words." *Id.* (quoting

Supreme Court, basing its holding on the state police power, ruled that a constitutional violation had not occurred because of the reasonableness of the regulation.[26]

Although the Court in *Jacobson* refused to rule that the Preamble was an independent source of rights, earlier constitutional writers did consider the Preamble to hold such power.[27] Indeed, several anti-federalists that had attended the Constitutional Convention believed that the Preamble held too much power.[28] For example, one famous protestor writing under the assumed name "Brutus," analyzed all aspects of the Constitution and explained to his fellow countrymen that the powers granted to the federal branches of the government were inordinately vast.[29] The Preamble to the Constitution, Brutus asserted, clearly embodied the "spirit" of the Constitution and thus the Preamble would be utilized by courts and leaders to interpret the various clauses of the Constitution.[30]

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)).

26 *See Jacobson*, 197 U.S. at 39. The Court noted that a state's police powers are not absolute and therefore must give way to the federal government when a conflict arises either with one of its express powers or "to any right which that instrument gives or secures." *See id.* at 25. Although the Court referred to the rights secured by the Constitution, the Court made no reference to the Ninth Amendment as a vehicle for such rights. *See id.* at 11. Having dismissed Jacobson's demand for the application of the Preamble to uphold his rights, the Court then raised the right to liberty as another possibility to invalidate the regulations. *See id.* at 25-26.

It is noteworthy to recall that the *Jacobson* decision preceded by just one term the landmark, and controversial, case, *Lochner v. New York*, 198 U.S. 45 (1905) (ruling that the freedom of contract prevented states from enacting legislation that limited the working hours of bakers to 10 hours per day and 60 hours per week). Although *Lochner's* extremely criticized reading of liberty, which outraged both legislators and commentators, was explicitly overruled in *West Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937), criticism again confronted the Court after its finding of a right of privacy in *Griswold v. State of Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). This was because commentators believed that these later cases reawakened the *Lochner* idea of broadly interpreted liberty. *See Griswold*, 381 U.S. at 514-16 (Black, J., dissenting).

27 *See* Brutus, *supra* note 2, at 298-302.

28 *See* Brutus, *supra* note 2, at 269.

29 *See* Brutus, *supra* note 2, at 269.

30 *See* Brutus, *supra* note 2, at 300. In *Essay XII*, Brutus stated:

> To discover the spirit of the [C]onstitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the [P]reamble, in the following words, viz, "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure

Brutus's analysis of the Preamble is meaningful because, as a delegate to the Constitutional Convention, his understanding of the Preamble may suggest that this was a common understanding among the framers of the Constitution.[31]

Despite arguments and evidence that the Preamble had initially been designed as an actual source of rights, the *Jacobson* decision, although handed down ninety-five years ago, remains conclusive on the issue.[32] Some scholars, conceding that the Preamble may be incapable of granting such rights independently, nevertheless have averred that the Preamble represents the "spirit" of the entire Constitution, and thus should be used, in conjunction with the Ninth and Fourteenth Amendments, to further advance the unenumerated rights.[33] That is, the Preamble's "aspirational character," apparent in the phrase "a more perfect union," could be applied by courts to aid in defining the many unenumerated rights.[34]

For example, an unenumerated right to privacy has been derived from the collective spirit of various constitutional

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> the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution," etc. If the end of the government is to be learned from these words, which are clearly designed to declare it, it is obvious it has in view every object which is embraced by any government. . . . The courts, therefore, will establish this as a principle in expounding the [C]onstitution, and will give every part of it such an explanation, as will give latitude to every department under it, to take cognizance of every matter, not only that affects the general and national concerns of the union, but also of such as relate to the administration of private justice, and to regulating the internal and local affairs of the different parts.

Id. Among other objections to the proposed constitution, Brutus maintained that the spirit of the Constitution, as announced in the Preamble, would infringe on the rights of the states. *See id.* at 301. Brutus supported this assertion by emphasizing that the Preamble speaks of "We the *People*," rather than in terms of the states. *See id.*

31 *See* Brutus, *supra* note 2, at 300.

32 *See* Marcin, *supra* note 17, at 282. One contemporary scholar believes that the Preamble "illuminates the objects of the Framers and, thus, can be a guide to construction, but it is not considered to confer powers or right." CHESTER JAMES ANTIEU, CONSTITUTIONAL CONSTRUCTION 31 (1982).

33 *See* Carrasco and Rodino, *supra* note 6, at 520. Some commentators observe that the right of privacy has been deemed to be closely related to the Ninth Amendment. *See id.* Justice Brandeis referred to this right as "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "The Ninth Amendment, using the Declaration and the Preamble as its guides, is the appropriate vehicle for vindicating retained rights that have typically been recognized under the Fourteenth Amendment." Carrasco and Rodino, *supra* note 6, at 521.

34 *See* Carrasco and Rodino, *supra* note 6, at 520.

provisions.[35] Two landmark cases in this arena were *Griswold v. Connecticut*,[36] where a "penumbra" of other, enumerated, rights created a "zone of privacy," and *Roe v. Wade*,[37] where the court referred directly to the right of privacy. These cases did not use the Preamble in recognizing the right of privacy. However, in the concurring opinion of *Doe v. Bolton*,[38] Justice Douglas explicitly referred to the Preamble as the location of the privacy right for purposes of abortion and noted that it envisioned a privacy right even broader than that needed to permit abortion.[39]

Today, courts continue to apply the right of privacy to new situations.[40] For example, although the Supreme Court has not embraced the idea that the right of privacy extends to homosexual activity between consenting adults,[41] courts have in recent years

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35 *See* Carrasco and Rodino, *supra* note 6, at 520.

36 381 U.S. 479 (1965). In reaching the finding that a zone of privacy exists, the Court invalidated a state statute that forbade the use of contraceptive devices even for married couples. *See id.* That zone of privacy, ruled the Court, was created by the First, Fourth, Fifth, and Ninth Amendments, and their penumbras, as such a right is essential for the implementation of the explicit protections. *See id.* The Court expanded this zone so as to also encompass non-married people in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court subsequently divided the privacy interests into two categories: (1) the interest in not having personal matters disclosed; and (2) the interest in autonomy concerning the making of certain decisions. *See* Whalen v. Roe, 429 U.S. 589, 599 (1977). The right of privacy, however, is not absolute, and courts may balance the right against countervailing state interests. *See id.* at 602.

37 410 U.S. 113 (1973).

38 410 U.S. 179 (1973) (Douglas, J., concurring).

39 *See id.* at 210 (Douglas, J., concurring). Douglas's concurrence in *Doe v. Bolton* also applied to *Roe v. Wade*, 410 U.S. at 167. In those cases that invalidated state abortion statutes, both of which were argued, reargued, and decided on the same day, Douglas noted that the Bill of Rights made no mention of the right of privacy. *See Doe*, 410 U.S. at 209 n.2 (Douglas, J., concurring). Although not mentioned in the Bill of Rights, Douglas explained that previous Court decisions had recognized the right as being among the fundamental values protected by the Bill of Rights. *See id.* Douglas then discussed *Griswold v. State of Connecticut*, where the Court invalidated a state statute that forbade the use of birth control. *See id.* at 210 (citing *Griswold*, 381 U.S. at 486).

40 *See, e.g.*, *Judge's Criticism*, *supra* note 7, at B1 (discussing a judge's decision to allow a civil suit against the city to proceed because the plaintiff's rights may have been violated with the allegedly staged perp walk).

41 *See* Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) (5-4 decision) (concluding that the right does not reach homosexual sodomy, as such a right lacks ancient origin and was outlawed in all thirteen states at the time of the ratification of the Bill of Rights).

increasingly asserted the employee right to privacy.[42] Therefore, while the Preamble to the Constitution may not explicitly grant additional rights to citizens, the issues remain as to whether the Preamble did have such a meaning and how much weight such meaning should be given.

III. The Background and Meaning of the Ninth Amendment

Because the Ninth Amendment seemingly refers to unenumerated rights, commentators have urged courts to base their findings of rights on that "forgotten" amendment, rather than try to stretch the meaning of the other amendments to fit the desired right.[43] Courts, by contrast, have been strikingly reluctant to fully embrace the Ninth Amendment as a source of protected rights.[44] The words of the Ninth Amendment, however, are quite simple: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[45] The Supreme Court's interpretation of this amendment has varied enormously throughout its history.[46] While the Amendment began as an important condition to the states' ratification of the Constitution, it subsequently went unnoticed by the Supreme Court for 174 years.[47]

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42 *See* Hudock, *supra* note 5, at 815. Concentrating on the legality of urinalysis by employers, this thorough article posits that there are four constitutional avenues to attack the practice: (1) the Fourth Amendment right to be free from unreasonable searches and seizures; (2) the 14th Amendment right to due process of the law; (3) the aforementioned constitutional right of privacy; and (4) the 14th Amendment right to equal protection of the law. *See id.* at 691.

43 *See generally* Carmen S. Matheson, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179 (1996).

44 *See* Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting).

45 U.S. CONST. amend. IX.

46 *See* Matheson, *supra* note 43, at 204. "[I]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Consequently, the interpretation of the Ninth Amendment has varied depending on the makeup of the Court. *See* Matheson, *supra* note 43, at 180.

