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YOU CAN RAISE THE FIRST, HIDE BEHIND THE FOURTH, AND PLEAD THE FIFTH. BUT WHAT ON EARTH CAN YOU DO WITH THE NINTH AMENDMENT?

LAWRENCE G. SAGER*

I.

The ninth amendment is singular in a way that ought to command attention. It is one of a limited number of constitutional provisions that are about rather than of the Constitution. With the preamble, the amendment clause (article V), the supremacy clause (article VI), the ratification clause (article VII), and the tenth amendment, the ninth amendment speaks on a conceptually higher level than the remainder of the Constitution. These provisions address the birth, change, primacy and structural meaning of the Constitution itself.

Even within this special group, the ninth amendment is remarkable. Only the ninth and tenth amendments speak directly to broad issues of substantive content; and this aspect of the tenth amendment is rather unimportant, since it functions merely as a restatement of the what-you-see-is-all-you-get structure of the national power-conferring provisions of the Constitution. But the ninth amendment can hardly be dismissed as unimportant or redundant: its terse announcement that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” certainly looks like news, and begs for an explanation.

* Professor of Law, New York University; Visiting Professor of Law, Boston University. Jane Cohen, Lewis Kornhauser, Ira Lupu, William Nelson, Aviam Soifer, and Larry Yackle read this essay in draft form and gave me the substantial benefit of their criticism, as did my students in the Theory of Constitutional Adjudication Seminar at Boston University. Richard Bernstein rendered vital assistance with the technical historical references.

1. The question of levels is of more than conceptual interest. It is entirely possible, I think, that attempts to change the pertinent parts of article V or article VI so as to alter the amendability or status of the Constitution in a fundamental way would be properly understood as unconstitutional.

2. Nominally, the unhappily-worded eleventh amendment, which I have neglected altogether, also addresses an issue of construction, and does so in terms parallel to the ninth: “The Judicial power of the United States shall not be construed . . . .” But the eleventh amendment, even if it is read in something like a straightforward way, is much too particular in focus to be thought of as occupying the same kind of ground as are these other provisions.

3. To the extent that the tenth amendment is seen as the textual home of a constitutionally secured principle of state autonomy that is not merely the by-product of the delegated-powers structure of articles I, II and III, then it assumes a separate importance, of course, but not of the special, foundational sort that distinguishes the ninth amendment and articles V, VI and VII.

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It does not follow from the singularity of the ninth amendment either that its importance is narrow or that it can usefully be viewed in isolation from the rest of the Constitution. With its suggestion that the whole of the Constitution may not be manifest in its explicit textual stipulations, the great promise of the ninth amendment is what it can tell us about important general features of the Constitution. Indeed, a foundational account\textsuperscript{4} of the Constitution which did not reconcile itself in some fashion to the ninth amendment would be vulnerable to question. For just that reason, in turn, a persuasive interpretation of the ninth amendment in isolation is impossible: where the implications of divergent interpretations are so great at the foundational level, the perspectives one brings to the task of interpretation will be especially weighty ingredients in the interpretive process.

II.

The ninth amendment is not, in terms, particularly elusive. There is an obvious way to interpret the stipulation that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” At the conceptional level, it is easy to read this language as an indication that the liberty-bearing provisions of the Constitution are to be understood as prominent and accessible instantiations of a general sense of the proper relationship between a government and its citizens but not as a complete set of the limitations on government necessary to perfect that relationship. At the functional level, this reading has its obvious corollary: the amendment announces that there are valid claims of constitutional right which are not explicitly manifest in the liberty-bearing provisions of the Constitution but which enjoy the same status as do those made explicit in the text. Given a constitutional jurisprudence that long since has secured the judicial en-

\textsuperscript{4} A satisfactory understanding of the Constitution requires two kinds of accounts. First, we need an account of the kind of thing the Constitution is, how and what it signifies in our political and legal culture, and how, in quite general terms, it is to be understood and approached. We need, in other words, a foundational account of the Constitution. Questions on the order of whether the Constitution is positive law or merely a collected set of moral principles, whether if law it is accessible by judges in much the same way as other sources of law, whether it is appropriately regarded as a collection of more or less ad hoc stipulations or as an integrated code of governance, or whether its written provisions exhaust or merely represent its operational content, are questions within the aegis of a foundational account. Such a foundational account of the Constitution will very much inform or predispose the second kind of account necessary to a full understanding of the Constitution—a substantive account. In a substantive account, content is supplied to the Constitution as a whole or to specific constitutional provisions by a process that is consistent with the foundational account of the Constitution. The great promise of the ninth amendment is that it ought to be able to shed light on important questions that arise in the effort to give a satisfactory foundational account of the Constitution.
forcement of the Constitution and applied the central provisions of the Bill of Rights to the states, this reading of the ninth amendment would mean in turn that it is appropriate for our constitutional jurisprudence to validate some claims of right that lack an explicit provenance in the text of the Constitution, and appropriate for judges to enforce such validated claims against federal and state governmental actors.

