An Essay on the Ninth Amendment: Interpretation for the New World Order

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INTRODUCTION

The Ninth Amendment declares that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”1 The text, on its face, seems to support the argument that the rights protected by the Constitution are not limited to its express provisions. By inference the language of the Ninth Amendment also invites the view that judges are authorized to protect rights that are not enumerated as well as ones that are enumerated.2 Yet the United States Supreme Court, which has in fact “found” authority to protect rights not expressly conferred by the Constitution,3 has never in-

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1. U.S. CONST. amend. IX. In the first Congress, James Madison proposed that the enumeration of specific rights in the Constitution “shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.” 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789). In offering the proposal, Madison explained:

   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 that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the [g]eneral [g]overnment, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against. I have attempted it . . . .

_id. at 439.


3. See, e.g., Taylor v. Kentucky, 436 U.S. 478, 485 (1978) (use of the phrase “presumption of innocence” important to impressing upon jury right of accused to have guilt or innocence determined only on basis of evidence presented at trial); In Re Winship, 397 U.S. 358 (1970) (beyond a reasonable doubt standard required in criminal trial); Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (right to interstate travel fundamental to concept of federal union); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy located in penumbras of enu-
terpreted the Ninth Amendment as playing a prominent role in constitutional interpretation. Although there have been references by individual Supreme Court Justices to the Ninth Amendment as a source of protection, until the 1960s it was never invoked in decisions of the Court. Even in Griswold v. Connecticut, the case best known for introducing the Ninth Amendment to legal analysis, Justice Goldberg in his concurrence hastened to add that it was not to be applied against the states by virtue of the Fourteenth Amendment and should not be read as a source of rights against the national government. Rather, he said, the Ninth Amendment should simply be treated as an acknowledgment of the existence of rights not specified in the text of the Constitution.

While acknowledging his own skepticism about natural rights, Sanford Levinson, a constitutional scholar who has come to view the Ninth Amendment as judicially enforceable, has called it “the stepchild of the Constitution.” In 1988, Professor Levinson predicted that “like Cinderella, [the Ninth Amendment] seems on the verge of taking center stage.”

4. E.g., Hodgson v. Minnesota, 110 S. Ct. 2926, 2943 (1990) (parent’s right to raise child free from undue government interference protected by several constitutional provisions including Ninth Amendment); Bowers v. Hardwick, 478 U.S. 186, 201 (1986) (Blackmun, J., dissenting) (disagreeing with majority’s refusal to consider Ninth Amendment as basis for invoking right to privacy); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15 (1980) (plurality opinion) (Ninth Amendment was intended to ensure that expression of certain guarantees in Bill of Rights does not exclude other rights); Roe v. Wade, 410 U.S. 113 (1972) (Douglas, J., concurring) (while Ninth Amendment does not create federally enforceable privacy rights, such rights come within liberty guaranteed by Fourteenth Amendment); Stanley v. Illinois 405 U.S. 645, 651 (1971) (integrity of family unit protected by Ninth Amendment); Olff v. East Side Union High Sch. Dist., 404 U.S. 1042, 1044 (1972) (Douglas, J., dissenting from denial of certiorari) (liberty includes rights retained by the people under Ninth Amendment).

5. 381 U.S. 479 (1965).

6. Id. at 492. (Goldberg, J., concurring).

7. Id. Justice Goldberg stated that “[t]he Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied simply because they are not specifically listed in the first eight constitutional amendments.” Id. Justice Goldberg admonished judges to “look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’” Id. at 493 (citation omitted).


9. Id. Contrast the position taken in 1980 by John Hart Ely with that of Suzanna Sherry less than a decade later in 1988. Ely characterized the Ninth Amendment as “that old constitutional jester.” Ely, supra note 2, at 33. He said that “[i]n sophisticated legal circles mention-
If the increasing number of scholarly writings concerning the Ninth Amendment can be taken as a measure, then it seems that his prediction is coming true.\(^1\) For some writers expressing interest in and enthusiasm for the Ninth Amendment, however, the focus is on limiting the government's encroachment on the liberty interests of the fittest, and not on utilizing the amendment as a source of protection or sustenance for political and social outsiders.\(^1\)  

As our view of the world order shifts,\(^2\) and the social ills of this country and the world seem to become both more intractable and interconnected, it seems shortsighted for reflections on the meaning of our fundamental law not to include a consideration of how useful any reading of the Ninth Amendment may be in the creation of effective solutions to today's problems and in response to tomorrow's world view. The test of endurance of the Constitution may depend upon arriving at a principled interpretive stance that continues to promote stability while providing a fundamental framework for justice that is responsive to the changing needs of a diverse society. In the case of Ninth Amendment interpretation, the fact that there has been disagreement about the framers' original intentions, and little in the way of meaningful case law, presents us with the opportunity to test our commitment to the concept of "rights," and our understanding of freedom.  

In this essay, I will comment on the scant, sometimes unfortunate judicial responses offered on the meaning of the Ninth Amendment and

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1. See, e.g., Russell L. Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223 (1983); Massey, supra note 2; Thomas B. Mcafee, The Original Meaning of the Ninth Amendment, 90 Colum. L. Rev. 1215, 1215-18 (1990) (changing tide of scholarly acceptance of the Ninth Amendment in the last decade provides a textual foundation for modern fundamental rights); Symposium on Interpreting the Ninth Amendment, 64 Chi.-Kent L. Rev. 37 (Randy E. Barnett ed. 1988). These articles represent only a few prominent examples of recent Ninth Amendment scholarship; for a more complete bibliography see The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed. 1989).

outline several plausible readings of the amendment’s text and history which scholars have recently offered.\textsuperscript{13} I will then consider whether these readings can respond to our changing world needs. The works of Thomas McAffee\textsuperscript{14} and Randy Barnett\textsuperscript{15} will be a principal focus of discussion here since they appear to offer contrasting responses to the current scholarly debate concerning affirmative rights and judicial enforcement of those rights, and have received considerable attention. I should emphasize, however, that their work does not even begin to reflect the range and breadth of positions taken by legal scholars in the debate about the meaning of the Ninth Amendment. Although they each respond differently to the question of judicial enforceability of unenumerated rights, both authors put forth interpretive postures that threaten to trivialize the amendment’s meaning.

**THE SUPREME COURT AND THE NINTH AMENDMENT: A TALE OF MISSED OPPORTUNITIES**

Since *Griswold*,\textsuperscript{16} some Supreme Court Justices have alluded to the Ninth Amendment in their efforts to enforce certain unenumerated rights.\textsuperscript{17} However, none of those Justices has attempted to offer a coherent theory of precisely what unenumerated rights this amendment acknowledges or encompasses. The reluctance of the Court to fully utilize the Ninth Amendment is hard to understand, as it could potentially be used to provide innovative solutions to many of today’s constitutional problems.