47 *See id.* Although the Framers had intended to merely modify the Articles of Confederation, the end result was the creation of the U.S. Constitution. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 5 (3d ed. 1996). Some scholars have suggested that the entire process of creating the Constitution was illegal, and perhaps void,

The Amendment gained new strength in *Griswold v. State of Connecticut*,[48] *Palmer v. Thompson*,[49] *Roe v. Wade*,[50] and *Doe v. Bolton*.[51] The Ninth Amendment, however, has also been characterized as empty of meaning, and incapable of being a source of unenumerated rights.[52] Because many do not regard the Ninth Amendment as being very important, the majority in *Griswold v. State of Connecticut* based its finding of a constitutional right of privacy on various different amendments, rather than relying solely

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considering that the Articles of Confederation expressly stated that unanimity by the states was necessary to amend them and that Rhode Island refused to send delegates to Philadelphia for the Constitutional Convention. *See* Alex Kozinski and Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1587-88 (1997) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND THE IDEAS IN THE MAKING OF THE CONSTITUTION (1996)). The Framers nevertheless wrote the Constitution over several months in 1787, and then presented it to the states for ratification. *See id.*

48 381 U.S. 479, 484 (1965). Justice Douglas authored the majority opinion in *Griswold*, whereby the Court struck down a Connecticut statute prohibiting the use of birth control by married couples. *See id.* at 486. While the majority referred to the Ninth Amendment as part of the "penumbra" of rights that together created the constitutional right of privacy, Justice Goldberg more clearly depicted the spirit of the Amendment in a concurrence. *See id.* at 487 (Goldberg, J., Concurring). Justice Breyer, a clerk to Goldberg at the time of *Griswold*, presumably also played a role in that important concurrence. *See* Matheson, *supra* note 43, at 179.

49 403 U.S. 217, 233 (1971) (Douglas, J., dissenting).

50 410 U.S. 113, 153 (1973) (stating that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restriction upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people," is sufficiently broad to include a woman's choice to have an abortion); *see also* Bower v. Hardwick, 478 U.S. 186, 201 (1986) (Blackmun, J., dissenting) (advocating that the Court should consider defendant's claim that prosecution for homosexual sodomy violates Ninth Amendment rights).

51 410 U.S. 179 (1973). Justice Douglas asserted that the Ninth Amendment permitted no exceptions to the constitutional right of privacy. *See id.* at 211 (Douglas, J., concurring). Justice Douglas also declared that the Ninth Amendment is the source of the constitutional right to vote in state elections. *See* Lubin v. Panish, 415 U.S. 709, 722 (1974) (Douglas, J., concurring).

52 *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 27 (1988). Judge Bork, who believes that the Ninth Amendment has no application in a court of law, remarked,

> 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 inkblot, 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 inkblot.

Id. at 1.

on the words of the Ninth Amendment.[53] While the controversy surrounding the Ninth Amendment's meaning has arisen in the confirmation hearings of Court Justices in recent years, these discussions have not led to conclusive rulings regarding the Amendment's current significance.[54]

To understand the original meaning of the Ninth Amendment, and how it might be used in conjunction with the Declaration of Independence and the Preamble to identify the "retained" rights of the people, it is necessary to study the political context in which the founders drafted the amendment.[55] After obtaining independence

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53 *See Griswold*, 381 U.S. at 479. The majority opinion, authored by Justice Douglas, noted that zones of privacy have been guaranteed by several of the first ten amendments. *See id.* at 484. Rather than expounding on the meaning of the Ninth Amendment, the *Griswold* Court simply suggested that the amendment, along with others, made the Connecticut statute unconstitutional. *See id.* (quoting U.S. CONST. amend. IX).

54 *See* Matheson, *supra* note 43, at 192. The Senate's refusal to confirm President Bush's nomination of Judge Bork to the Supreme Court may have been based on Bork's analogy of the Ninth Amendment to an "ink blot." *See id.* at 180. The Senate also asked other Justices about their interpretation of the Ninth Amendment. *See id.* For example, in reference to the right of privacy, Justice O'Connor commented that the Ninth Amendment recognizes the unenumerated rights held by people, even though courts have not *expressly* stated that the Ninth Amendment is a source of the particular right in question. *See id.* at 193. Commentators have additionally noted that Justice Breyer may be a strong supporter of an expansive Ninth Amendment interpretation, for Breyer clerked for Justice Goldberg when Goldberg authored the *Griswold* concurrence. *See id.*

55 *See* CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS 21-22 (1995). When looking at the intent of the founders, Massey noted that confusion necessarily exists as to *whose* intent is important.

> It is not certain whose intent counts. Is it the intent of the fifty-five men who convened [at the Constitutional Convention] in Philadelphia in 1787? Is it the intent of the smaller set of men who actually drafted the text, or those who participated most vigorously in the deliberations in Independence Hall? Is it the intent of the delegates to the various state ratification conventions? What are we to do with the intentions of those who opposed the Constitution or any given [A]mendment? Are their intentions relevant, in a negative way, to describing the intentions underlying the constitutional text? What of the pamphleteers? Is the Federalist troika of Publius the only one to count, or may we include the anti-Federalist opposition? What about the intention of those people utterly excluded then but included now?

Id. For a discussion on the use of legislative history for statutory interpretation, see Robert J. Aravjo, *The Use of Legislative History in Statutory Interpretation: A Recurring Question - Clarification or Confusion*, 16 SETON HALL LEGIS. J. 551 (1992).

from the British, and the signing of the Declaration of Independence, the early Americans adopted the Articles of Confederation ("Articles") to guarantee unity among the states for foreign and domestic purposes.[56] While the Articles brought unity, the Articles also left the states with most of the powers.[57] Because revolutionary Americans distrusted a centralized authority, the design of the Articles allowed states to retain their own separate sovereignty.[58] States therefore used this power to create their own form of republican government.[59] Inadequacies with the Articles, however, soon became apparent,[60] thus demonstrating the need for change.[61]

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56 *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 2 (1996). The Articles of Confederation were written in 1777 and sent by the Continental Congress to the legislatures of the states for approval. *See* 16 AM. JUR. 2D *Constitutional Law* § 7 (1998). The states finally approved the Articles of Confederation in 1781. *See id.* The government created by the Articles of Confederation had one branch, and lacked a centralized executive power as the states wished to retain their own autonomy. *See id.*

57 *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 9 (Ralph Ketcham ed. 1986) [hereinafter *Ketcham*]. The second provision of the Articles of Confederation states: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by the Confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION art. II. The third provision more specifically addresses the purpose of the Articles: "The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." ARTICLES OF CONFEDERATION art. III.

58 Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 307 (1987). Because the states desired to retain most powers, the central government under the Articles of Confederation lacked the power to raise revenue through taxes and tariffs. *See id.* Moreover, any action by Congress allowed under the Articles of Confederation required unanimity, thereby again limiting its power. *See id.*

59 *See Ketcham*, *supra* note 57, at 3. Because of the important period between 1776 and 1787, Thomas Jefferson once calculated that the new states had amassed, by the time of the Constitutional Convention in 1787, almost 150 years of republican government experience (11 years multiplied by the 13 states). *See id.* Jefferson's remark is supported by the fact that all states had drafted at least one constitution by 1787. *See id.*

60 *See* Massey, *supra* note 58, at 307. Difficulties with the Articles of Confederation involved rivalries among states, tariffs, and problems caused by the lack of a uniform national currency. *See id.* Indeed, many political leaders challenged the Articles even before their implementation on March 1, 1781. *See id.*

61 *See Ketcham*, *supra* note 57, at 10. Troubled by the inefficiency and weakness of the infant federal government under the Articles of Confederation, "nationalists"

The requirement of unanimous consent among the states to effect alterations to the Articles resulted in the rejection of most proposals.[62] Ultimately, however, after less than successful conferences to improve the Articles in Annapolis and Mount Vernon, a convention was arranged for May 1787 in Philadelphia.[63] Recognition of the general ineffectiveness of the Articles, combined with crises such as Shay's rebellion,[64] resulted in every state, except Rhode Island, agreeing to send delegates to Philadelphia.[65] Although the fifty-five delegates that arrived in Philadelphia intended to strengthen the Articles, the methods and goals of improving the Articles were not yet clear.[66]

Virginians had developed extensive ideas as to how the Articles should be changed or replaced.[67] For instance, prior to the

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generated proposals to strengthen the Articles of Confederation. *See id.* Notable "nationalists" were Alexander Hamilton, James Madison, George Washington, and James Wilson. *See id.* They believed that an effective national government required the power to tax and the power to control interstate and foreign commerce. *See id.*

62 *See Ketcham*, *supra* note 57, at 10. Although most proposals failed, a meeting at Mount Vernon in 1785 resolved various disputes between Maryland and Virginia, thereby inspiring further attempts to strengthen the Articles of Confederation. *See id.* Following that conference, state leaders tried to promote a discussion concerning trade regulations under the Articles of Confederation by organizing an Annapolis convention in September 1786. *See id.* Because many states decided not to participate, the Annapolis Convention fell short of its goal. *See id.* However, the convention did produce an agreement for the delegates to meet again in Philadelphia in May 1787. *See id.*

63 *See Ketcham*, *supra* note 57, at 10.