I am not the first person to stumble upon this obvious interpretation of the ninth amendment, of course. Give or take, it was Justice Goldberg’s view in *Griswold v. Connecticut*, and it has the general support of a thin but venerable line of scholarship, running back at least as far as Justice Story. But for the most part, judges and scholars have labored against this straightforward reading. They have had to labor rather hard. The language and sparsely recorded history of the ninth amendment surely signify this much: that some sorts of things appropriate to the appellation “rights” were perceived to exist without the benefit of explicit textual provenance in the Constitution, that these normative figments could reasonably be thought to be at risk through the introduction into the Constitution of a written Bill of Rights, and that this risk was serious enough initially to forestall—or at least to be a plausible excuse for resisting—the inclusion of a Bill of Rights and ultimately to require the prophylactic guide-to-construction embodied in the ninth amendment. Thus, anyone who resists the head-on interpretation of the amendment has to either find a way of characterizing the unenumerated rights it canonizes which falls short of treating them as orthodox constitutional rights but which nevertheless satisfies these conditions, or proffer some other grounds for disavowing the amendment’s apparent meaning.

There are four possible readings of the ninth amendment which avoid the full force of the head-on interpretation. First, the amendment might not implicate legal norms at all, but rather some other sort of normative animal. Second, the amendment, while involving positive legal norms, might only concern the protection of state law from federal interference. Third, the amendment, while referencing rights in a more or less traditional sense, might only concern the protection of state law from federal interference. Third, the amendment, while referencing rights in a more or less traditional sense, might nevertheless be judicially unenforceable. And

5. 381 U.S. 479, 486-87 (1965).
fourth, the amendment, while otherwise involving full-blooded federal legal rights, might not apply to the states. None of these is easy going.7

A. The Non-legal Animal Thesis

We might understand the ninth amendment as a simple reminder that the text of the Constitution—including the Bill of Rights—does not exhaust the domain of political argument. On this view, the amendment merely affirms the sense of arguments on the order of “It may be constitutional for the state to do that, but it would be deeply wrong.”

What there is of an historical record certainly does not support this view of the ninth amendment. The concerns to which the amendment was a response were characteristically expressed in distinctly operational terms. The expressed fear seems to have been that of legal misconstruction, not of the distortion or discouragement of moral or political discourse. Consider these classic and much-thumbed remarks (to which we will return below): “[A]n imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.”8 Or: “[A Bill of Rights] 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 General Government, and were consequently insecure.”9

Nor is the Constitution’s text particularly congenial to this view. Consider the ninth amendment in juxtaposition to the tenth:

7. The first and second of these readings center on claims intrinsic to the interpretation of the ninth amendment itself; they try to deflect the basic thrust of the head-on interpretation. The third and fourth readings, in contrast, concede the basic thrust of the head-on interpretation, but make claims involving the intersection of the amendment with other, freestanding notions in our constitutional jurisprudence. My discussion of these claims reflects this difference: the first two claims are dealt with in the terms in which they are offered, with reference to the language, history and logic of the amendment and the Constitution in which it is embedded; the second two are considered in the more conceptual terms apt to the political question and incorporation doctrines.

8. Speech of James Wilson in Pennsylvania Ratifying Convention (Nov. 28, 1787) reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (M. Jensen ed. 1976). For further discussion of this speech and a sketch of the evidentiary problems concerning it and other records of the state ratifying conventions, see infra note 15 and accompanying text.

9. 1 ANNALS OF CONGRESS 439 (J. Gales & W. Seaton eds. 1834) (Remarks of Rep. Madison). For further discussion of this speech and its context and for a sketch of the evidentiary problems concerning the work of the First Congress, see infra note 18 and accompanying text. Those studying the proceedings and actions of the First Congress should use the Annals with caution, for the records of the debates presented there are of suspect reliability. See Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 TEX. L. REV. 1, 35-38 (1986) (criticism of Thomas Lloyd, the principal reporter of the Pennsylvania ratification convention’s debates). Further, Leonard White pointed out in his classic The Federalists that there are several editions of the Annals with varying pagination. L. WHITE, THE FEDERALISTS 18 n.14 (1948). I have used the edition with the running head “History of Congress,” the one preferred by White.
The enumeration in the Constitution, of certain rights, shall not be
construed to deny or disparage others retained by the people.

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.

There is symmetry here. The ninth amendment denies for the liberty-
bearing provisions of the Constitution precisely what the tenth amend-
ment confirms for the power-conferring provisions: the applicability of
the principle of expressio unius. The liberty-bearing provisions are not
exhaustive; the power-conferring provisions are.

The two amendments seem to occupy the same general conceptual
space: they are guides to a structural understanding of the Constitution's
enumeration of governmental powers and personal rights, guides to the
actual construction of a document which itself was plainly intended to
enjoy the status of positive law, guides which are presumably intended to
inform positive legal results. Nothing in the structure or language of the
ninth signals that it, unlike the tenth, is to operate only at the level of
extra-legal discourse and judgment. The preamble aside, no other part of
the Constitution addresses itself to government in a purely advisory way,
or in any sense attends to the kinds of matters people ought to take ac-
count of in their political discourse and judgment. It would be an odd
turn for the Constitution to take, especially without warning; and the
ninth amendment certainly does not signal such a change of direction.
To the contrary, its formulation—“The enumeration of certain rights . . .
should not be construed to deny or disparage others . . .”—suggests
agreement in the status of the rights on each side of the equation.