Justice Douglas, concurring in *Roe v. Wade*,\textsuperscript{18} joined the majority though he added: “[i]he Ninth Amendment does not create federally enforceable rights . . . But a catalogue of the rights [retained by the people] includ[ing] customary, traditional, and time-honored rights, amenities, privileges and immunities . . . come within the sweep of ‘the Blessings of Liberty’ mentioned in the [P]reamble to the Constitution.”\textsuperscript{19} Rather than explicitly locating privacy rights in the Ninth Amendment, however, he noted that “[m]any of them, in my view, come within the meaning of the term ‘liberty’ as used in the Fourteenth Amendment.”\textsuperscript{20} As in *Griswold*,\textsuperscript{21} Justice Douglas then proceeded to locate in the Bill of

\textsuperscript{13} Ely, *supra* note 2.
\textsuperscript{14} McAffee, *supra* note 10.
\textsuperscript{15} Barnett, *supra* notes 2, 10, and 11.
\textsuperscript{16} 381 U.S. 479 (1965).
\textsuperscript{17} See cases cited at *supra* note 3.
\textsuperscript{18} 410 U.S. 113, 209 (1973) (Douglas, J., concurring).
\textsuperscript{19} *Id.* at 210.
\textsuperscript{20} *Id.* at 210-11.
\textsuperscript{21} 381 U.S. at 484-85. (Douglas, J. concurring).
Rights, such as the First Amendment and its penumbras, the rights that he believed partook of privacy.\textsuperscript{22}

Chief Justice Burger’s plurality opinion in \textit{Richmond Newspapers, Inc. v. Virginia}\textsuperscript{23} mentioned the Ninth Amendment, but the case was ultimately decided on other grounds. Addressing the state’s argument that the right to attend trials is not spelled out in the Constitution, Chief Justice Burger said that “Madison’s efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.”\textsuperscript{24} Although his opinion seemed to be leaning toward a Ninth Amendment rationale, the Chief Justice declined his own invitation, finding the right of the public to attend criminal trials “implicit in the guarantees of the First Amendment.”\textsuperscript{25}

More recently, Justice Stevens mentioned the Ninth Amendment in his plurality opinion in \textit{Hodgson v. Minnesota},\textsuperscript{26} as support for governmental protection of the integrity of the family unit.\textsuperscript{27} Ironically, in light of Justice Douglas’ references to the Ninth Amendment in \textit{Roe},\textsuperscript{28} Justice Stevens cited the Amendment as justification for parental notification and a 48-hour waiting period to afford time for family consultation before a minor receives an abortion.\textsuperscript{29}

Although some lower courts have based decisions on the Ninth Amendment,\textsuperscript{30} the United States Supreme Court has been clearly reluctant to use it. The Court has continued to rely on the Fourteenth

\textsuperscript{22} \textit{Roe}, 410 U.S. at 211-14.

\textsuperscript{23} 448 U.S. 555 (1980).

\textsuperscript{24} \textit{Id.} at 579 n.15. The Chief Justice continued: “[t]he concerns expressed by Madison and others have thus been resolved; fundamental rights, even those not expressly guaranteed, have been recognized by the Court as indispensable to the employment of rights explicitly defined.” \textit{Id.} at 580.

\textsuperscript{25} \textit{Id.} Burger justified this somewhat strained result by explaining that “without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.” \textit{Id.} (citations omitted).

\textsuperscript{26} 110 S. Ct. 2926, (1990) (plurality opinion).


\textsuperscript{28} 410 U.S. at 210 (while Ninth Amendment does not create federally enforceable privacy rights, such rights come within liberty guaranteed by Fourteenth Amendment).


\textsuperscript{30} \textit{See, e.g.,} Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), \textit{rev’d}, 478 U.S. 186 (1986) (holding state statute proscribing sodomy implicated fundamental right of freedom from state regulation of intimate associations protected by Ninth Amendment); Grossman v. Gilchrist, 519 F. Supp. 173, 176-77 (N.D. Ill. 1981) (examining state employees’ claim that forced participation in civil service retirement plan was violative of Ninth Amendment); Ha-
Amendment's Due Process Clause or, more frequently in the last decade, it has refused to recognize rights—either as implicit in the concept of liberty in the Due Process Clause—or "found" elsewhere—if they are not expressly formulated in the Constitution.\textsuperscript{31} Moreover, the Court's recent narrow construction of 42 U.S.C. § 1983\textsuperscript{32} has increased the ability of some defendants to use qualified or good faith immunity\textsuperscript{33} to avoid claims of liberty violations,\textsuperscript{34} and has constricted the ability of plaintiffs to find a duty,\textsuperscript{35} or requisite policy or practice,\textsuperscript{36} upon which to base a claim of constitutional violation. The resulting narrowing of the claims that may be litigated under § 1983 has limited the potential for lower courts to consider a liability theory by reference to rights that are possibly located in or acknowledged by the Ninth Amendment.\textsuperscript{37} In short, the Ninth Amendment remains largely outside the ambit of judicial deci-


As McCaffee notes, lower courts appear reluctant to "embrace the [N]inth [A]mendment as a source of fundamental rights decision making . . . partly [because of] the Supreme Court's tendency to rely on the [D]ue [P]rocess [C]lause in fundamental rights cases." McCaffee, supra note 10, at 1216 n.7. More recently, the Supreme Court's reluctance may stem from a perceived hostility toward the recognition of individual protection that is not the product of popular will. See Robin West, The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously, 104 HARV. L. REV. 43 (1990).


32. 42 U.S.C. § 1983 (1988), which provides a remedy for violations of constitutional and federal rights states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

33. See Harold S. Lewis, Jr. & Theodore Y. Blumoff, Reshaping Section 1983's Asymmetry, 140 U. PA. L. REV. 755 (1992) (government agents can escape liability for damages under § 1983 by using qualified immunity unless the right violated was previously recognized by judicial precedent of "unmistakable application and clarity").

34. Id.

35. Deshaney, 489 U.S. at 201.

36. See, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), reh'g denied, 473 U.S. 925 (1985) (proof of a single incident of unconstitutional activity is insufficient to establish municipal liability under 42 U.S.C. § 1983 unless it includes proof that the incident was caused by an existing unconstitutional policy attributable to a municipal policymaker).

37. See, e.g., Strandberg v. City of Helena, 791 F.2d 744, 748-49 (9th Cir. 1986) (civil rights claim must stem from deprivation of specific constitutional guarantee to be viable). But see McCaffee, supra note 10, at 1216 n.7 (acknowledging hesitancy of lower courts to utilize Ninth Amendment as "a source of fundamental rights decision making," but pointing to signs that the "revolution in the academy may yet find its way to the courts.").
sions. At least one court has concluded that judicial disuse confirms the view that the Ninth Amendment can serve no functional use in the protection of individual rights against governmental action.\(^{38}\)

**The Role of the Ninth Amendment in Supreme Court Nominations**

A dialogue about unenumerated rights and the meaning of the Ninth Amendment, however, continues, not only in law reviews but also, particularly as a result of the abortion controversy, in the political arena.\(^{39}\) Indeed the willingness or reticence of several recent Supreme Court nominees to acknowledge the existence of unenumerated rights—not in their opinions, but in their public declarations—has had great impact on their political favor and ultimate viability as judicial candidates.

For example, former District of Columbia Court of Appeals Judge Robert Bork’s refusal to acknowledge the “unenumerated” right to privacy as part of the set of constitutional rights enjoyed by Americans has been said to have cost him a Supreme Court position.\(^{40}\) Not only was Bork forthcoming about his views on privacy and other unenumerated rights before his nomination by President Reagan, his outspoken comments during his confirmation hearings and afterwards spawned a host of responses.\(^{41}\) Among Bork’s more pithy comments was his statement that he regards the Ninth Amendment as analogous to “an amendment that says ‘Congress shall make no’ and then there is an inkblot and you cannot read the rest of it . . . .”\(^{42}\) Bork later repeated this sentiment when he observed that “it is a little hard to know what category of rights, if any, were supposed to be preserved by the [N]inth [A]mendment unless it is the [s]tate constitutional rights.”\(^{43}\)

In his confirmation hearings, Supreme Court Justice Kennedy, taking a more moderate approach (or perhaps simply a more accommodat-

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38. Charles v. Brown, 495 F. Supp. 862, 863-64 (N.D. Ala. 1980) (no authority exists to show that Ninth Amendment, like first eight, was made applicable to states by virtue of Fourteenth Amendment; Ninth Amendment is merely rule of construction and it does not raise unenumerated rights to constitutional magnitude), see also Griswold, at 381 U.S. at 520 (Black, J., dissenting) (failure to use the Ninth Amendment reflects historical consensus of its unenforceability).