64 *See Ketcham*, *supra* note 57, at 10. Shay's Rebellion, which took place in the winter of 1786, was the result of frustration over the actions of popular government. *See* Lance Banning, *1787 and 1776: Patrick Henry, James Madison, the Constitution, and the Revolution*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 59, 77 (Neil L. York ed., 1988).

65 *See Ketcham*, *supra* note 57, at 10.

66 *See Ketcham*, *supra* note 57, at 10.

67 *See Ketcham*, *supra* note 57, at 31 (quoting letter from James Madison to George Washington, Apr. 16, 1787). In a letter to George Washington, James Madison stated: "Having been lately to revolve the subject which is to undergo the discussion of the Convention, and formed in my mind *some* outline of a new system, I take the liberty of submitting them without apology, to your eye." *Id.* at 32 (emphasis in original). Madison, later in the letter, theorized that "[t]o give a new System its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures. This will be the more essential as inroads on the *existing Constitutions* of the States will be unavoidable." *Id.* at 34 (emphasis in original). The idea of ratification by the "people" was an inventive idea. *See* Kozinski and Susman, *supra* note 47, at 1588. This process, however, raises Calvin R. Massey's concerns as to *whose* intent is important when attempting to

commencement of the Philadelphia Convention on May 29, 1787, the Virginia delegates conferred and voted on the new plan of government envisioned by James Madison.[68] The state's Governor, Edmund Randolph, then began the Convention by introducing the "Virginia Plan" to the other delegates.[69]

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discern the original intent of the Ninth Amendment, or any other Constitutional provision. *See* MASSEY, *supra* note 55, at 21-22.

Some scholars have asserted that equating the words of the Constitution to the actual intent of the ratifiers (or in Madison's terms, "people") is not accurate. *See* Kozinski and Susman, *supra* note 47, at 1588. First of all, it was widely agreed that the Articles of Confederation could no longer lead the nation. *See id.* Therefore, the Constitution was essentially given to the state ratification conventions on a "take-it-or-leave-it" basis. *See id.* By 1787, it was widely agreed that the Articles of Confederation could no longer lead the nation. *See id.* When the framers submitted the Constitution to the ratifying conventions, the only choice was whether to adopt it completely, or reject it completely. *See id.* Rejection would have meant continued rule under the Articles of Confederation. *See id.* Furthermore, ratification of the Constitution by, as Madison put it, "the people," did not entail all Americans. *See id.* Public sentiment in some towns in Massachusetts and Pennsylvania was so against the document that they refused to send delegates to their state convention. *See id.* Moreover, because ratification required only nine out of the thirteen states, the vote in the key states of New York and Virginia became of little significance upon New Hampshire's becoming the ninth state to ratify the Constitution. *See id.*

68 *See Ketcham*, *supra* note 57, at 35. Although the delegates to the Philadelphia Convention were supposed to merely "alter" the Articles of Confederation, Madison's idea, later termed the "Virginia Plan," called for an entirely new Constitution. *See id.*

69 *See Ketcham*, *supra* note 57, at 35. Governor Randolph, remarking that a new federal system was essential because of the national crisis, suggested that the debates center on four inquiries: "1) the properties, which such a government ought to possess, 2) the defects of the confederation, 3) the danger of our situation and 4) the remedy." *Id.* As part of the remedy, the Virginia Plan "[r]esolved that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defense, security of liberty and general welfare." *Id.* at 37. Several parts of Governor Randolph's resolution are embodied in the Preamble to the United States Constitution. *See id.* Randolph's sixth resolution was also significant:

> Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the Articles of Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

Id. at 37-38.

Soon after Randolph described the parameters of the "Virginia Plan," the delegates embarked on an important debate concerning the defects of the Articles.[70] Because a major weakness concerned Congress's inability to control state legislation that infringed on national laws or treaties with foreign nations, the Virginia Plan proposed a system whereby the national government could invalidate "improper" state laws.[71] The Constitutional Convention debate concerning the veto of state laws began on June 8, 1787, when a delegate moved for a vote on giving the National Legislature the "authority to negative all laws which they should judge to be improper."[72] After debating this issue, the delegates voted against

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70 *See Ketcham, supra* note 57, at 58.

71 *See Ketcham, supra* note 57, at 58-9. Article VI of the Articles of Confederation did give Congress some power in regulating the actions of state legislatures:

> No state without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter any conference, agreement, alliance or treaty with any king, prince or state. . .No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is entered into, and how long it shall continue. No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled.

ARTICLES OF CONFEDERATION art. VI. The Virginia Plan described this as the power to "negative" state laws. *See Ketcham, supra* note 57, at 58.

72 *Ketcham, supra* note 57, at 58. James Madison meticulously recorded this debate, while also playing a major role in the debate itself. *See id.* at 59, 62. Madison seconded Charles Pinckney's (South Carolina) motion regarding the federal power to invalidate improper state laws. *See id.* at 58. Pinckney's motion, however, was ultimately defeated, with seven states voting "no." *See id.* at 58. Madison's summary of Pinckney's beginning arguments was as follows:

> He urged that such a universality of the power was indispensably necessary to render it effectual; that the States must be kept in due subordination to the nation; that if the States were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner stone of an efficient national government; that under the British government the negative of the Crown had been found beneficial, and the States are more one nation now, then the colonies were then.

Id. at 58-59.

Following Pinckney's introduction, Madison then said that such an unlimited power to invalidate state laws was "absolutely necessary to a perfect system" since the

granting such a power to the National Legislature.[73] This debate

states had a tendency "to infringe the rights and interests of each other; to oppress the weaker party within their respective jurisdictions." *Id.* at 59. Madison later remarked, "This prerogative of the General government is the great pervading principle that must control the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order and harmony of the political System." *Id.*

Other delegates disagreed with Madison. *See id.* Hugh Williamson, a scholar and physician from North Carolina, feared that granting such a power to the national legislature "might restrain the states from regulating their internal police." *Id.* Elbridge Gerry of Massachusetts was unsure as to the extent of the power to negative a state law, and was against all powers that were not "necessary." *See id.* at 59-60. Gerry, however, agreed with Pinckney and Madison that the national legislature should be equipped with the authority to negative state laws concerning matters like paper money. *See id.* at 60. Gerry stressed that the interests of the states varied widely, and that the states were "ignorant" of the interests of other states. *See id.* Another problem with the proposal cited by Gerry was that "new states" would be reluctant to join the Union were their views to differ from the "old states." *See id.*

Roger Sherman, a delegate from Connecticut, thought that the national legislature's power to "negative" state laws should be defined. *See id.* He suggested that the state law not be invalidated until a trial for that purpose is actually held. *See id.* Responding to one of Sherman's points, James Wilson (Pennsylvania) noted the impracticality of defining all of the scenarios in which the national legislature could exercise its power. *See id.* at 60. Observing that "[f]ederal liberty is to states, what civil liberty, is to individuals," Wilson realized that some discretion must be left with either the states or the national government and, because the "whole" should not be at the mercy of the "parts," Wilson urged that the national government be granted the power to negative improper state laws. *See id.* at 60-61. Wilson added:

> To correct [the Articles of Confederation's] vices is the business of this convention. One of its vices is the want of an effectual control in the whole over its parts. What danger is there that the whole will unnecessarily sacrifice a part? But reverse the case, and leave the whole at the mercy of each part, and will not the general interest be continually sacrificed to local interests?

Id. at 61.

Delaware's Gunning Bedford distrusted the proposed national power to invalidate state laws because it would require the states to send their proposed laws to a distant legislature to deliberate on even in times of great urgency. *See id.* Bedford further observed that such power would require the National Legislature to sit continuously so as to meet the heightened demands. *See id.* at 61-62. Madison replied to Bedford by suggesting that the states could have temporary powers to effectuate laws in times of emergency, and, the entire National Legislature need not be gathered because the much smaller Senate could alone have the power to rule on the validity of state laws. *See id.* at 62.

[73] *See Ketcham*, *supra* note 57, at 58-62. Five major problems were cited: (1) the states' powers would decrease; (2) the power, if granted, should be defined; (3) the state laws should only be invalidated if a trial raises the issue; (4) the authority would make it necessary for states to seek approval from the National Legislature even when urgent situations required immediate state action; and (5) the power would deter other states from joining the Union whose interests differ from the national legislature. *See id.* The proponents for the motion, however, maintained that the power to "negative"

regarding the veto power over state laws is important because it shows that the framers of the Constitution were divided as to whether state laws could ever be overturned by a higher power.