The sparse record and constitutional text aside, this view of the
ninth amendment is simply far-fetched. To be sure, there is nothing un-
toward or improbable about the idea that there is a domain of moral
discourse which is not included in the domain of positive constitutional
law. What is implausible is the idea that political actors or persons in the
population at large would be tempted to the view that arguments of polit-
ical morality lost all force outside the four corners of the Constitution. It
is still more implausible that anyone who was in fact drawn to such a
view would be steered away by a simple textual suggestion (for that is
what the ninth amendment would be reduced to on this view) to the
contrary.

B. The State Law Thesis

The state law thesis holds that the ninth amendment was intended
and should be construed merely to protect state law from federal interfer-
ence of a sort not properly countenanced by the Constitution but nevertheless sustainable by an erroneous understanding of the first eight amendments. In the form most compatible with the language of the amendment, the claim is that the ninth amendment is there to protect rights granted by the states to their citizens—by constitution, statute and common law—against the possibility that the Bill of Rights would somehow unravel these state guarantees.10

How exactly might the Bill of Rights have undermined the rights granted by states to their citizens? Perhaps the Bill of Rights could have been regarded as a canonical rendition of all valid rights, and have persuaded the people in some or all of the states to devalue and eventually abandon other rights against state government; or perhaps it is Congress that might have come to devalue state-granted rights and feel inappropriately free to override them in the course of enacting federal legislation. But these accounts are essentially retellings of the non-legal animal thesis, and it grows less rather than more plausible with iteration. (No one, so far as I know, suggests that the ninth amendment actually immunizes state-granted rights from being undone by Congress as a matter of positive law, or was remotely intended to have such an effect; this would give artful state lawmakers the ability to insulate almost any state law from federal legislative preemption, and thus reshape radically one of the most settled features of our constitutional tradition.11 Also, were this its purport, the ninth amendment would have addressed the enumerated powers of Congress, not the enumerated rights which were plainly intended to limit those powers.)


11. It is possible that some states wanted the Constitution to be amended in this radical way. The first amendment proposed by Pennsylvania’s ratifying convention to its ratification of the Constitution included a stipulation that could be so read: “[E]very reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.” Proceedings of the Meeting at Harrisburg in Pennsylvania (Sept. 3, 1788), *reprinted in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 545 (J. Elliot 2d ed. 1863).

Compare the first of a series of proposed amendments offered by the Maryland ratifying convention’s Antifederal minority (these amendments were rejected by the full convention but appeared in Baltimore newspapers after Maryland’s vote to ratify the Constitution):

1. That Congress shall exercise no power but what is expressly delegated by this constitution.

By this amendment, the general powers given to Congress, by the first and last paragraphs of the 8th sect. of art. 1, and the second paragraph of the 6th article, would be in a great measure restrained: those dangerous expressions by which the bills of rights and constitutions of the several states may be repealed by the laws of Congress, in some degree moderated, and the exercise of constructive powers wholly prevented.

The only other possibility along this line is that the role of the ninth amendment is to avoid a misconstruction of the liberty-bearing provisions of the Constitution pursuant to which these provisions themselves would be understood to constitutionally preempt the rights granted by states to their citizens. But this seems fantastic. How would the preemption villain of this story have proceeded? Consider the possibility that, in modern parlance, the Bill of Rights would somehow be seen as having "occupied the field" of personal rights altogether, divesting the states of all power to extend personal rights to their citizens. The "occupying the field" metaphor actually gives this line of the state law thesis a more plausible gloss than it deserves. In the classic preemption situation of this sort, the federal government is seen as having taken over some regulatory enterprise and having thereby ousted the states from the same enterprise. But it was clear to the framers that the Bill of Rights only restricted the federal government; it did not assume any role of restricting the states. Hence, no one could have thought that the Bill of Rights was taking over the enterprise of "regulating" the states in the name of personal rights. Moreover, the scope of such a preemption would have been awesome: it would have devastated the states as independent law-making entities, since virtually any state legal norm could be understood as granting persons rights against the state.

Whittling down the scale of the preemption does not much help things in the plausibility department. Suppose only those matters "germane" to the Bill of Rights were at hazard. (Note that it makes no sense to say that the feared preemption would be limited to the exact content of the Bill of Rights; the whole point is that somehow the states would be prevented from exceeding the scope of the Bill of Rights.) Could it really have been feared that provisions in the Bill of Rights—plainly intended to restrict only the federal government—would be understood as placing a federal cap on the protections that persons could enjoy against their respective states? There is simply no reason at all why anyone would have foreseen this construction; least of all is it plausible that the federalists—whose manifest fears first stayed the Bill of Rights and then induced the ninth amendment—would have had this extravagant concern on behalf of the states.