39. See Levinson, supra note 8, at 134-35.

40. Id. at 135.


42. The Nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States, Hearings Before the Committee on the Judiciary, United States Senate, 100th Cong., 1st Sess. 249 (1988).

43. Id. at 290.
ing one) was willing to read the Ninth Amendment as a potential source of privacy rights.44 Agreeing to what the Senate Committee Report characterized as a "balanced approach,"45 Justice Kennedy said he believed the Ninth Amendment was fully consistent with his understanding of liberty as found in the Due Process Clause.46 When asked his thoughts on unenumerated rights, Kennedy responded that the framers believed "that the first eight amendments were not an exhaustive catalogue of human rights"47 and that "the Court is treating [the Ninth Amendment] as something of a reserve clause, to be held in the event that the phrase 'liberty' and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision."48 Not surprisingly, despite his apparent willingness to embrace the Ninth Amendment during his confirmation hearings, Kennedy has yet to refer to it in any of his opinions.

We now know much more about Justice Clarence Thomas' views on the Constitution and judicial activism than was reflected by his comments at his Supreme Court confirmation hearings.49 At the time of the hearings, however, Thomas was clearly reluctant to discuss his judicial philosophy concerning unenumerated rights such as privacy, and he was

44. See Top Court Nominee Cautious, CHI. TRIB., Dec. 2, 1987, C1 (discussing Kennedy's views on judicial enforceability of unenumerated constitutional rights).
45. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. Exec. Rep. No. 113, 100th Cong., 2d Sess. 20-21 (1988). In a section entitled Judge Kennedy has a Reasoned and Balanced Approach to the Ninth Amendment, One that is Fully Consistent with His Understanding of 'Liberty' in the Due Process Clause, Justice Kennedy expressed the view that the Ninth Amendment was designed to protect the states' ability to confer rights beyond those enumerated in the Bill of Rights.
46. Id.
47. Id. at 20.
48. Id.
49. See, e.g., Dawson v. Delaware, 112 S. Ct. 1093, 1100 (1992) (Thomas, J., dissenting) (arguing that First and Fourteenth Amendments do not prohibit introduction of evidence of defendant's membership in Aryan Brotherhood prison gang during sentencing phase of capital murder trial); Franklin v. Gwinnett County Public Schools, 112 S. Ct. 1028, 1038 (Scalia, J., concurring in judgment, joined by Rehnquist, C.J. & Thomas, J.) (accepting majority's conclusion that under Court's precedent, federal law against sex discrimination in schools and colleges permits private lawsuits for monetary damages, but questioning whether Court should ever have found private right to sue in the first place); Hudson v. McMillan, 112 S. Ct. 995, 1004 (1992) (Thomas, J., dissenting, joined by Scalia, J.) (arguing that Eighth Amendment's ban on cruel and unusual punishment does not protect prisoners from beatings by guards unless prisoners suffer serious injuries); Presley v. Etowah County Commission, 112 S. Ct. 820 (1992) (holding that resolution passed by county commission which greatly diminished traditional authority of first elected black commissioners did not require pre-clearance under section 5 of the Voting Rights Act, despite fact that resolution transferred authority to other commissioners and appeared to be in response to election of first black commissioners in county history); White v. Illinois, 112 S. Ct. 736, 744 (1992) (Thomas, J. concurring in part and concurring in judgment) (calling for reconsideration and overruling of Court's well established precedents on Sixth Amendment Confrontation Clause and Eighth Amendment).
criticized for not being forthcoming.50 Confirming the suspicions of many of his critics, he has since taken a position matched only by Justice Scalia in upholding the state's authority to limit personal liberty.51 Both Justice Scalia and Justice Thomas appear to prefer certainty in rules and social order over individual rights.52 They also see constitutional decision making by the courts as a means of "conserv[ing] the collective wisdom and traditions of the culture."53

The use of litmus-test questions designed to elicit Supreme Court candidates' views about the Ninth Amendment and the concept of unenumerated rights clearly reflects the increasing politicization of the judicial nominating process under recent administrations. While such lines of questioning may have introduced Americans to an amendment few had been acquainted with, much less understood, as a potential source of constitutional protection, the responses about the Ninth Amendment offered by these judicial nominees were at worst disingenuous, and, at best incomplete, political characterizations that belie the complexity of the issues. Often reduced to "sound-bite" formulations, these responses are most disturbing because they lack the discipline of reflection which is a product of case review, and lack the application of justificatory principles and rules which ordinarily accompany judicial communications. They offer little in the way of forwarding the project of interpreting the Ninth Amendment or guiding our conception of rights.

50. See, e.g. Linda Greenhouse, Judicious Activism: Thomas Hits the Ground Running, N.Y. TIMES, March 1, 1992, § 4, p.1 (contrasting Thomas' judicial activism in support of conservative causes with his repeated statements to the Judiciary Committee indicating that he firmly believed in judicial restraint); Ruth Marcus, Thomas Affirms Right to Privacy: Nominee Deflects Abortion Question, WASH. POST, Sept. 11, 1991, A1 (quoting various Democratic Judiciary Committee members who criticized Thomas' apparent "confirmation conversion" on civil rights issues such as abortion and privacy, and his renunciation of his earlier views on natural law).

51. In a New York Times editorial Justice Thomas was described as the "youngest, cruelest Justice," and his dissent in Hudson v. McMillan called a "crashing disappointment." In that case, Thomas found himself rebuked by a seven-member majority for disregarding humane standards of decency that animate the Eighth Amendment provision against cruel and unusual punishment applied to the states through the Fourteenth Amendment Due Process Clause. The Youngest, Cruelest Justice, N.Y. TIMES, Feb. 27, 1992, A24.


53. West, supra note 30, at 55.
THE NINTH AMENDMENT IN THE ACADEMY: A BRIEF SURVEY OF RECENT SCHOLARSHIP

Despite the lack of exposition by the United States Supreme Court, or perhaps because of it, scholarly writing about the Ninth Amendment has increased in the last five years. One reason seems to be a reaction to an earlier controversy provoked by former Attorney General Edward Meese and his jurisprudence of original intent. A related, but somewhat distinguishable, reason may be the public’s perception of the Court’s growing hostility toward individual rights and its acceptance of governmental actions that interfere with personal liberty interests even without a compelling reason. Finally, there is the scholarly interest in utilizing the Constitution to respond to the burgeoning federal regulation of industry, affecting commercial interests and the interests of those profiting from commercial enterprises.

Somewhat ironically, constitutional scholars who can be characterized as constitutional originalists or strict constructionists, as well as interpretivists, and even those characterized as noninterpretivists, have sought to use the text and history of the Ninth Amendment to justify their competing positions as to whether or not at least some unenumerated rights are the focus of the Ninth Amendment, and thus warrant judicial protection. In this current effort to justify the various

54. See Levinson, supra note 8, at 135 & n.17 (citing several speeches by Meese in which he emphasized the role of original intent when interpreting the Constitution); Office of Legal Policy, U.S. Dept. of Justice, Report to the Attorney General: Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause (1987) (calling for a less expansive view of the Ninth Amendment which would be more in line with the jurisprudence of original intent).

55. See, e.g., West, supra note 30, at 44 & n.10 (public hostility to individual rights evidenced by public support for constitutional amendment barring flag desecration, mandatory drug testing, police searches of suspected drug dealers homes and random searches of cars for drugs).