While the issue of judicial review of legislation is related to the aforementioned debate, it nevertheless did not play a major role in the Constitutional Convention because it was widely accepted at the time that courts *would* have such power.[74] What was not settled at the time, and remains unclear, is the power of the courts to invalidate legislation that contravenes rights that are not enumerated in the Constitution.[75] While the enumerated rights are derived from

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"improper" state legislation was necessary to the survival of the Union because a serious weakness of the Articles of Confederation was that the central government lacked control over the states. *See id.*

74 *See* Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 143, 160 (Neil L. York ed., 1988). Although the Supreme Court Justices James Iredell and Samuel Chase later debated the controversial issue of natural law in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1796), the Constitutional Convention did not significantly discuss the general idea of judicial review. *See id.* at 145, 160. Rather, the delegates spent most of the time discussing the organization and strength of the executive, the handling of slavery, and the framework of representation in Congress by the states. *See id.* at 160. Most delegates that did consider judicial review assumed that it would exist. *See id.* Because judicial review remained but a secondary issue at the Constitutional Convention, discussions on the enforcement of the unwritten constitution by the judicial branch consequently were quite rare. *See id.* Several delegates did, however, explicitly refer to the idea of judicially enforcing the unwritten constitution while discussing the ex post facto clause, "No bill of attainder or *ex post facto* law shall be passed." *See id.* (citing U.S. CONST. art. I, § 9, cl. 3). Oliver Ellsworth of Connecticut, who was against the clause, urged his fellow delegates that the Constitution need not expressly prohibit the federal government from convicting a person for a crime that became illegal *after* the act was committed because, "there was no lawyer, no civilian who would not say that ex-post facto laws were void of themselves. It can not[sic] then be necessary to prohibit them." *See* Grey, *supra*, at 160 (quoting FARRAND, 2 RECORDS 375-76). Agreeing with Ellsworth, James Wilson remarked that adding such a prohibition to the Constitution would "proclaim that we are ignorant of the first principles of Legislation." *See id.*

75 *See generally* Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107 (1998). Cosgrove commented that the Declaration of Independence and the Preamble to the Constitution are the best places to begin searching for fundamental rights. *See id.* at 139. The Declaration of Independence gave this country various "natural" and "unalienable" rights. *See* John Patrick Diggins, *Recovering "First Principles," in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 119, 140 (Neil L. York ed., 1988). In *Commonwealth v. Aves*, for example, Chief Justice Lemuel Shaw ruled that the Declaration of Independence necessarily freed a slave girl who was brought to Massachusetts by her master. *See Commonwealth v. Aves*, 18 Pick. 193 (Mass. 1836), *available in* 1836 WL 2441. The Declaration of

the text of the Constitution and the amendments that followed, the so-called "unenumerated" rights have evolved over hundreds of years and have been cited by courts, commentators, and politicians.[76] Commentators have referred to these unenumerated rights, collectively, as the "unwritten constitution."[77]

Independence reads in part:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.- That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it; and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2. Some scholars have noted that by the antebellum period of American history, "all could agree that the living part of the Declaration lay in the now 'immortal' lines of the Preamble." Phillip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 574 (1962).

76 *See, e.g.*, Carrasco and Rodino, *supra* note 6, at 498. Carrasco and Rodino listed many rights not expressly mentioned in the Constitution that have been cited by the United States Supreme Court. *See id.* at 513 nn.69-83. The Supreme Court has found enumerated rights in adjudicating the following cases: Griswold v. Connecticut, 381 U.S. 479 (1965) (the right to privacy); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality) (the right to attend and report on criminal trials); Jackson v. Virginia, 443 U.S. 307 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); Estelle v. Williams, 425 U.S. 501 (1976) (a presumption of innocence and the standard of proof beyond a reasonable doubt in criminal trials); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (freedom of personal choice in matters concerning family life); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the right to choose whether to have children); Loving v. Virginia, 388 U.S. 1 (1967) (the right to make marital decisions); Dunn v. Blumstein, 405 U.S. 330 (1972) (the right of interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (the right to vote); DeGregory v. Attorney Gen. of N.H., 383 U.S. 825 (1966) (the right to freely associate with others); Bolling v. Sharpe, 347 U.S. 497 (1954) (the right to equal protection of federal laws); and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to control the upbringing of one's own child). Other unenumerated rights cited by courts have been: the right to keep one's American citizenship, despite even participation in criminal activities, until explicitly renounced; the right to utilize the federal courts; and the right to choose a profession. *See* AMERICAN CONSTITUTIONAL INTERPRETATION 1083-84 (Murphy ed., 1986).

77 *See* Grey, *supra* note 74, at 157. Grey's essay, among other things, discusses *Travett v. Weeden* and *Bayard v. Singleton*, two pre-1787 state cases dealing with judicial review of legislation. *See id.* These controversial opinions were handed down immediately before and during the Constitutional Convention, and thus are good examples of the sentiment of the framers of the Constitution regarding judicial review.

See id. Judges in both cases invalidated state statutes despite heated challenges by the legislatures. *See id.* While the court in *Bayard* applied North Carolina's Constitution to strike down the state legislation, the *Travett* court utilized the unwritten constitution to invalidate the Rhode Island statute. *See id.* The dispute in *Travett* involved a Rhode Island statute that monetarily penalized those who refused to transact in the state paper money in payment of debt. *See id.* The statute further provided that actions to collect the penalty were to be without a jury. *See id.* Because Rhode Island was one of the two states without a constitution and because the colonial charter did not guarantee a trial by jury, the defendant was forced to frame his objection in "terms of pure Cokean unwritten constitutionalism." *Id.* Counsel's widely read pamphlet, outlining his arguments, urged that the statute transgressed fundamental law, and thus was "a mere nullity, and void." *Id.* Although no written opinion exists, the court presumably based its ruling for the defendant on the unwritten constitutional ground. *See id.* Outraged, the Rhode Island legislature demanded that the judges appear before them, but the judges denied the legislators' plea to retract their earlier decision. *See id.* at 157-58. Consequently, the legislature removed four of the five judges during the following year. *See id.* However, the legislature also repealed the very statute that the judges had found invalid. *See id.*

The dispute in *Bayard* implicated a North Carolina statute that mandated summary dismissal of legal challenges to government seizures of Loyalist (people who supported the British during the Revolutionary War) property. *See* Grey, *supra* note 74, at 158. James Iredell, later the Supreme Court Justice involved in the famous debate with Justice Chase regarding the existence of natural rights in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), represented a plaintiff in a seizure proceeding. *See* Grey, *supra* note 74, at 158. Iredell contended that the North Carolina Constitution's guarantee of a right to a jury made the statute void. *See id.* A preliminary ruling by the court sided with Iredell's judicial review argument, and Iredell wrote a pamphlet defending the judges in the ensuing political battles. *See id.* Many of the arguments for judicial review later set forth by Hamilton and Madison were included in Iredell's pamphlet. *See id.* The legislators' attempt to censure the judges failed, and the court, while the Constitutional Convention was taking place, ultimately invalidated the statute on the constitutional reasoning urged by Iredell. *See id.*

Because the controversy regarding *Bayard* occurred at the same time as the Constitutional Convention, Iredell participated in a famous correspondence with Richard Spaight, a North Carolina delegate in Philadelphia who ardently protested the *Bayard* decision to invalidate a properly passed piece of state legislation. *See id.* at 158. In further support of his earlier pamphlet, Iredell discussed what has become the standard positivist doctrine of judicial review in the United States:

> I confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the judges, consistently with their duties could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every exercise of those powers must, necessarily, be compared. . . .It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another.

Id. at 159 (quoting GRIFFITH MCRAE, 2 THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-49 (citations omitted)). Unlike his later debate with Justice Chase,

Many of the arguments set forth by champions for the unwritten constitution have incorporated the teachings of Sir Edward Coke.[78] Coke has long been regarded as the leading seventeenth century British judge, and his ideas, though not completely accepted by early Americans, nevertheless represented the underpinning of the notion of fundamental law.[79] Several state

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Iredell's letters to Spaight contained remnants of the Cokean doctrine whereby the rights of citizens are not restricted to the words of the constitution:

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

Id.

78 *See* MASSEY, *supra* note 55, at 27.

79 *See* MASSEY, *supra* note 55, at 27. Coke, who lived in England during the 16th and 17th century, is considered to epitomize the idea of natural law, and to this day is still cited as authority by the United States Supreme Court. *See, e.g.*, Jones v. United States, 526 U.S. 227, 247 n.8 (1999) (citing Coke as authority for the importance of having the jury decide issues of fact); Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (quoting Coke for the proposition that "[a] man's home is his castle.") The Cokean Doctrine is most explicitly documented in *Dr. Bonham's Case*, 8 Co. 113b, 77 Eng. Rep. 646 (K.B. 1610), where Coke professed that courts possess the power to strike down legislation that offends fundamental law. *See* MASSEY, *supra* note 54, at 27. Although a statute clearly allowed the college in *Bonham* to fine and imprison unlicensed physicians, Coke remarked:

> [I]t appears in our books that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.

Bonham, 8 Co. at 118a, 77 Eng. Rep. at 652.