Understandably, the most popular version of the state law thesis takes a different tack altogether. The Bill of Rights, the argument runs, was thought to pose a threat to the appropriate constitutional order of things because the express limitations on federal authority in the eight substantive amendments might be construed to be the only limitations on national authority, thus expanding the domain of the federal government
far beyond its intended bounds. On this telling, the ninth amendment is merely a reminder that the Bill of Rights adds nothing to the power of the federal government as delineated in the body of the Constitution proper.\textsuperscript{12}

The tenth amendment is a daunting obstacle to this version of the state law thesis. Not only does the tenth amendment do exactly the job that this claim assigns to the ninth, but the language of the tenth indicates that the framers were capable of expressing themselves quite clearly when they wanted to negate the possibility of implied or unenumerated federal powers: "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." This version of the state law thesis thus requires us to treat the ninth amendment as a colossally bad first draft of the tenth.\textsuperscript{13}

There clearly were serious concerns on the part of a number of the states that the Constitution submitted to them for ratification in 1787 could somehow be construed to confer powers on the national government beyond those enumerated; but these concerns were not excited by guarantees of personal rights in the Constitution, of course, since there were virtually no such guarantees in the Constitution submitted to the states. (\textit{Virtually} none, because the prohibitions against ex post facto laws, bills of attainder and the suspension of habeas corpus are surely rights-bearing provisions.) Thus, the calls from Pennsylvania, Massachusetts, South Carolina, New Hampshire, Virginia and New York for amendments to the Constitution all included draft proposals that made explicit the enumerated powers rule of construction.\textsuperscript{14} These proposals

\textsuperscript{12.} A recent example of this view appears in Berger, \textit{The Ninth Amendment}, 66 \textit{CORNELL L. REV.} 1 (1980).

\textsuperscript{13.} This point, of course, has been made before. \textit{See, e.g.}, J. ELY, supra note 6, at 34-35; Kel- sey, \textit{The Ninth Amendment of the Federal Constitution}, 11 \textit{IND. L.J.} 309, 310 (1936).

\textsuperscript{14.} The proposals for amendments recommended by the several state ratifying conventions, which were those received by the First Congress from states ratifying the Constitution before the launching of the new government, also appear in \textit{4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS} (C. Bickford & H. Veit eds. 1986); (Massachusetts—"That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised." \textit{Id.} at 12.); (South Carolina—"This Convention doth also declare that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union." \textit{Id.} at 13.); (New Hampshire—"First That it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised." \textit{Id.} at 14.); (Virginia—"First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal [sic] Government. . . . SEVENTEENTH, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or other-
naturally predated the Bill of Rights and were responsive to the draft Constitution itself; they did not depend upon the prospect of such a listing-out of rights. They speak, as we would expect, in the language of federal and state power, not of personal rights.

In contrast, the concerns of those who—at least initially—opposed the inclusion of a bill of rights in the Constitution centered on the impact that such a specification of rights would have on rights not specified. A bill of rights was not resisted as a threat to the containment of federal power, but as a threat to the full realization of the very liberty it sought to protect. It was, after all, the federalists who initially opposed the inclusion in the Constitution of a bill of rights, and the anti-federalists whose real and tactical concerns about possible abuses of citizens by the national behemoth led them to press strenuously for such an explicit statement of rights against the federal government. Prominent quotations from the federalist stalwarts are familiar, but two especially well-known statements are worth setting out, in part because of some confusion which is latent in modern readings of them:

James Wilson, at the Pennsylvania convention on ratification:

In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitu-

wise as inserted merely for greater caution.” Id. at 17, 19); (New York—“That the Powers of Government may be reassumed by the People, whencesoever 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 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. at 19-20). I do not discuss the proposals offered by the 1789 North Carolina ratifying convention and by the 1790 Rhode Island ratifying convention, because these conventions submitted these proposed amendments after the First Congress proposed the Bill of Rights to the states for ratification. See R. Bernstein with K. Rice, Are We To Be A Nation? The Making of the Constitution 261-72 (1987) and sources cited therein.

Antifederalist minority blocs from the Pennsylvania and Maryland ratifying conventions proposed their own sets of amendments which they could not persuade the conventions to endorse formally. These proposals are presented in The Complete Anti-Federalist, supra note 11. Pennsylvania’s proposal appears in 3 id. at 150-52 and Maryland’s appears at 5 id. at 94-98. See especially 5 id. at 94-95 (proposal and explanation by Maryland ratifying convention’s Antifederal minority, quoted supra note 11). See also 2 The Documentary History of the Ratification of the Constitution, supra note 8, at 599 (convention debates, Dec. 12, 1787) (15th proposed amendment, submitted by Antifederal delegate Robert Whitehill: “That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States in Congress assembled”). (The 15th proposed amendment offered on the floor of the Pennsylvania ratifying convention is omitted from the list of 14 proposed amendments in The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, (Dec. 18, 1787), reprinted in 2 The Documentary History of the Ratification of the Constitution, supra note 8, at 618-40, and in 3 The Complete Anti-Federalist, supra note 11, at 147-67).
tion is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.\textsuperscript{15}

James Madison on the floor of Congress, arguing for the amendments which he had been moved to introduce, echoing the general federalist and his own previously announced concern\textsuperscript{16} that a bill of rights would