57. Compare, e.g., Barnett, supra note 2, at 34 n.114, 38 (constructive method of interpretation particularly appropriate for construing unenumerated procedural rights while presumptive method effective at reinforcing and extending delegated powers) with McAfee, supra note 10, at 1218 (traditional view of amendment as part of scheme preserving a national government of limited and enumerated powers has not outlived usefulness).

58. Interpretivism dictates “that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.” Ely, supra note 2, at 1; see generally Thomas Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).

59. Noninterpretivism dictates “that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.” Ely, supra note 2, at 1; see generally, Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980); Irvin M. Kent, Under the Ninth Amendment What Rights Are the “Others Retained by the People?”, 29 Fed. B.J. 219 (1970).

60. See McAfee, supra note 10, at 1218. The author labels as “nonoriginalists” those
readings of the Ninth Amendment, the range of arguments built on the scant text and framing history is truly amazing. Few would dispute that at the time of the Constitution's framing and the discussion of proposed amendments there was a general belief in natural law. However, historians and constitutional scholars have utilized both well known and obscure writings of the framers, speeches contemporaneous with the Constitution's drafting, congressional debates, and proposed amendments offered by representatives of the states, to support a spectrum of views as to whether it was the intention of the founding men to draft in the Ninth Amendment a constitutional provision that incorporated their natural law beliefs and provided a mechanism for some measure of protection against future majority decision making.

Most recently, Ninth Amendment commentary has centered on the framers' focus on positive law, and the meaning of "rights" and "powers" sought to be reserved from national government encroachment. Reinforcing traditional or "old orthodoxy," Thomas McAffee has revisited the historical documents, questioning affirmative-rights proponents' assumptions about the intent of the framers in drafting the amendment and the meaning of language used by them. Notably, McAffee has used the text and documents to create a "residual rights" whose reading of text and history diverge from his documented account and criticizes the sloppy use of text and documents of both originalists and nonoriginalists. Id. at 1218-23.


62. See, e.g., Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978) (Under revolutionary legalist view "fundamental law prevented legislative infringement of legal rights[,] . . . although these rights were commonly regarded as dictates of natural law, it was a natural law more accessible to the legally learned than to the common sense intuition of the laity."); Suzanna Sherry, The Founder's Unwritten Constitution, 54 U. CHI. L. REV. 1127 (1987) (natural law theories tremendously influential upon generation framing Constitution).

63. See generally McAffee, supra note 10 (utilizing historical sources to discover original intent of framers who drafted Ninth Amendment).

64. Compare, e.g., Calvin R. Massey, The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law, 1990 WISC. L. REV. 1229 (Ninth Amendment intended to guarantee the existence of rights created or preserved in state constitutions) with Barnett, supra note 2.

65. McAffee, supra note 10, at 1218-23.

66. McAffee acknowledges that the affirmative-rights proponents have established a "new orthodoxy" challenging the accepted belief that the Ninth Amendment was not intended to point toward enforceable fundamental rights. Id. at 1222.

67. McAffee utilizes this terminology to contrast his reading of the Ninth Amendment as part of the power-limiting scheme for national government to an affirmative rights approach. McAffee's scheme views the Ninth Amendment as securing rights retained residually from the powers granted to the national government. These powers include "a broad range of privileges
or "rights-powers" interpretation of the Ninth and Tenth Amendments, concluding that they are complementary, the meaning of each affected by the presence of the other.

McAfee's argument is carefully detailed with references to original documents such as speeches and writings of the drafters of the Constitution and congressional statements. Indeed, he disparages other scholarly efforts that support their Ninth Amendment conclusions with sloppy references to history, and sets about identifying those historians whose scholarship he commends as well documented, despite his disagreement with their conclusions. Ultimately, however, McAfee's theory about the framers' original intent involves unsupportable conclusions like those of the scholars he criticizes.

McAfee's position is that the Ninth Amendment's purpose was not to secure unenumerated affirmative limitations on the powers the Constitution granted to the federal government; rather, he views the historical material as proof that the purpose of the Ninth Amendment was to assuage the colonists' fear that the Constitution would be read as a general conferral of power to the central government. The amendment was intended to bar the inference that the general reservation of rights flowing from a scheme of limited powers would be undermined by the introduction of a Bill of Rights or enumeration of protection. According to McAfee, the framers believed that consolidation of power vested in the national government threatened both state and individual autonomy. The Ninth Amendment was drafted to negate any attempt to enlarge the enumerated and delegated powers of the central government, thereby in-

and prerogatives[,] . . . collective rights held by the people as a whole, rights held under state law, and those individual rights that we might call 'fundamental.'" Id. at 1221. An "affirmative rights" reading "contend[s] that the Ninth Amendment embodies the tradition of an unwritten fundamental law of constitutionally enforceable individual rights, most frequently including the right to privacy." Id. at 1221:22.

68. Randy Barnett labels McAfee's methodology a "rights-powers" approach, in that it defines the "rights" retained by the people under the Ninth Amendment as derived residually from the limited "powers" granted to the federal government elsewhere in the constitution. Id. at 1219-20, n.20.

69. U.S. CONST. amend. X states: "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."

70. McAfee, supra note 10, at 1314-16.

71. Id. at 1306-07 (Ninth Amendment serves "the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power.") McAfee, in fact, argues that: "The Ninth Amendment reads entirely as a 'hold harmless' provision; it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights." Id. at 1300 n.325. But see Barnett, supra note 11, at 638-39.

72. McAfee, supra note 10, at 1221-22 & nn.24-25.
vading powers, prerogatives and privileges held by the people collectively or individually.\textsuperscript{73} McAffee concludes that, contrary to popular view, the Tenth Amendment is not merely a federalism provision, but should be read along with the Ninth Amendment as a means of ensuring these "residual rights."

McAffee's research leads him to claim that the framers intended both the Ninth and Tenth Amendments to be read together as giving structural protection against the enlargement of national power by preserving the rights of the people and powers of the state governments.\textsuperscript{74} His argument is that against the historical findings, the Ninth Amendment's reference to "rights retained by the people"\textsuperscript{75} can most plausibly be read as an allusion to the general reservation of rights embodied in the system of enumerated powers made explicit in the Tenth Amendment's limitation of governmental power. For McAffee, the Ninth Amendment's language merely reaffirms that individual rights and (most notably to McAffee) individual liberties and communal rights of self-government (such as the right to be governed by a republican government) should not be usurped by the federal government.\textsuperscript{76} McAffee concludes that the "original meaning" of the Constitution contradicts the conclusion that the Ninth Amendment "embodies a set of individual-rights norms found outside specific Constitutional provisions."\textsuperscript{77}

In contrast to McAffee's, other readings of the Ninth Amendment focus on identifying particular residual rights and resolving the question of their judicial enforceability.\textsuperscript{78} Building upon much of the same textual and historical material used by McAffee, scholars like Douglas Laycock assert that legally enforceable affirmative rights, including the right of privacy, were intended to be recognized by the language of the Ninth Amendment, and that these rights define the limitations of governmental control over individuals.\textsuperscript{79} In an article challenging John Hart Ely's

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 1225 n.38.

\textsuperscript{75} U.S. CONST. amend. IX.

\textsuperscript{76} McAffee, supra note 10, at 1226.

\textsuperscript{77} Id. at 1229. Indeed, McAffee has such confidence in his methodology that he is bold enough to assert that "[t]he combination of text, context[,] and historical consensus here establishes [the residual rights theory of] the meaning of the [N]inth [A]mendment as conclusively as it can for any constitutional provision whose meaning is not self-evident on its face." Id. at 1318.