Although many scholars have asserted that *Bonham* enounced a fundamental law theory, others maintain that the case merely represents a strict statutory construction theory. *See* MASSEY, *supra* note 55, at 28. Regardless of the modern debate as to the precise meaning of *Bonham*, Coke's ideology played a major jurisprudential and political role in early America. *See id.* at 28-29. Cases from the colonial period offer some good examples of this point. *See id.* at 29. The British government in *Paxton's Case*, also known as *Writs of Assistance Case*, justified general search warrants by referring to specific statutes. *See id.* James Otis, Jr., however, explicitly alluded to Coke's *Bonham* decision as authority for the assertion that courts possess the power to strike down statutes that offended "fundamental Principles of Law." *See id.* at 29 n.18 (quoting Quincy's *Massachusetts Reports* 51 (1761)). John Adams referred to Otis's remarks as having sparked independence from Great Britain because the idea meant that any court in Colonial America could simply strike down the Parliament's laws. *See id.* at 29. Coke's natural rights were again invoked in a Massachusetts court against the Stamp Act: "the Act. . . is against Magna Charta, and the Natural Rights of Englishman, and therefore, according to Lord Coke,

cases expressly invoked the Cokean doctrine to invalidate statutes that exceeded the bounds of fundamental, or natural, law, despite the fact that the states' duly-elected representatives enacted such legislation.[80]

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null and void." *See id.* Professor Massey, while a staunch supporter of the proposition that the Ninth Amendment expressly grants to Americans various rights not mentioned elsewhere in the Constitution, also acknowledges that the Cokean doctrine was not universal among Americans at the time of the Constitution:

> This is not to suggest that Otis's argument in the *Writs of Assistance Case* sparked an unbroken trend toward vigorous exercise of judicial review in the service of unwritten fundamental law; rather, it is only to claim that the Cokean legacy was a powerful and influential aspect of the intellectual heritage of the framers.

MASSEY, *supra* note 55, at 30. Many of the ideas expressed in Massey's book *Silent Rights* were discussed at length by Massey in law journal articles. *See* Calvin R. Massey, *Anti-Federalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987 (1988); Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229 (1990); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L. J. 305 (1987); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992).

80 *See* Grey, *supra* note 74, at 157. Back in England, "[t]he Cokean tradition blended traditional private law, the customary constitution of English government, and the rhetoric of natural law into a conglomerated 'fundamental law,' which was binding on the legislature and which- so it was said from time to time- judges could enforce." *Id.* Although the importance of the Cokean tradition lessened in England after the Revolution of 1688 (Coke died in 1634), the ideas nevertheless remained widespread there in the mid-18th century. *See id.* at 152. The important law texts of the period continued to invoke Cokean jurisprudence for support of the position that courts possessed the power to invalidate statutes that impinged on the boundaries implicitly created by "common right and reason." *See id.*

Although most of the American states prior to the Constitutional Convention contained at least remnants of the Cokean tradition, if not more, scholars have noted that Pennsylvania selected an alternative approach. *See* MASSEY, *supra* note 55, at 34; GORDAN S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 84 (1969). Pennsylvania's constitution, enacted in 1776, represented a "radical democracy," and thus the state entrusted the legislature with complete authority to effect the will of the people. *See* MASSEY, *supra* note 55, at 34. Because judicial review of the unwritten constitution collides directly with a pure democracy, in that it permits judges to invalidate a law passed by representatives of the people themselves, Pennsylvania did not accord judges much discretion to nullify statutes. *See id.* In place of a governor in Pennsylvania, elected committees instead performed necessary executive duties. *See id.* Moreover, "[t]o make the legislature more responsive to its theoretical master, the people, Pennsylvania required annual elections of representatives, required representatives to subject their acts to the instructions of their constituents, and required the legislature to submit proposed legislation to popular review." *Id.* (quoting STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 28 (1991)). The legislature also handled the tenure of the judges, and in no event could such judges remain on the

These cases demonstrate that judges were utilizing these unenumerated rights at the time the Constitution was written. For example, judges in *Travett v. Weeden* invalidated a statute that penalized people who refused to accept government-printed paper money in discharge of debt, because the statute violated fundamental law in that defendants could be prosecuted without the benefit of a jury trial.[81] Considering that Rhode Island lacked a written constitution in 1786, it is quite clear that the Rhode Island court applied the unwritten constitution in determining that people have a fundamental right to be tried by a jury of their peers.[82] Consequently, because courts recognized unenumerated rights in the time period surrounding formation of the constitution, it follows that by adopting the Ninth Amendment, the Framers desired to retain these unenumerated rights.

IV. The Framers' Debates, the Bill of Rights, and the Constitution's Ratification

Proponents of the unwritten Constitution contend that by listing some rights in the Bill of Rights, the Framers had not intended to say that no other rights exist. The question as to whether the new Constitution should include a bill of rights resulted in extensive debates, both during the Constitutional Convention and in the period leading up to ratification of the Constitution by the states.[83] Opponents of adding a bill of rights based their arguments

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bench in excess of seven years. *See id.* at 34. Pennsylvania's Constitution, however, was unlike most of the other states, whose systems, at least implicitly, did allow for some judicial review. *See id.*

81 *See* MASSEY, *supra* note 55, at 42.

82 *See* Grey, *supra* note 74, at 157.

83 *See, e.g.*, THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Alexander Hamilton explained that bills of rights are unnecessary in the United States:

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by subsequent princes.

on the fact that, because the federal government created by the Constitution was one of limited powers, the government necessarily lacked the power to abridge any of the people's rights.[84] Supporters of this view favored the adoption of the Constitution exactly as it was, without any changes.[85] Alexander Hamilton explained in *The Federalist No. 84* that a bill of rights was "not only unnecessary in the proposed Constitution but would even be dangerous."[86]

> Such was the *Petition of Right* assented to by Charles the First at the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown in the form of an act of Parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants.

Id. at 512-13.

[84] *See id.* at 513. Alexander Hamilton once stated that "[h]ere, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America." *Id.* (emphasis in original).

[85] *See id.*

[86] *Id.* Although Hamilton did not play as major a role at the Constitutional Convention as some of the other delegates, his diligence in publishing *The Federalist* led to his becoming perhaps the most famous of the Federalists. *See* THE FEDERALIST PAPERS, x-xi (Clinton Rossiter ed., 1961). Hamilton, a politician from New York, designed *The Federalist Papers* as a means of persuading New Yorkers, and more specifically, the ratifiers, to adopt and ratify the Constitution without any changes. *See id.* at ix. The work, a collection of 85 essays, or letters, printed in newspapers, has been cited as the third most "sacred" political writing in American history, behind only the Declaration of Independence and the Constitution. *See id.* at viii. The writers of *The Federalist Papers*, Hamilton, Madison, and John Jay, used the pseudonym "Publius" at the end of each "letter" to the people. *See id.* at viii. In No. 84, Hamilton continued with his explanation as to why a bill of rights would not only be useless, but even dangerous:

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Others, however, ardently resisted the adoption of the proposed Constitution without a bill of rights.[87] These "anti-federalists," as they became known, feared that the American people would be stripped of their natural rights in the exercise of the broad federal power vested by the "necessary and proper clause."[88] Although the federalists[89] arguably "won," considering that all thirteen states

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87 *See* THE FEDERAL FARMER, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 657 (Neil H. Cogan ed., 1997) [hereinafter *The Federal Farmer*]. Although the anti-federalists failed to produce an alternative proposal to the one created by the delegates at the Constitutional Convention, they did succeed in making their opinions public. *See Ketcham*, *supra* note 57, at 13-14. Similar to the way Alexander Hamilton, James Madison, and John Jay assumed the name "Publius" in the *The Federalists Papers*, the anti-federalists, in essays by "Centinnel," "Cato," "Brutus," and "The Federal Farmer," explained at length, in newspaper articles circulated throughout the nation, the various problems with the proposed constitution. *See id.* Although it was generally agreed that the Articles of Confederation were ineffective, the anti-federalists, unlike the federalists, advocated a second constitutional convention or the adoption of amendments, rather than the adoption of the constitution in the form presented to the states. *See* Kozinski and Susman, *supra* note 47, at 1583.

88 *See* Brutus, *Essay I, Oct. 18, 1787*, *in* THE ANTI-FEDERALISTS PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 269 (Ralph Ketcham ed., 1986). The letters by Brutus criticized the Constitution at length in an attempt to persuade the people to reject it. *See id.* Regarding the "Necessary and Proper Clause," he wrote:

> This government is to possess absolute and uncontrolable power, legislative, executive and judicial, with respect to every object to which it extends, for by the last clause of section 8th, article 1st, it is declared "that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution[.]" And by the 6th article, it is declared "that this constitution, and the laws of the United States. . .shall be the supreme law of the land."

Id. at 271-72.

The anti-federalists stressed the dangers inherent in a strong government, as previously announced by Blackstone. *See* Grey, *supra* note 74, at 164. Pursuant to that position, and about which the anti-federalists feared, it was presumed that the authority of the legislature had no limits. *See id.* The Blackstonian doctrine therefore equipped the legislature with the power to do anything that was not expressly withheld, while the people must expressly state those rights they intend to retain. *See id.* Perhaps the fear of the anti-federalists, that a government unfettered by a bill of rights would attempt to exercise every power not expressly prohibited, was accurate considering Justice Black's objection to the majority's decision to strike down a state statute that banned birth control devices for married couples in *Griswold*: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." Griswold v. State of Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting).