15. 2 The Documentary History of the Ratification of the Constitution, \textit{supra} note 8, at 388 (Nov. 28, 1787). Compare the alternative accounts of James Wilson's statement as recorded by Jasper Yeates, Anthony Wayne, and Alexander Dallas:

An enumeration of the rights of the people would be dangerous—for what are omitted are supposed to be excluded. (Yeates)

A bill of rights not even thought of in the Federal Convention; it was absurd. If we undertake to enumerate and omit any part of the rights of a people, their liberties are abridged or incomplete; and what is not expressly mentioned is taken for granted or ceded. (Wayne)

[I]t was not only unnecessary, but on this occasion, it was found impracticable; for who will be bold enough to undertake to enumerate all the rights of the people? And when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressively mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government is not so dangerous as an omission in recapitulating the rights reserved by the people. . . . In short, sir, I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution. (Dallas)

2 The Documentary History of the Ratification of the Constitution, \textit{supra} note 8, at 390-91 (emphasis in original).

Readers who find themselves involved with the surviving documentary evidence of the ratification conventions should be aware of the disputed reliability of Jonathan Elliot's compilation of the debates. The Debates in the Several State Conventions on the Adoption of the Federal Constitution \textit{supra} note 11, at 1-639. See Hutson, \textit{supra} note 9. Quotations in text above generally follow the Lloyd version, because it is deemed the most complete and reliable by the editors of The Documentary History. 2 The Documentary History of the Ratification of the Constitution, \textit{supra} note 8, at 324-25.

16. [G]entlemen apprehend, that by enumerating three rights, it implied there were no more. The observations made by a gentleman lately up, on that subject, correspond precisely with my opinion. That resolution declares, that the powers granted by the proposed constitution, are the gift of the people, and may be resumed by them when perverted to their oppression, and every power not granted thereby, remains with the people, and at their will. It adds likewise, that no right of any denomination, can be cancelled, abridged, restrained or modified, by the general government, or any of its officers, except in those instances in which power is given by the constitution for these purposes. There cannot be a more positive and unequivocal declaration of the principles of the adoption, that every thing not granted, is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied, that every thing omitted, is given to the general government? Has not the honorable gentleman himself, admitted, that an imperfect enumeration is dangerous? Does the constitution say that they shall not alter the law of descents, or do those things which would subvert the whole system of the state laws? If he did, what was not excepted, would be granted. Does it follow from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power.

Speech of James Madison at Virginia ratifying convention (June 24, 1788), \textit{reprinted in} 5 The Writings of James Madison 231 (G. Hunt ed. 1904). Compare this statement with Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) \textit{reprinted in} id. at 271-72:

As far as [alterations to the Constitution] may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who
do more harm than good to liberty, but assuaging that concern by reference to his draft of what was to become the ninth amendment (even fathers of constitutions have their share of labor pains):

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 General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into the system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.17

By contemporary lights, there is a shuffling of the language of rights and the language of power here, and that circumstance has been conceived by some to support the state law thesis that the ninth amendment was all about the cabining of federal authority, not the preservation of unenumerated personal rights.18 These commentators are able to take further solace from the language of Madison's draft of what was to become the ninth amendment, which perpetuates the shuffle:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.19 But even at face value, these formulations on fair reading indicate that the central concern leading to the ninth amendment was the potential

think such addition unnecessary, and not a few who think it misplaced in such a Constitution. . . . My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light—1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in the question are reserved by the manner in which the federal powers are granted. 2[,] because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. . . . 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience provides the inefficacy of a bill of rights on those occasions when its control [sic] is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.

(emphasis in original). Madison seems to have been heavily pragmatic about the question of a bill of rights—a question which, in fairness to him, was one of strategy rather than principle.

17. 1 ANNALS OF CONGRESS, supra note 9, at 439.
19. 1 ANNALS OF CONGRESS, supra note 9, at 435.
loss to the "rights of the people": these were the rights that Wilson feared would "be rendered incomplete" by the effort of specification, and these rights were the rights that Madison acknowledged would be left "insecure" by a bill of rights which did not include an amendment preserving as did his draft of the ninth the "just importance of other rights retained by the people."

Beneath the surface of the words of Wilson and Madison as they appear to the modern reader, this understanding becomes even more clear. Madison (and quite probably Wilson) used the language of rights and power in a perfectly sensible way, but in a way different than that common among contemporary constitutional commentators. For Madison the power of a government was the net authority of that government to act. In the case of the national government, this meant that power was restricted by two forms of withholding: the withholding in favor of the states implicit in the enumerated powers structure of the Constitution (made explicit in the tenth amendment) and the withholding in favor of personal rights. In such a linguistic scheme, it makes perfectly good sense to speak, as did Madison, of concern lest the Bill of Rights give rise to the 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," and mean simply that you fear for the loss of rights not specified; and in such a scheme it makes perfectly good sense to provide against such a misconstruction by stipulating that the specification of rights "shall not be 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 things do not run in the opposite direction: that is, it does not follow from this linguistic scheme that Madison would be led to speak of "rights retained by the people" as a means of referencing withholdings of federal power in favor of the states. Finally, lest we lose sight of the true object of our attention, it is worthy of note once again that the final text of the ninth amendment—which closely tracked the draft generated by the House of Repre-