\textsuperscript{78} E.g., Barnett, supra note 2; Levinson, supra note 8; Massey, supra note 2; see also Simeon C.R. McIntosh, On Reading the Ninth Amendment: A Reply to Raoul Berger, 28 HOW. L. REV. 913 (1985) (constitutional interpretation as hermeneutic enterprise leading to support for justice-seeking moral claims for protection against the state).

reading of unenumerated rights,80 Laycock says the text of the Ninth Amendment "admits of no other interpretation"81 than that unenumerated individual rights were the focus of the framers.82

While reading the Constitution as supportive of unenumerated affirmative rights is not novel, Laycock's position raises anew the controversy of how to restrain judges' uncontrolled value preferences in determining what rights are fundamental, and therefore enforceable. Laycock cautions against a selective reading of the Constitution which privileges only the rights found in the document to respond to the question of interpreting open-ended provisions like the Ninth Amendment. His comments have some bearing on the recent highly visible and politicized discussions of the Ninth Amendment and unenumerated rights. For example, during the Thomas confirmation hearings, much attention was given to recent scholarship encouraging the use of the Constitution to protect property rights of individuals against government regulation.

Supportive of this effort to justify the protection of economic liberties by requiring that government justify any interference with such liberties is the writing of Randy E. Barnett.83 Starting at about the same place as Laycock, Barnett invites a "reconceiving"84 of the Ninth Amendment that would focus on specific, affirmative rights which he believes the framers originally intended to be encompassed by the Ninth Amendment and for which he argues judicial enforcement is justified.85 His reading is that the framers intended to protect the interest of liberty defined not as "welfare rights entitling persons to claim a specified portion of the resources of others, but as liberty rights entitling persons to the freedom to use what is theirs as they choose."86 Barnett argues that a

80. See Ely, supra note 2.
81. Laycock, supra note 79, at 368.
82. Id. at 349.
83. Barnett, supra note 11, at 631 n.56 (citing Bernard H. Siegan, Economic Liberties and the Constitution (1980)).
84. Barnett, supra note 2, at 1.
85. Barnett, supra note 11, at 625. Barnett himself notes, however, that "a complete enumeration of such rights is simply impossible." Id. at 626. Indeed, he quotes James Wilson as arguing during the debates 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 citizens. . . . Enumerate all the rights of men! I am sure, sir, that no gentleman in the late [c]onvention would have attempted such a thing.

Id. at 626 (citing 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (J. Elliot reprint ed. 1987) (2d ed. 1836) (remarks of James Wilson)).
86. Id. at 626 (emphasis in original).
presumption favoring this kind of liberty is justified, and that with appropriate constraints judges should scrutinize legislative acts to protect these unenumerated liberty interests.\textsuperscript{87} Barnett's constraints, however, reflect the classical liberal concern for protecting nonpositive rights. He argues that the judicial enforcement of these rights is not inconsistent with the rule of law, responding to a principal concern of positivists and many originalists.\textsuperscript{88} Thus, extending "the protection afforded to the enumerated rights [such as] free speech . . . to the unenumerated freedoms" he has identified as intended by the framers, Barnett argues that it should be the government's burden to justify both the means and the end of asserted governmental action affecting liberty.\textsuperscript{89}

**THE SEARCH FOR AN ACCEPTABLE INTERPRETATION**

Despite the Supreme Court's apparent present unwillingness to find new constitutional protection of individual rights, the arguments raised and reasoning offered by the rights-power approach of McAffee and the power-constraint/affirmative-rights approach of Barnett are worth exploring because they challenge us to reexamine competing visions of constitutional democracy and the so-called "counter-majoritarian" problem of judicial review. As McAffee himself acknowledges,

the evidence showing a clear consensus on how to integrate the written Constitution, a theory of the judicial role, and the idea of natural law and unwritten norms remains elusive to this day. Given this seemingly insoluble conflict, it seems reasonable to believe that the issue will more likely be settled by resort to constitutional theory than to constitutional history.\textsuperscript{90}

\textsuperscript{87} Id. at 626-35; see also Barnett, supra note 2, at 35-42.


\textsuperscript{89} Barnett, supra note 11, at 638 (constitutional rights—including unenumerated rights—operate both as "means-constraints" and "ends-constraints"); see BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 324 (1980), (quoted by Barnett, supra note 11).

[T]he government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives, that is, . . . the fit between means and ends must be close; and third, that a similar result cannot be obtained by less drastic means.

Barnett, supra note 11, at 631 n.56.

\textsuperscript{90} McAffee, supra note 10, at 1319-20. Notably, as McAffee acknowledges, the Ninth Amendment is a "unique product of the struggle to ratify the constitution, and, more specifically, the ratification-period debate over the omission of a [B]ill of [R]ights from the Constitution drafted by the Philadelphia Convention." McAffee supra note 10, at 1227. Historians have pointed to the range of views reflected in the period of constitutional framing about judi-
But which constitutional theory is appropriate? McAfee's historical explanation of why rights and powers might be interchanged in debates and how the arguments of James Madison can support his reading are supported by laborious documentation. But ultimately his persuasiveness seems to rest on whether you are prepared to view the Ninth and Tenth Amendments strictly as complementary, like two sides of one coin. Moreover, McAfee's reading of the "rights" language of the Ninth Amendment is wholly captured by his focus on the "powers" side of the equation. Under his reading, the Ninth Amendment serves little functional use beyond what can be read from the Tenth Amendment's language standing alone—that "the power delegated to the United States by the Constitution nor prohibited by it to the United States are reserved to the states, respectively or to the people." Most important for purposes of this discussion, he is forced to present a crabbed definition of "rights" contemplated by the language of the Ninth Amendment.

It becomes clear that McAfee's objective, ultimately, is to reinforce the notion that the framers originally sought protection from governmental abuse in positive law. He asserts that the rights retained by the people were those created by state governments prior to the formation of the United States. Although he is critical of the sloppy use of history by originalists and interpretivists alike, McAfee concludes that originalist methodology is preferable, because it can supply both a reason to reject what he terms as an "open-ended model of individual rights," and support a positivist conception of the Constitution and the Bill of Rights. Although McAfee's project is presented in an authoritative manner, it can also be criticized as reflecting the "authoritarianism of originalist approaches," in that it wrongly assumes that the moral principles underlying the Ninth Amendment are understandable only in terms of what could have been contemplated by the framers.

91. See McAfee, supra note 10, at 1305-14.
92. As Barnett argues, McAfee's references to documents such as the writings of Madison are detailed, but do not encompass every reference to the Ninth Amendment. Additionally, Barnett points out that McAfee goes to great lengths to interpret the "unfriendly evidence" that he does acknowledge. See Barnett, supra note 11, at 639-40 & n.91.
93. U.S. CONST. amend. X.
94. McAfee, supra note 10, at 1240-42.
95. Id. at 1316.
96. Id. at 1314-20.
In contrast to McAfee's positivism, affirmative-rights proponents such as Randy Barnett conceive the Ninth Amendment as built upon a power-constraining reference to affirmative, unenumerated rights which, like the enumerated rights of the first eight amendments, are more than declaratory; they actually constrain the exercise of other provisions of the Constitution concerning the exercise of governmental power. Barnett's focus begins with the Federalist belief in rights antecedent to both state and federal governments, and draws upon the recognition that enumerated rights can limit even permissible ends of government and the means government can choose in pursuing an end.\textsuperscript{98} He argues that the same view should be accorded rights "retained and not to be disparaged"\textsuperscript{99} under the Ninth Amendment. Like McAfee, Barnett draws upon Madison's vision. But affirmative-rights proponents like Barnett emphasize Madison's view of the legislature as the most dangerous branch in order to argue for protection by an independent judiciary.\textsuperscript{100} Barnett reasons that the rightness of judicial review for enumerated rights settles the issue of the rightness of judicial review for unenumerated ones, because anything else would "disparage" these latter rights.\textsuperscript{101}