89 The supporters of ratification strategically called themselves "federalists" because

ultimately ratified the Constitution, the arguments put forth by the anti-federalists also played a major role in the adoption of the first ten amendments and in the documentation regarding the original intent of the first ten amendments.[90]

The delegates at the Constitutional Convention recognized the difficulties in creating a government that balanced the rights and liberties of the people with the need for a strong central government.[91] While the leaders understood that human nature

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"federation" at the time meant a league of governments. *See Ketcham, supra* note 57, at 12. The name was clever, if not misleading, considering that the sentiment among Americans of the time was against a strong national government, and in favor of a federation. *See id.* The federalists that advocated for the adoption of the Constitution without changes were different than the "Federalist" political party established in the 1790s. *See id.*

90 *See Ketcham, supra* note 57, at 14. Ratification by the necessary nine states was not easily achieved. *See id.* Delaware, New Jersey, and Georgia ratified quickly and unanimously. *See id.* While Connecticut also ratified it quite easily (128-40), public opinion in the other states was more divided. *See id.* The federalists were victorious in Pennsylvania (46-23), on December 18, 1787, but the margin may have partly been the result of the federalist plan to keep anti-federalists out of the ratification convention by organizing the vote for members of the convention at very short notice. *See id.*; Massey, *supra* note 58, at 315. Massachusetts ratified the Constitution on February 16, 1788, in a close vote: 187-168. *See Ketcham, supra* note 57, at 14. Uncertainty as to the fate of the Constitution arose following the close Massachusetts vote, but, large federalist victories in Maryland (63-11), in April, and South Carolina (149-73), in May, meant that ratification would be complete with one more state. *See id.* The anti-federalists were strong in both New York and Virgina, and Virgina planned to hold its convention before New York. *See id.* The Virginia Convention, commonly regarded as the most important convention, therefore seemed to be the deciding vote because the anti-federalists appeared to be in the majority in New Hampshire, while Rhode Island, the state that failed to even send delegates to Philadelphia's Constitutional Convention, and North Carolina were both hostile to the whole Constitution. *See id.* Virginia's 89-79 vote to ratify on June 25, 1788, however, was preceded by the surprise in New Hampshire where the federalists won 57-47. *See id.* New York's vote therefore was inconsequential because 10 states had already ratified before New York's convention commenced. *See id.* Although the anti-federalists out numbered the federalists 46 to 19 at the New York Convention, the delegates nevertheless voted for ratification, 30-27, in what some commentators have suggested to have been an act to keep the nation's capital in New York. *See id.* North Carolina voted against ratification, 193-75, and Rhode Island did not even hold a ratification convention. *See id.* at 14. North Carolina finally decided to ratify the Constitution in November 1789, and Rhode Island did the same in May 1790. *See id.*

91 *See* THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

> Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. Without substantially

makes it necessary to create certain restraints,[92] the framers also acknowledged the fact that a government should exist primarily for

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> accomplishing this part of their undertaking, they would have very imperfectly have fulfilled the object of their appointment, or the expectation of the public; yet that it could not be easily accomplished will be denied by no one who is unwilling to betray his ignorance of the subject.

Id.

92 *See* THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint."). Moreover, the teachings of John Locke instruct us that "where there is no law, there is no freedom." SIR WILLIAM BLACKSTONE, COMMENTARIES 1:157, *reprinted in* THE FOUNDER'S CONSTITUTION, at 388 (Philip B. Kurland and Ralph Lerner eds., 1987). Blackstone, a leading English judge one century after Coke's death, explained the need for law to advance the liberty of all:

> Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind. . . . For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power.

Id. Blackstone, however, noted that some laws oppress more than they promote the well being of society, and therefore do not serve the proper purposes of government:

> Thus the statute of King Edward IV, which forbad people to wear pike on their shoes or boots of more than two inches, was a law that oppressed; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility.

Id. As to the natural rights of people, Blackstone remarked:

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principle view of human laws is, or ought to be, to explain, protect, and enforce such rights as are absolute. . . .The Absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.

Id. at 120.

the benefit of the people.[93] Although it was not universally agreed that the version of the Constitution in existence at the close of the Convention perfectly balanced the rights of the citizens with the need for a strong government, the delegates nevertheless decided to present the document directly to the people by means of ratification conventions.[94]

With the proposed constitution now in the hands of the states, both political writers and delegates to the Philadelphia Convention attempted to sway the votes of their countrymen.[95] A major issue involved the omission of a bill of rights from the Constitution. [96] The anti-federalists repeatedly maintained that in the absence of such rights the people would lose many of the natural rights that were held by Englishmen at common law and fought for by

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93 *See* THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

> It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.

Id. Hamilton was likely influenced by the seventeenth-century philosopher and political scientist, Thomas Hobbes. *See* Massey, *supra* note 58, at 315. Hobbes, unlike Locke, believed that a strong, if not absolute, government was necessary because humans, unbridled by an external authority, were innately selfish. *See id.* Thus, life without a strong sovereign power was "solitary, poore, nasty, brutish and short." *Id.* (quoting THOMAS HOBBES, LEVIATHAN ch. 13 (1651)). Locke, whose ideas modern commentators believe to have been the dominant theory on politics in America during the period of the Constitutional and ratification conventions, instead maintained that humans could escape the misery Hobbes alluded to by entering into compacts in which people hand over certain rights to the state in exchange for the government's agreement to advance the general interests of the people. *See* Massey, *supra* note 58, at 315.

94 *See* Masssey, *supra* note 58, at 308. Massey noted that not all Americans favored the Constitution, as is demonstrated by the fact that only 10% of eligible Pennsylvanians voted for the ratification convention members because those in favor of the new constitution plotted to elect their own representatives to the convention by planning the election at the last moment. *See id.* Moreover, over 40 towns refused to send delegates to the Massachusetts ratification convention since public opinion in those towns was against adoption. *See id.* Considering that the vote to ratify in Massachusetts was 187-168, it is quite clear that it would have been rejected had all the towns been represented. *See id.* (citing A. BEVERIDGE, 1 LIFE OF JOHN MARSHALL 348 (1916)). Because of the fear of a strong national government, the people in New York and southern Virginia also opposed the Constitution. *See id.* at 308-09. Thus, the Constitution would likely not have been adopted by the required nine states had the promise to add the Bill of Rights not been made. *See id.*

95 *See, e.g., The Federal Farmer, supra* note 87, at 657.

96 *See The Federal Farmer, supra* note 87, at 657.

Americans during the Revolutionary War.[97]

The federalist reply was that such a list of rights would be "superfluous" considering that the federal government created by the Constitution was one of limited powers and thus, by definition, lacked the capacity to affect the rights of the people in any way not expressly provided for in the text of the Constitution.[98] In addition, the federalists believed that it was impossible to succeed in enumerating *all* the rights of mankind and that it would prove dangerous to attempt to do so since those in power may one day infer that any right not expressly listed was ceded to the federal government.[99] For example, why must the Constitution state that

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97 *See The Federal Farmer, supra* note 87, at 657.

98 *See* THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

99 *See id.* Many of the arguments asserted by Hamilton in that letter to his fellow Americans were actually borrowed from writings and speeches of James Wilson, an influential lawyer and judge from Pennsylvania who played a major role in his state's ratification convention. *See Ketcham, supra* note 57, at 183. Wilson's argument as to why a bill of rights would not be necessary proved very influential in not only his own state's ratification convention, but in conventions in all of the states. *See id.* The following arguments were made at the Pennsylvania Convention:

> In a government possessed of enumerated powers, such a measure [adopting a bill of rights] would be not only unnecessary, but preposterous and dangerous. Whence comes this notion, that in the United States there is no security without a bill of rights? Have the citizens of South Carolina no security for their liberties? They have no bill of rights. Are the citizens on the eastern side of the Delaware less free, or less secured in their liberties, than those on the western side? The [S]tate of New Jersey has no bill of rights. The [S]tate of New York has no bill of rights. The [S]tates of Connecticut and Rhode Island have no bills of rights. I know not whether I have exactly enumerated the states who have thought it not necessary to add a *bill of rights* to their constitutions; but this enumeration, sir, will serve to show by experience, as well as principle, that, even in single governments, a bill of rights is not an essential or necessary measure. But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. 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, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied powers into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and

citizens have the right to the press when absolutely nothing in the Constitution vests the federal government with the power to affect the right to a free press in the first place?[100] That the people should retain such a right, according to the federalists, necessarily implied that the federal government initially possessed such a power.[101]

The anti-federalists acknowledged the federalist position on this issue, but insisted that it was "unclear" as to whether people would understand that the absence of an enumeration of rights implied that all rights were left with the people, and that the federal government therefore had *only* the powers expressly enumerated in the Constitution.[102] It was therefore conceivable by the anti-federalists that people would interpret the absence of a bill of rights as meaning that the federal government had the power to impose any law, and take any action, that was not expressly prohibited by the text of the Constitution.[103] Because the interpretation could either be that the people possessed all the remaining rights or that the government did, the anti-federalists zealously contended that the addition of a bill of rights was necessary to clarify that inferences should be decided in favor of the people.[104]

> by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the [people].

JAMES WILSON, SPEECH AT THE PENNSYLVANIA RATIFICATION CONVENTION (Oct. 28, 1787), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 647-48 (Neil H. Cogan ed., 1997). As to the difficulty in enumerating the rights, Wilson remarked just eight days prior to Pennsylvania's vote to ratify the Constitution:

> I consider that there are very few who understand the whole of these rights. All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens.. . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late convention would have attempted such a thing.

Id.

100 *See, e.g.*, WILSON, *supra* note 99.

101 *See, e.g.*, WILSON, *supra* note 99.

102 *See The Federal Farmer*, *supra* note 87, at 657.

103 *See The Federal Farmer*, *supra* note 87, at 657. By contrast, the express powers granted to Congress by the Constitution are limited. *See* U.S. CONST. art I., § 8.