20. Madison's notes for his speech of June 8, 1789 are given in 5 THE WRITINGS OF JAMES MADISON, supra note 16, at 389-90 n.1. One can get beneath the surface of Madison's remarks in another sense. In his notes for his speech to the House of Representatives on the Bill of Rights (from which speech the quote at supra note 16 is taken) Madison indicates, as he did not in the speech itself, that he saw state bills of rights as posing the same kind of risk to unenumerated rights that a federal bill of rights would pose. This seems contrary to the view that what troubled Madison about a federal bill of rights was the possibility that such a listing out could preempt explicit state personal rights, but entirely consistent with the idea that it is unenumerated federal personal rights that Madison saw as in peril. Caplan, supra note 10, at 255, cites the Madison notes, but seems to overlook their negative significance for his view.
sentatives' "Committee of Eleven" on which Madison sat—is all about rights; the language of power was reserved for the tenth amendment.

C. The Judicial Unenforceability Thesis

The unenumerated rights memorialized by the ninth amendment might be just what they seem to be—personal constitutional rights which enjoy the status of positive law—yet not be enforceable by the judiciary. That, after all, is the fate of those few, exotic matters that the federal judiciary treats as falling within the ambit of the political question doctrine, and not altogether different than the judicial restraint prescribed by the doctrine of deference with which the federal judiciary approaches a considerably more generous range of constitutional questions. But while deference is a familiar part of the constitutional landscape, its invocation requires some explanation; and the radical non-justiciability of the political question doctrine remains a rare deviation from the Marbury v. Madison norm, a deviation requiring powerful justification. The assignment of the whole lot of unenumerated rights referenced by the ninth amendment out of the hands of the judiciary before we have even considered what rights these might be demands a warrant that is far from obvious.

The apparent impulse behind the judicial unenforceability thesis is the sense that somehow democratic theory is better served if electorally accountable officials are the exclusive guardians of the unenumerated constitutional rights of the people. But remember the context in which this notion arises: presumably, we are not fighting the battle of Marbury v. Madison again; and we are assuming for the moment that the unenumerated rights addressed in the ninth amendment have the status of positive constitutional law. (It is certainly true that one brand of democratic theory might seem to encourage a reconsideration of this assumption, even at the cost of turning our backs on the ninth amendment; we will consider this brute force approach to the ninth amendment below in section III.) With these premises in place, the argument from demo-

21. The Committee draft read, "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people." House Committee Report, July 28, 1789, reprinted in 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 14, at 29. On August 17, 1789, a motion by Antifederal Representative Elbridge Gerry (Mass.) to strike out "disparage" and insert "impair" failed for lack of a second. 4 id. at 29 n.22. See also 1 ANNALS OF CONGRESS, supra note 9, at 783.

22. The statute of limitations has run, but my views on these matters remain close to what they were in Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1220-28 (1978).

23. 5 U.S. (1 Cranch) 137 (1803).

24. See infra text at p. 254.
cratic theory is singularly unpersuasive.

Consider what a judicially unenforceable constitutional norm is like: it is legal authority, binding on all persons and institutions that fall within its reach, supreme over competing sources of positive law except those which share its federal constitutional status; it lacks only in its susceptibility to judicial enforcement.25 If there are unenumerated, judicially unenforceable constitutional rights as promised by the ninth amendment on this reading, those rights command the respect of governmental actors whose conduct could transgress them; in the absence of judicial enforcement those actors are still obliged to winkle out these rights and to respect them at the expense of the conflicting impulses of their constituents. The problem from democratic theory thus does not go away, but simply travels with the burdens of obedience and enforcement.

Thus, there is nothing about elected non-judicial officials that qualifies them specially to respond to the rights referenced by the ninth amendment;26 and conversely, there is nothing about judges that disqualifies them specially. Indeed, just the reverse would seem to hold. Legitimate claims of constitutional right that do not enjoy an explicit textual provenance are especially needy of the independence and coherence27 best promised by the judicial process: independence because constitutional rights that do not announce themselves may be especially vulnerable to neglect; and coherence because the identification of such rights should depend on the judgment that they are of a piece with the broader jurisprudence of the Constitution.28

27. I addressed the question of coherence in judicial decision-making informally in Sager, What's a Nice Court Like You Doing in a Democracy Like This?, 36 STAN. L. REV. 1087, 1099-101 (1984); and formally (with my colleague Lewis Kornhauser) in Kornhauser & Sager, Unpacking the Court, 96 YALE L.J. 82, 102-15 (1986).
28. This last observation might be met with a contrary argument, as follows: In the end, Marbury and our sustained commitment to judicial review are premised on the empirical judgment that the risk of constitutional courts running amuck (Lochner) is less to be feared than the risk of unrestrained elected officials cheating on the Constitution (e.g., Margaret Thatcher banning the Spy-Catcher). But in the absence of a textual tether the running amuck risk grows so large as to reverse our ordinary judgment about these competing institutional hazards. Hence the justification for treating claims of unenumerated rights as political questions.