Notwithstanding McAfee's laboriously detailed historical account from which he concludes that the affirmative-rights reading cannot be established, the recognition of an affirmative-rights theory to support judicial recognition and enforcement of unenumerated rights, grounded in the Ninth Amendment seems more justifiable. An historically bound reading of words like "rights" and "retained" unduly trivializes an amendment which, given recent controversies about the courts' social role, could be of great significance in developing our understanding of the capacity of courts to participate in defining our social reality. The Ninth Amendment can not only provide protection from future majoritarian abuse, it can also relieve the strain of our having stretched the meaning of explicit rights and language found in open-ended provisions such as the Due Process Clause to include fundamental liberties not mentioned by the framers. At a time when further expansion of enumerated as well as unenumerated rights seems not to be a project on the Supreme Court's decisional agenda, scholarly exploration of questions about the interpretive function of courts and the potential for developing constitutional interpretation by focusing on the Ninth Amendment as a source of rights seems particularly appropriate. Before accepting the affirmative-rights reading of scholars like Barnett, however, we need to critically examine the philosophical underpinnings upon which his theory is built.

\textsuperscript{98} Barnett, supra note 11, at 638; Barnett, supra note 2, at 34-38.
\textsuperscript{99} U.S. Const. amend. IX.
\textsuperscript{100} Barnett, supra note 2, at 14-15, n.54, 17-21; Barnett, supra note 11, at 636-39.
\textsuperscript{101} Barnett, supra note 11, at 630-35, 641-42.
THE INFLUENCE OF LIBERAL LEGALISM ON NINTH AMENDMENT SCHOLARSHIP

The scholarly discussion of the Ninth Amendment in support of the enforceability of some unenumerated rights is reflective of a long-standing tradition built on judicial acceptance of liberal legalism—a "‘court-centered' and rights-focused strategy for protection of liberty."^{102} Over the last 200 years through inferences, penumbras, and structural justifications, courts have recognized more than a dozen unenumerated rights.^{103} The recognition of such rights underscores that "imperatives of justice"^{104} have been acknowledged by courts. The historical recognition of these rights seems to reinforce the view that positive constitutional law is not inconsistent with a background set of individual rights which correspond with moral concepts developed over time through adjudication.^{105} The judge's role in defining these rights, in the context of a case or controversy concerning governmental action, is now an accepted part of our conception of judicial decision making. What can be important about the new interest in and continued discussion of the Ninth Amendment, however, is the effort to characterize and provide theoretical support for appropriate substantive and procedural constraints on the judicial power to identify rights which qualify for protection. Such scholarly discussion can be particularly helpful as we struggle to respond to the needs of a diverse society entering the twenty-first century.

But if McAfee's originalist-bound response does not take account of the developing functional role of courts and of Constitutional interpretation since the founding, neither does Barnett's interpretivist version. Utilizing a classical liberal model, Barnett argues that the Ninth Amendment should be read as establishing a constitutional presumption favoring liberty.^{106} He concludes therefore that courts should scrutinize

^{102} West, supra note 30, at 60.

^{103} Barnett summarizes these as: the right to retain American citizenship; the right to receive equal protection from both state and national government; the right to vote subject only to reasonable restriction to prevent fraud; the right to cast a ballot equal in weight to those of other citizens; the presumption of innocence and right to demand proof beyond a reasonable doubt; the use of federal courts and other governmental institutions to urge others to use these processes to protect their interests; the right to associate with others; the right to enjoy a zone of privacy; the right to travel, to marry, to make one's own choices about having children, and to educate them as long as certain minimum standards set by the state are met; the right to follow a profession; and the right to attend and report on criminal trials. Barnett, supra note 2, at 32 & n.106 (case citations omitted).

^{104} Barnett, supra note 2, at 34; see also Owen Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1 (1979) (discussing structural reform and footnote 4 of Carolene Products as sanction of judicial action, in face of legislative failure or neglect).

^{105} E.g., Barnett, supra note 11, at 615; Barnett, supra note 2, at 17-39.

^{106} Barnett, supra note 11, at 624-40; Barnett, supra note 2 at 34-42.
legislation—even acts in pursuit of legitimate ends of government—which abridge liberty. From the substantive constraints he places on the judicial power to define rights and perform review,\textsuperscript{107} however, it becomes clear that Barnett intends to justify a preference for protection of nonpositive economic liberty interests.\textsuperscript{108} This reflects his view that neither courts nor legislatures should be involved with redistributive efforts which reshape free market choices for social purposes.

Barnett’s position is that his liberty-reinforcing approach is both consistent with the rule of law and protective of individual rights as was intended by the framers, who were not willing to leave liberty to the accommodation of the political process. But a focus on the conditions Barnett claims should properly restrain judicial activism reveals his purpose to create a safe haven for laissez-faire and to constitutionalize resistance to government efforts to define and redistribute public goods. Barnett’s distinction between the “freedom of individuals to use what is theirs as they choose,”\textsuperscript{109} which he would “constitutionalize,” and “welfare rights entitling persons to claim a specified portion of the resources of others,”\textsuperscript{110} for which he would require strong legislative justification, is disturbing. His liberty-motivated assertions of conditions necessary for legislative and judicial action is no more socially responsive than a similar posture of the 1890s.\textsuperscript{111} It also fails to take account of social equality, which is an additional value that society has more recently deemed important in its interpretation of the Constitution. Therefore, Barnett’s approach privileges self-regarding, isolated acts of the individual, minimizing the potential for evolving public norms favoring community.

There are strong grounds for challenging this economic libertarian focus, particularly in the face of emerging scholarship concerning rights and community. As scholars such as Robin West\textsuperscript{112} and Martha Minow\textsuperscript{113} have recognized, the traditional liberal conception of the “indi-

\textsuperscript{107} The two substantive constraints he would impose on the judicial power to define rights and perform review are (1) limiting individual rights to the “negative domain,” describing conduct entitled to be without interference, and not “welfare” rights generating affirmative claims against the government, and (2) limiting the power of judges to nullify acts of the state. See Barnett, supra note 2, at 38-42; Barnett, supra note 11, at 624-35.

\textsuperscript{108} Barnett minimizes the significance of this preference for liberty over other values, arguing that this limitation is justified by the framers’ intent (a convenient originalist posture) and the rule of law. For a discussion of the political and theoretical reasons for this preference, see Suzanna Sherry, The Feminine Voice, 72 VA. L. REV. 543, 568-69 (1986).

\textsuperscript{109} Barnett, supra note 11, at 626.

\textsuperscript{110} Id. at 626.


\textsuperscript{112} West, supra note 30, at 43; Robin West, Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision, 46 U. PITT. L. REV. 673 (1985).

\textsuperscript{113} See, e.g., MARTHA MINOW, JUSTICE AND THE POLITICS OF DIFFERENT (1990); Minow, supra note 29.
individual” and of “rights” reflected in Barnett’s work has contributed to community disconnection and breeds intolerance.\textsuperscript{114} The danger of embracing a Ninth Amendment rights-focus like that of Barnett is that it deprives us of the opportunity to make full use of the amendment’s potential to revitalize the meaning of rights in a manner that is responsive to the needs of individuals in a diverse, yet increasingly interconnected community.\textsuperscript{115} We should therefore be cautious about embracing Barnett’s efforts to confine rights in the Constitution and the Ninth Amendment to negative, liberty-reinforcing meanings. Rather than reinforce liberal legalism, acceptance of Barnett’s “reconceiving challenge” should entail a critique of rights such as that which is invited by the scholarship of West.