104 *See The Federal Farmer*, *supra* note 87, at 657.

V. *Analysis*

The federalists and anti-federalists did at the very minimum agree that the rights of the people should be retained.[105] The anti-federalists at the state ratification conventions, however, did not believe that the Constitution, as drafted by the framers, provided for adequate safeguards.[106] Therefore, in addition to the anti-federalists' numerous articles and speeches attacking the validity of the proposed Constitution, [107] some of the state ratification conventions sent in proposals for additions or changes to the Constitution.[108]

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105 *See generally supra* Part IV.

106 *See, e.g., The Federal Farmer, supra* note 87, at 657.

107 *See The Federal Farmer, supra* note 87, at 657. James Iredell, the future Supreme Court Justice that would later argue against the existence of natural rights, urged a different position at the North Carolina Convention. JAMES IREDELL, SPEECH AT THE NORTH CAROLINA RATIFICATION CONVENTION (July 29, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 649 (Neil H. Cogan ed., 1997) ("The gentleman says that unalienable rights ought not to be given up. Those rights which are unalienable are not alienated. They still remain with the great body of the people."). In response, Mr. Bloodworth made a typical anti-federalist statement:

> By its not being provided for, it is expressly provided against. I still see the necessity of a bill of rights. Gentlemen use contradictory arguments on this subject, if I recollect right. Without the most express restrictions, Congress may trample on your rights. Every possible precaution should be taken when we grant powers. Rulers are always disposed to abuse them.

BLOODWORTH, SPEECH AT THE NORTH CAROLINA RATIFICATION CONVENTION (July 29, 1788), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 649 (Neil H. Cogan ed., 1997).

108 *See, e.g.*, PROPOSALS FROM THE STATE CONVENTIONS: NEW YORK, JULY 26, 1788, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 635 (Neil H. Cogan ed., 1997). As an example of a state's proposal, the New York Convention proposed the following:

> That all Power is originally vested in and consequently derived from the People, and that Government is instituted by them for their common Interest Protection and Security.
>
> That the enjoyment of Life, Liberty, and the Pursuit of Happiness are essential rights which every Government ought to respect and preserve.
>
> That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom

Some of those proposals included bills of rights similar to those included in state constitutions.[109] Although the states ultimately ratified the Constitution without inserting any of the proposed changes, it is quite possible that ratification would have failed had the supporters of the Constitution not promised to add a bill of rights soon after the adoption of the Constitution.[110]

Although only sparingly utilized by courts to find particular rights since the enactment of the Bill of Rights in 1791, the Ninth Amendment expressly secures, and encompasses, all of the rights alluded to by the framers and ratifiers of the Constitution.[111] Considering that the framers intended to give effect to every constitutional clause, any argument suggesting that the Ninth Amendment was merely an observation, and nothing else, appears to run contrary to established jurisprudence.[112]

Furthermore, the rights embodied in the Ninth Amendment should be recognized because of the manner in which the states ratified the Constitution.[113] That is, the ratification process was similar to a negotiation to enter into a contract, with the promise of a bill of rights serving as the parties' consideration.[114] The proponents of a bill of rights, as a guarantee of the rights and liberties of the people, would not have been content with only the

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> they may have granted the same; and that 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.

Id.

109 *See id.*

110 *See* Barnett, *supra* note 52, at 28.

111 *See* Barnett, *supra* note 52, at 28. The Ninth Amendment states that "[t]he enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

112 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it."); *see also* Barnett, *supra* note 52, at 1 (suggesting that it is now time to begin studying the intended utility of the Ninth Amendment because the United States Supreme Court has virtually ignored its application despite the many rights in which it contains).

113 *See* Barnett, *supra* note 52, at 29 (arguing, among other things, that the ratification process was similar to the various components of a contract).

114 *See* Barnett, *supra* note 52, at 29.

abbreviated list of rights included in the first eight amendments.[115] Indeed, only a selected few of the many rights that the state ratification conventions proposed were actually incorporated into the bill of rights.[116] So as to "compensate" the critics of the Constitution, without whom the Constitution would likely have not been ratified, the framers of the bill of rights inserted the Ninth Amendment.[117]

Although Madison had once agreed with Hamilton and Wilson's objection to a bill of rights on the grounds that it was both unnecessary and dangerous, he later adjusted his position so as to carry out the promise to those people that only approved the Constitution on the condition that a bill of rights would later be attached.[118] Madison acknowledged that an enumeration of rights could lead people to presume that the rights were exhaustive, yet he believed that his proposal, which eventually became the Ninth Amendment, would sufficiently safeguard against the presumption.[119] The express purpose of the Ninth Amendment is

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115 *See* Barnett, *supra* note 52, at 29.

116 *See* Barnett, *supra* note 52, at 29.

117 *See* Barnett, *supra* note 52, at 29.

118 *See* Grey, *supra* note 74, at 164-65. One of Madison's proposals later evolved into the Ninth Amendment. *See id.* at 165. Madison explained the need and reason behind this proposal to the House of Representatives:

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

Id. (quoting 1 ANNALS OF CONG. 451-52 (Joseph Gales and W. Seaton eds., 1789)).

119 *See* Grey, *supra* note 74, at 165; *see also* Barnett, *supra* note 52, at 18-19 (explaining that Madison's fear and distrust of majority rule, and more particularly factions, led to his belief that the Ninth Amendment was necessary to ensure that the rights of those without the majority are still protected). For instance, prior to ratification of the Constitution, Madison remarked:

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). In a

thus clear in light of the earlier arguments about the danger of adding a bill of rights.[120] This "canon of construction" demonstrates that the Ninth Amendment represents an unwritten constitution, in which people possess many rights not expressly enumerated in the written Constitution.[121]

It is also likely that the framers planned for the "dual purposes" of the Ninth Amendment in preventing many of the dangers feared by the federalists.[122] One such purpose was to prevent the construction that the mere declaration of a specific right meant that the federal government otherwise possessed the power to encroach upon this right.[123] Such an interpretation would grant the federal

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letter to Thomas Jefferson, Madison further explained his belief that rights were not merely formed by majoritarian will:

> Wherever the real power in a government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* Barnett, *supra* note 50, at 18. So as to allow people to exercise their many rights, including their unenumerated rights, Madison believed that the judicial branch would have the power to "resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the declaration of rights." Davis v. Passman, 442 U.S. 228, 241 (1979) (quoting 1 ANNALS OF CONG. 439 (1789)). Through these letters and speeches, Barnett concluded, Madison intended the tribunals to protect people's rights, both the enumerated and the unenumerated, from infringement by the legislative and executive branches. *See* Barnett, *supra* note 52, at 20.

120 *See* Grey, *supra* note 74, at 165.

121 *See* Grey, *supra* note 74, at 165.

122 *See generally* MASSEY, *supra* note 55, at 53-94.

123 *See generally* MASSEY, *supra* note 55, at 53-94. One anti-federalist, writing under the pseudonym observed the need for safeguards such as the Bill of Rights and the Ninth Amendment because of the uncertainties as to how the express powers of the federal government and rights of the people would be construed:

> It is said, that when the people make a constitution, and delegate powers, that all powers not delegated by them to those who govern, is reserved to the people; and that the people, in the present case, have reserved in themselves, and in there [*sic*] state governments, every right and power not expressly given by the federal [C]onstitution to those who shall administer the national government. It is said on the other hand, that the people, when they make a constitution, yield all power not expressly reserved to themselves. The truth is, in either case, it is mere matter of opinion, and men usually take either side of the argument, as will best answer their purposes: But the general assumption being, that men who

government unenumerated powers, a result desired by neither the federalists nor the anti-federalists.[124] Another purpose for inclusion of the Ninth Amendment was to avert the possibility that by listing certain rights, people would presume that the rights were exhaustive.[125]

While the framers likely intended to combat both dangers when they passed the Ninth Amendment, it has been suggested that the Amendment was aimed only at the first danger: that the very declaration of a right, such as the right of free speech, would mean that the federal government initially had such power.[126] This "single purpose" approach bolsters the position of those who assert that the Ninth Amendment is not an independent source of rights.[127] Instead, under the single purpose interpretation, the amendment merely restricts the federal government to the powers enumerated in the Constitution.[128]

The analytical underpinnings of the "single purpose" approach is weak, however, for such an interpretation simply restates the express meaning of the Tenth Amendment: "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."[129] Construing the Ninth Amendment as just another version of the message set out in the Tenth Amendment, would mean that the drafting of the Ninth Amendment by the framers was a meaningless exercise.[130] Moreover, the states have adopted language similar to the Ninth Amendment in their own constitutions, and there is no reason to provide in a state

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> govern, will, in doubtful cases, construe laws and constitutions most favorable for encreasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved.

The Federal Farmer, *supra* note 87, at 657.

124 *See* MASSEY, *supra* note 55, at 94.

125 *See* MASSEY, *supra* note 55, at 94.

126 *See generally* MASSEY, *supra* note 55.

127 *See generally* MASSEY, *supra* note 55.

128 *See generally* MASSEY, *supra* note 55.

129 *See generally* MASSEY, *supra* note 55; U.S. CONST. amend. X.