But, in the end, it is the good judgment of judges and structural limitations in and on the judicial process that we depend upon in our post-Marbury institutional arrangements, not the tether of constitutional text. The Lochner era, of course, makes this point from one direction: between the contracts clause, the takings clause, the substance gloss on the due process clause, and the enumerated powers structure of the power-conferring provisions of the Constitution, the Supreme Court had more than enough textual support to make any amount of trouble. Conversely, the great restraint which characterizes the Court's treatment of economic regulation and federal power issues in
D. The State Immunity Thesis

The rights encompassed in the ninth amendment’s allusion to “others, retained by the people” might be members of the constitutional pantheon in good standing, but signify only as restraints on the federal government. This comparatively modest reservation about the ninth amendment shifts the discussion from doubts about the proposition that there are valid claims of constitutional right which lack an explicit textual provenance to the question of whether such claims should run against the states as well as the federal government.

None of the rights-bearing provisions in the Bill of Rights run against the states of their own force, of course. But under the impulse to spread the constitutive norms of constitutional justice to all governmental entities, we have construed the fourteenth amendment to incorporate most of the Bill of Rights and make them applicable to the states. (The same impulse has led to the conclusion that the due process clause of the fifth amendment makes the norms of the equal protection clause applicable to the federal government.) The question, then, is whether there is any good reason to treat the claims of right referenced by the ninth amendment as ineligible for incorporation by the fourteenth amendment.

An argument to this effect might proceed as follows: “What distinguishes those norms in the Bill of Rights which we deem to have been ‘incorporated’ into the fourteenth amendment and hence made applicable to the states from those which we deem not to have been transmuted in this fashion is the centrality of the incorporated norms to the project of personal liberty to which the Constitution in general and the Bill of Rights in particular is committed. Notions of constitutional right which do not derive from the ratified text of the Constitution can be, at best, of the modern era does not emanate from textual exegesis of the Constitution, but rather from judicially developed theories of the Constitution’s project of just the sort required by any sensible use of the ninth amendment.

It is not the case that every sane society would opt for our institutional arrangements per Marbury. Many have not. But those arrangements have served us quite well on the whole and evulsive changes are not on the table. Within the framework of those arrangements, the case for exceptional treatment of unenumerated rights simply has not—and I believe cannot—be made.

29. In some hands, the argument for the state immunity thesis turns instead on the historical observation that the ninth amendment, like all of the provisions in the Bill of Rights, was not about limiting the states, nor about increasing federal power; rather it and they were about restricting federal power. See Berger, supra note 12, at 8-14. But of course this is persuasive if at all as an argument against incorporation in general, not about the rights referenced by the ninth amendment as special candidates for non-incorporation. Professor Berger sees incorporation as a colossal and reversible error. See, e.g., id. at 12-13. I am inclined to see incorporation as the laudable result of our correct understanding of the status of the Constitution, not as an embarrassment. See infra text p. 257.
only peripheral significance. Accordingly, if there are rights that pend to the ninth amendment, they surely do not qualify for application to the states."

Selective incorporation is a rather awkward doctrine, but it is easy to see how we got to it. Most of the Bill of Rights’ provisions seem to be central elements in a common understanding of constitutional justice; this is especially true because many of the provisions we would be inclined to think of in this light are pitched at a rather high level of generality, and in the act of interpreting them we conform them to a common understanding. Some provisions, however, while germane to the enterprise of constitutional justice, are at once particular in their demands and peripheral to the understanding which drives the enterprise. These latter provisions are not an embarrassment, since they do no real conceptual harm, but neither do they commend themselves for insertion into the fourteenth amendment by force. Hence the impulse to parse among the provisos in the Bill of Rights.

But matters are different in the realm of extratextual rights, where there is no pre-analytical stipulation of nominal rights. A claim of constitutional right unsupported by explicit text should not commend itself except upon a showing that it shares in the essence of our constitutional enterprise; there is no other justification for the embrace of such a claim. It gets things just backwards, therefore, to reason from the absence of textual support to the conclusion that a claim of right is marginal to the organizing vision of political justice underlying our constitutional jurisprudence.

III.

The implausibility of any of the interpretive options returns us to the head-on interpretation of the ninth amendment—to a metaconstitutional understanding of the liberty-bearing provisions of the Constitution as significant but incomplete instances of a general vision of the boundaries of legitimate governmental behavior. But we would gain little if we rested our examination of the ninth amendment without a consideration of the foundational impulse that has driven so many constitutional analysts to avoid the amendment’s obvious meaning. That impulse, I think, is majoritarianism.

Majoritarianism holds that the grounds of legitimate governmental choice is the conformity of that choice with the popular will. For the majoritarian, the Constitution itself must be reconciled with popular will; typically, this has drawn majoritarians to a view of the Constitution
which centers on its status as enacted law. On this account, the legitimacy of the Constitution depends upon the majoritarian bona fides of the process through which it was originally adopted and subsequently amended. This in turn has led many majoritarians to view the Constitution—Bill of Rights and all—as a closed system of more or less freestanding textual stipulations. For majoritarians of this stripe, principles of constitutional justice must be endorsed by explicit provisions in the Constitution's text: textual explication is essential because it alone is a durable tether to the will of the populace that blessed the Constitution with ratification.