**THE SEARCH FOR A NEW APPROACH TO THE NINTH AMENDMENT**

In *The Supreme Court, 1989 Term—Foreward: Taking Freedom Seriously*,\textsuperscript{116} Robin West observes that the Supreme Court has been willing to move away from its traditional role of protecting individual rights to a view that affirms the position that “the state has the power to regulate, restrict, abolish or criminalize individual liberties that run contrary to the immediate public will.”\textsuperscript{117} The result has been that power has been redistributed away from individuals to government, and the purposes and interests of the government have gained in stature. She emphasizes that this movement seems to have the support of the people.\textsuperscript{118} Tracing this erosion of individual rights and liberties to the dissipation of judicial and public interest in liberal individualist ideals in this country, West contrasts it with the ascendancy of similar ideals in the context of revolutions in Eastern and Central Europe.\textsuperscript{119} She ultimately concludes that we Americans can learn from this movement and refocus our attention “to the maintenance of a free, tolerant[,] and diverse public sphere.”\textsuperscript{120}

West argues that the Supreme Court’s shifting away from “liberal legalism”\textsuperscript{121} and its disparagement of individual rights should challenge

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{114} Civic republicans also question the rights focus of liberalism. See, e.g., Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). See generally MARY ANN GLENDON, RIGHTS TALK (1991) (discussion of traditional rights puts damper on the process of public justification, communication and deliberation).
\item\textsuperscript{115} Compare, e.g., Minow, supra note 29.
\item\textsuperscript{116} West, supra note 30, at 43.
\item\textsuperscript{117} Id. at 43-44.
\item\textsuperscript{118} Id. at 44 (concluding a large percentage of Americans believe individual rights should be reduced in the presence of a nation facing drug wars, drunk driving, flag burning, child abuse, sexual promiscuity, and violent crimes).
\item\textsuperscript{119} Id. at 46.
\item\textsuperscript{120} Id. at 47.
\item\textsuperscript{121} West, supra note 30, at 51 & n.52.
\end{enumerate}
\end{footnotesize}
us “to consider means other than judicial enforcement of rights to ensure a liberal, tolerant, diverse community and to maximize freedom.” Undertaking this challenge, she explores a new vision of liberalism, centered not in the writing of the eighteenth century (like Barnett’s and McAfee’s), but found by her in the late twentieth-century writings of the “post democratic” political philosopher, and now twice-elected president of Czechoslovakia, Vaclav Havel.\footnote{122}

Havel’s writings seem to share with classical liberalism the core commitment to individual liberty, but he presses us further as he speaks passionately about human identity, responsibility, and community connection.\footnote{123} His writing is fundamentally concerned with individual responsibility as both an important aspect of a human being’s existence, and a foundation for positive human freedom. Havel urges us to learn from the experiences of totalitarianism and the rise and fall of communism.\footnote{124} The danger of totalitarianism is that “state-sponsored ideology severely truncates individual responsibility for both actions and beliefs by fostering a climate of disingenuity in which the individual is not only permitted[,] but is also encouraged[,] to disavow individual agency.”\footnote{125}

\footnote{122. \textit{Id.} at 46 n.19, \textit{citing} Vaclav Havel, \textit{The Power of the Powerless}, in VAČLAV HAVEL, OR LIVING IN TRUTH 36, 119 (J. Vladislav ed. 1986). Celebrated internationally as a dissident playwright during Communist rule, and founder of the Charter 77 dissident movement in the 1970s, Havel’s “look at politics ‘from the inside,’” as President after the ‘velvet revolution’ 1989, was controversial, especially because of the ethnic break up of the country. Havel has remained “the most popular man in Czechoslovakia,” according to all the polls. Yet he was criticized for taking too lofty a posture as President, particularly failing to use the office and his popularity to press for the maintenance of the common state of Czechs and Slovaks. Henry Kamm, \textit{Nation Split, Havel Aspires to a New Political Life}, N.Y. TIMES, Sept. 30, 1992 at A3. Having resigned in 1992, Havel was elected President of the new Czech Republic after the Czech Republic and Slovakia split in two on January 1, 1993. After the vote, Havel stated that his main goals were “to promote political stability and the ‘moral dimension’ in government, as well as human rights.” \textit{Havel is Elected President of the New Czech Republic by it Parliament}, N.Y. TIMES, Jan. 27, 1993, A3.}

\footnote{123. In a speech to the World Economic Forum in Davos, Switzerland, on February 4, 1992, Havel said: \textit{Things must once more be given a chance to present themselves as they are, to be perceived in their individuality. We must see the pluralism of the world, and not bind it by seeking common denominations or reducing everything to a single common equation . . . . We must try harder to understand than explain. The way forward is not in the mere construction of universal systemic solutions . . . it is . . . in seeking to get to the heart of reality through personal experience.}}

\footnote{124. \textit{Id.}}

\footnote{125. West, \textit{ supra} note 30, at 66. Expanding on this theme, West suggests that: If Havel is right, the manager who disclaims his actions by recourse to the mandates of his role, the lawyer who disowns his actions and words by recourse to the [] adversarial excuse[, the judge who disowns his decisions by recourse to the dictates of precedent, and the citizen who disowns his social obligation by recourse to his legal right of privacy are all renouncing responsibility for their actions and thereby fracturing their identities. West, \textit{ supra} note 30, at 67.}
Drawing on Havel’s work, West argues that individuals in a liberal society should feel “responsible for the moral consequences of their action[s] and the truth of their shared beliefs...”

West contrasts Havelian liberalism (her label, not his), which is responsibility-based, with our “liberal legalism,” which has self-centered rights as its central focus. The problem with a rights focus is that it insulates the subjectivity of the individual right-holder creating distance between the decision maker and the litigant, and annulling her humanity. Although the strength of liberal legalism has been characterized as the power of affording protection to each of us without consideration of individual merit or moral worthiness, the insularity results in community disconnection:

We need not understand, much less sympathize, with the subjective experience of our fellow right-holder, because we give him his due when we accord him his rights. . . . We neglect our human capacity to walk a mile in another’s shoes, see the world from his perspective, or understand his subjective experience of the world. . . . The trade-off implicit in the liberal-legal mandate to take rights seriously is that by strengthening the respect with which we grant rights, we wither our capacity for civic virtues and, by doing so, to some extent we dilute our sense of community.

In short, by employing the traditional language of rights, we may actually prevent our judges and ourselves from identifying with the right-holder, breeding distrust and destroying community because we do not take responsibility for the social repercussions of our actions.