130 *See* Massey, *supra* note 58, 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.").

constitution that the federal government is restricted to its limited powers.[131]

The Ninth Amendment should also enjoy some legitimate constitutional function because of the extensive process in which the amendment went through prior to its enactment.[132] After James Madison conceived of the Ninth Amendment,[133] a House committee revised Madison's proposal,[134] the House and Senate approved it, and the states ultimately ratified the amendment along with the other nine amendments that make up the Bill of Rights.[135] Despite

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131 *See* Barnett, *supra* note 52, at 25 n.87.

132 *See* Barnett, *supra* note 52, at 2. Professor Barnett attempted to demonstrate why courts have for so long ignored the Ninth Amendment as a source of rights. *See id.* Barnett believes that courts have erroneously applied the "rights-power" idea of constitutional rights to the Ninth Amendment, thereby making it functionless. *See id.* The rights-power conception characterizes the relationship between the federal government's power and the rights of the people as being logically complementary. *See id.* at 6. According to Barnett, because a conflict between a right and a power can never arise under the method usually applied by the courts, the amendment has thus rarely been invoked. *See id.* Barnett stresses that the rights-power approach should be set aside for the "power-constraint" conception of constitutional rights. *See id.* at 11-12. Courts do not apply the rights-power conception of rights when construing enumerated rights because "[e]numerated rights need not be the logical mirror image of enumerated powers." *Id.* at 12. Unlike the courts' treatment of unenumerated rights, enumerated rights can limit an enumerated power. *See id.* For example, the federal government expressly has the power "to lay and collect taxes." U.S. CONST. art. 8, § 8, cl. 1.

133 Madison's proposal read in part as follows:

> That in Article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit. . . .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 for greater caution.

Proposal by Madison in House, June 8, 1789, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 627 (Neil H. Cogan ed., 1997).

134 *See* Barnett, *supra* note 50, at 2. After Madison's proposal, the Ninth Amendment was revised by the House committee that Madison served on. *See id.* The changed amendment read the same as the current version except for the grammatical placement of commas. *See id.* Among the various motions made regarding the proposal that would become the Ninth Amendment, Representative Elbridge Gerry suggested that the words be "deny or impair," because the word "disparage" "was not of plain import." Motion by Gerry in House, Aug. 17, 1789, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, at 628 (Neil H. Cogan ed., 1997). Gerry's motion, however, was not seconded. *See id.*

135 *See* Barnett, *supra* note 52, at 2.

the general presumption that any provision that survives the process demands a legitimate constitutional function, the Ninth Amendment was essentially ignored for most of its history prior to its revival in *Griswold v. State of Connecticut*.[136]

Though it is conceivable that Congress may have approved, and that the states ratified, an amendment that could not apply to any circumstance, as would be the case under the "rights-powers" conception of the amendment, such an interpretation should not be used where another interpretation contemplates a potential role for the amendment.[137] Simply because the Ninth Amendment had not been used by courts for many years, perhaps due to the understanding in prior years that the federal government truly was one of limited powers, does not mean that the drafting of the Amendment was merely a passing sentiment.[138] This viewpoint is further supported by the fact that many states that joined the Union in the nineteenth century adopted extremely similar language in their respective constitutions.[139]

The Ninth Amendment today embodies two different types of rights: "natural" and "positive."[140] Natural rights were those that

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136 *See* Barnett, *supra* note 52, at 2 n.9 (citing Griswold v. State of Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring)). Justice Goldberg relied on several scholarly writings about the Ninth Amendment. *See id.* (citing BARRY PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Norman Redlich, *Are There 'Certain Rights. . .Retained by the People?'*, 37 N.Y.U. L. REV. 787 (1962)).

137 *See* Barnett, *supra* note 52, at 7.

138 *See* Barnett, *supra* note 52, at 2.

139 *See* Barnett, *supra* note 52, at 25 n.87. "The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof." CONST. OF THE CONFEDERATE STATES OF AMERICA art. VI, § 6 (1861), *reprinted in* 1 J. DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 672 (1958). Various state constitutions include provisions extremely similar to the Ninth Amendment. *See, e.g.*, ALA. CONST. art. I, § 33; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; COLO. CONST. art. II, § 28; FLA. CONST. art. I, § 1, par. XXVIII; ILL. CONST. art. I, § 24; IOWA CONST. art. I, § 25; KAN. CONST. bill of rights, § 20; LA. CONST. art. I, § 24; MD. CONST. declaration of rights, art. 45; MICH. CONST. art. I, § 23; MISS. CONST. art. 3, § 32; NEB. CONST. art. I, § 26; NEV. CONST. art. I, § 20; N.J. CONST. art. I part. 21 ("This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."); N.M. CONST. art. II, § 23; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. I, § 33; R.I. CONST. art. I, § 24; UTAH CONST. art. I, § 25; WYO. CONST. art. I § 36.

140 *See* MASSEY, *supra* note 55, at 118. Massey discusses at length the colonial period and the break from British rule. *See generally id.* The constitutions created by

emanated from the Lockean idea of inalienable rights of people,[141] while positive rights originated in state common, constitutional, and statutory law.[142] While many scholars doubt the significance of the Ninth Amendment, it is difficult to overlook the contrary view. In addition to the many reasons discussed above and under the rules of English syntax and grammar, the Ninth Amendment's language, as of that in the First Amendment, is imperative in mood and not declarative.[143] Moreover, considering the thought, planning, and debate that preceded the writing and adoption of the Bill of Rights, it is doubtful that the framers would have taken part in a moot exercise.[144]

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the states in the first years essentially included the "rights of Englishman," as announced in the Magna Carta (1215), the Petition of Rights (1628), the Habeas Corpus Act (1679), the Declaration of Rights (1689), the Toleration Act (1689), the Mutiny Act (1689), and the Settlement Act (1701). *See id.* at 118 n.4.

141 *See also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights").

142 *See* MASSEY, *supra* note 55, at 118. Massey asserts that Madison was well aware of this distinction when Madison remarked that natural rights are "those rights which are retained when particular powers are given up to be exercised by the Legislature," while positive or civil rights are those that "may seem to result from the nature of the compact." *Id.* (quoting 1 ANNALS OF CONG. 454 (Joseph Gales and W. Seaton eds., 1789)). For example, the right to a jury, expressly guaranteed by the Seventh Amendment, "cannot be considered a natural right, but a right resulting from the social compact which regulates the actions of the community." *Id.* (quoting 1 ANNALS OF CONG. 454 (Joseph Gales and W. Seaton eds., 1789)). By contrast, Madison viewed the right to freedom of speech as being a natural right. *See id.* at 118. Madison, and the other framers, enumerated both natural and positive (or civil) rights in the Bill of Rights because both types deserved protection. *See id.* Massey contends that it is therefore fair to infer that the Ninth Amendment's unenumerated rights also were believed by the framers to consist of moth varieties. *See id.* at 118-19. Massey further maintains that Madison aspired to give equal constitutional protection to the specified and unenumerated rights, as is implicit from the fact that Madison did not distinguish between the clause that later formed the Ninth Amendment and the enumerated rights when he explained to Congress that the tribunals could enforce the Bill of Rights. *See id.* at 119-19.

143 *See* WALTER E. MURPHY, JAMES E. FLEMING, AND SOTIRIUS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION: PRIVACY, PERSONHOOD AND PERSONAL LIBERTY 1237 (1995). Because the Ninth Amendment is a constitutional mandate and not simply a recognition of ideas, many scholars feel that there is no reason to automatically treat it unlike the other amendments to the Bill of Rights simply because it does not specifically describe those "certain rights." *See id.*; U.S. CONST. amend. IX.

144 *See* Massey, *supra* note 58, at 316.

V. Conclusion

The Constitution's express grant of some rights to the people does not mean that the citizens relinquished all other "unenumerated" rights, the formation of which evolved over hundreds of years. Though scholars have suggested that the Preamble and the Ninth Amendment kept these unenumerated rights alive, acceptance of this idea has been slow. Consequently, in ethereal areas such as the right of privacy, courts have resorted to explaining that the right to a zone of privacy exists as a penumbra of the Bill of Rights.[145] This confusion in recognizing such an inalienable right as the right of privacy could be greatly reduced by giving more importance to the clear words of the Ninth Amendment and the Preamble.

Congressman Rodino believes that the Preamble is the "heart, soul, and spirit of the Constitution." [146] Perhaps more leaders will one day stress the importance of the Preamble as they interpret the meaning of the Constitution. While the Supreme Court in *Jacobson v. Massachusetts*[147] may have determined that the Preamble does not itself grant rights, it nevertheless seems reasonable that the Preamble might still play some part in judicial decisions as courts continue to interpret a document written over 200 years ago.

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145 *See supra* note 36.

146 *See Interview*, *supra* note 10. Congressman Rodino, expanding on his past law review article and published speeches, explained in an interview that, while understanding that the Preamble lacked the force of law, it nevertheless reminds leaders who "we" as a "people" hope to be. *See id.* With that in mind, Rodino elaborated that it is possible to "secure the blessings of liberty to ourselves and our posterity." *See id.* Indeed, Congressmen Rodino has commented that the language of the Preamble played a major role in the underlying policies of the Civil Rights Act of 1964, the drafting of which he witnessed. *See id.*; *see also* 133 CONG. REC. H7559 (daily ed. September 17, 1987) (statement of Rep. Rodino).

147 197 U.S. 11 (1905).