126. Id. at 66. As West notes, Havel’s conception of responsibility differs somewhat from ours in that he focuses not so much on accountability for the consequences of one’s decisions, but rather on the origins of individual actions and beliefs, the goal being to ensure that “they originate in [the individual’s] own authentic experience of the world, rather than in the ideological claims of impersonal authority.” Id.
127. Id. at 46.
128. Id. at 71. As West suggests, in Havelian liberalism the concept of the “right-holder” is replaced with that of the “responsibility-holder”:
For Havel, by contrast, the possession of responsibility rather than the possession of rights is the universal and universalizing aspect of a human being’s existence. Accordingly to Havel, “responsibility establishes identity; it is only in the responsibility of human existence for what it has been, is and will be, that its identity dwells.”
129. Compare DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989) (Rehnquist, C.J.), with id. at 1012 (Blackmun, J., dissenting) (exclaiming “Poor Joshua!” in response to the Court’s leaving the child an unprotected victim of the regulatory system). West recognizes that liberal dissenters have already begun to educate the community about the illiberal posture of the Court and can be of assistance in educating us about dominating ideological assumptions which subordinate the beliefs and ways of outsiders. West, supra note 53, at 105-06.
130. West, supra note 30, at 71-72.
Inspired by Havel, West urges a revitalization of liberalism which links freedom with responsibility for others and for the world. At the heart of this conception of responsibility are feelings of sympathy and community. For Havel, the presence of civic virtues such as “compassion, sympathy, fellow feeling and love” are “the best evidence of the liberality of a society” and he therefore “urges us to rediscover an ‘inner relationship to other people and to the human community.’”\(^{131}\) While Havel argues that “genuine democracy can be sustained only when leaders are personally responsible for their actions . . .”, he also claims that “[i]n the ideal postdemocratic state . . . social structures should be organized in such a way as to maximize individual responsibility.”\(^{132}\) Thus, a meaningful commitment to individual freedom would involve increased responsibility for both the public decisions of our governmental leaders, as well the private decisions made by individuals.\(^{133}\)

West looks principally to political opportunities for the development of this new liberalism but she generally urges theoretical liberals to recommit themselves to individual liberty by identifying and articulating responsibilities as well as rights in connection with controversies. West thus challenges judges and juries, legislators and voters—lawyers and scholars—to rethink the primacy of rights which reflect distanced, irresponsible, decision-making and consider the interconnectedness of the individual and her community.\(^{134}\)

CONCLUSION: RECONCEIVING THE NINTH FOR THE NEW WORLD ORDER

Although West’s discussion of Havelian Liberalism does not mention its potential as a framework for interpreting the Ninth Amendment, I believe her work offers many valuable suggestions for those of us who are attempting to “reconceive” the role of the Ninth in a rapidly changing New World Order. West challenges us to look beyond the nonpositive, affirmative-rights arguments of Barnett, favoring individual liberty

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131. Id. at 72 (quoting Vaclav Havel, The Power of the Powerless, in Vaclav Havel, Or Living in Truth, at 117-18 (J. Vladislav ed. 1986)).
132. West, supra note 30, at 75 (emphasis added).
133. Id. at 72. Havel notes, however, that the loss of personal responsibility by society’s leaders “is even more damaging than the loss of such responsibility within the citizenry. The result of massive “personal irresponsibility” among leaders . . . is that power in such a society is exercised in an essentially innocent fashion . . . because in the absence of responsibility lies the absence of blameworthiness.” Id. at 73.
134. Id. at 67. My understanding of this challenge is not to substitute for self-centered individualism a communitarian perspective that is majoritarian, suppressing dissidents or sacrificing the interests of minorities for the good of the whole. Rather, it charges us to feel some individual and collective responsibility for the wants and fears of the community. See Richard Delgado, Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating, 71 B.U. L. Rev. 525 (1991) (responding to Robin West).
which is atomistic and self-centered, to consider whether an interpretive
stance is available which can encourage a continuing dialogue about
rights and responsibilities we are willing to recognize as fundamental to
our union. My view is that this dialogue should neither be centered in
courts nor legislatures since the focus of the enterprise should be on ex-
change of ideas—finding opportunities to explore “the truth of our
shared beliefs,” in our local communities, national and even interna-
tional fora.

Some affirmative-rights proponents have already begun considering
the possibilities for exchange between legislators and judges as they
struggle to identify an appropriate interpretive stance in contemplation of
rights acknowledged by the Ninth Amendment and to consider the
problems of judicial enforcement. Sanford Levinson, for example, has
suggested that it might be appropriate for courts to adjudge whether legis-
lation is against “our political traditions” recognizing that traditions
change over time. A court could return “suspect” legislation—legisla-
tion it believes conflicts with such evolving traditions—“to the legislature
for a sober second look.” Given the Supreme Court’s current use of
history and tradition to negate the freedom of those outside the dominant
social culture to pursue their ends, it seems advisable to look for other
means of identifying areas we are not willing to leave simply to the ac-
commodation of the political process. Indeed, as some district courts

135. See Levinson, supra note 8, at 154-161. This judicial inquiry is in notable contrast to
the respect for the traditions of the past which the Supreme Court has acknowledged as a basis
for sustaining governmental action over claims of political outsiders. E.g., Bowers v. Hard-

136. Levinson would ask:
Is there good reason to believe that the legislator . . . considered the implications of
the given piece of legislation for values that do in fact seem central to ‘our’ tradition?
And even if the answer to the question is affirmative, did the consideration happen
recently enough in the past that we can recognize the legislators as our contemporaries?
Levinson, supra note 8, at 157. Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF
STATUTES 5-7 (1982) (suggesting a similar opportunity exists when courts confront statutes
which are outdated).

137. Levinson, supra note 8, at 158 (questioning whether the Court could in fact restrain
a legislature bent on depriving the majority of what had formerly been viewed as fundamental
rights). Id. at 158-59.

Other alternatives have been offered for effectuating the meaning of the Ninth Amend-
ment. Sotirios Barber speaks of an “active reasonableness test” which the court should apply
to ensure that government action meets the Ninth Amendment’s fundamental recognition of
principles of liberty and justice. Sotirios Barber, The Ninth Amendment: Inkblot or Another
whether a claim against the state has protection under the ninth amendment should be consid-
ered against a theory of justice which a judge believes best captures the nature of the Constitu-
tion. A determination is made as to “whether a claim merits protection under the Ninth
Amendment by balancing the argument for its protection against the moral justification that
the state can advance for denying protection.” McIntosh, supra note 78, at 940-41.
have already acknowledged,\textsuperscript{138} measuring legislation against "our political traditions" too narrowly confines the effort to conceive of rights and freedoms that are fundamental to existence. In this essay, I have attempted to demonstrate that the interpretation of the Ninth Amendment can benefit not only from an examination of our own history but also from moral and political understandings which are emerging in the New World Order.

Of course, the enterprise for interpreting the Ninth Amendment I have described ultimately requires the participation of a judiciary that is committed to the existence of individual rights, while remaining open to the possibilities of moving beyond orthodox "rights talk." I share with Robin West the belief that this commitment must be judged by the capacity for protecting "the freedom of the weak and despised, not the strong and the privileged."\textsuperscript{139} Judged by these standards, our current Supreme Court comes up somewhat short. As West and others have suggested,\textsuperscript{140} however, we all have responsibility in the interpretation enterprise. Thus even in the face of judicial reticence, our work can continue.

\textsuperscript{138} Compare, e.g., Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) aff'd on other grounds, 654 F. 2d 1382 (10th Cir. 1981) (international law principle that human beings should be free from arbitrary imprisonment, rather than traditional notions of due process, should be considered when assessing propriety of holding excludable aliens in detention) and Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980) (court has jurisdiction to hear wrongful death claim of asylees for torture of son committed in foreign country in violation of international law despite fact that jurisdictional statutes had not traditionally been interpreted to allow such claims) with Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980), aff'd in part on other grounds, 651 F. 2d 96 (2d Cir. 1981) (contemporary standards of various United States correctional organizations should be reviewed when considering whether overcrowded prison conditions violate constitutional rights of pretrial detainees).

\textsuperscript{139} West, \textit{supra} note 30, at 51.

\textsuperscript{140} See, e.g., Barber, \textit{supra} note 137, at 86 (favoring "a multiplicity of interpreters essential to the process of seeking better versions").