There may well be other theoretical constructs than majoritarianism which lead to the view that constitutional interpretation must be confined to explicit text as the essential tether to the ratifying will. If so, the problem of reconciliation with the ninth amendment that we are about to consider will dog these theories as well. So the comments which follow, while addressed to majoritarianism, can be generalized over the family of theories that have this common meta-interpretive payoff.

Taken straight, the ninth amendment raises obvious difficulties for the text-as-tether view: it flatly contradicts an insistence on explicit constitutional text. We ought to take a moment to focus on just why this contradiction is troubling. It is not the case, after all, that documents or persons which announce that they are to be interpreted in a certain way necessarily have to be listened to. The command "follow my orders precisely!" is logically presumptuous in a remarkable sense: it presumes exactly what it purports to direct, namely that the commander is entitled to be listened to strictly.30 (There is a notorious example of this sort of conundrum in our constitutional jurisprudence. In round three of a famous nineteenth century dispute over land title,31 the high court of Vir-


31. In brief (and to many readers, familiar) sketch, the litigation involved a dispute between Martin, who claimed title by devise from Lord Fairfax of a large chunk of Virginia, and Hunter, who claimed title by grant from the state of a mere 788 acres of that land. Hunter's claim depended on the lawfulness of the seizure of Fairfax's land by the state, and Martin's claim on the immunity of those lands against seizure by virtue of two treaties. Crucial to the force of the treaties was a question of the timing of Virginia's purported seizure. In round one, the Virginia Court of Appeals ruled for Hunter (Hunter v. Fairfax's Devissee, 15 Va. 218, 232 (1810)). In round two, the Supreme Court of the United States reversed, finding for Martin (Fairfax's Devissee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813)). In round three, the outraged Virginia Court of Appeals disputed the authority of the Supreme Court itself. With separate opinions by each of the court's four judges, the Court of Appeals unanimously held that the Supreme Court of the United States was not superior to the high court of Virginia or any other state, and was not constitutionally empowered to direct such courts to revise their judgments (Hunter v. Martin, 18 Va. 1, 58 (1814)). Round four is discussed in the text accompanying note 32. The controversy—including the great personal, professional and political rivalry between John Marshall and the President of the Virginia Court of Appeals, Spencer Roane,
ginia held that the Supreme Court of the United States lacked constitutional authority to review state court decisions; in round four—which we know as *Martin v. Hunter's Lessee*—the Supreme Court reversed, solemnly assuring the Virginia tribunal that the national court could indeed exercise this power under article III of the Constitution. The problem, of course, is why the high court of Virginia should listen to a Supreme Court which it had already determined had no authority over the matter at hand.)

But the problematic status of interpretive intent or interpretive commands in general can offer no solace to constitutional theorists who have already decided that their job is to obey the textually specific commands and only the textually specific commands of the Constitution. These theorists are unwitting members of a family which you will recognize as soon as I introduce some of its members: the male army barber under orders to shave all those men but only those men who do not shave themselves, his sister, who regularly asserts that "No generalities are true," and their ne'er-do-well cousin who reluctantly admits that everything he says is a lie. Constitutional theorists who take themselves to be bound to the explicit commands of the Constitution are placed in the same position of self-reference and self-contradiction by the ninth amendment, which textually commands them to abandon their bounds.

As conversation pieces, paradoxes of this sort are amusing, and even which was prominent in the background—is detailed in 4 A. Beveridge, *The Life of John Marshall* 144-67 (1919). The curiosity, of course, centers on round five: surely the Virginia Court had no analytical reason for treating the Supreme Court's judgment, as to its own power, as binding. (The thought that the question is political rather than analytical is reinforced by the replay of these events in a modern context with very different results, as described infra note 36).

32. 14 U.S. (1 Wheat.) 304 (1816).

33. As suggested supra note 31, the ultimate outcome in the Fairfax land litigation was neither analytical nor inevitable. Things went very differently in a modern Rhodesian paraphrase of the Virginia litigation. After its unilaterally declared independence in 1965, the Rhodesian government denied the validity of its earlier (1961) constitution, and rejected all forms of legal subordination to England. The Rhodesian courts endorsed the premise that the new (1965) Constitution was valid, and held that English authority no longer reached Rhodesia. *Dlamini v. Carter*, 2 S.A. 467 (1968). But England continued to assert its authority, and the Privy Council—in the course of hearing a criminal appeal from Rhodesian preventative detention (*Madzimbamuto v. Lardner-Burke*, 2 S.A. 284 (1968))—held the 1965 Constitution and the entire Rhodesian regime to be invalid under the 1961 Constitution. The Privy Council's ruling of course included the vital proposition that it was still entitled to act in review of the Rhodesian courts, notwithstanding the 1965 constitution's provisions to the contrary. This set the stage for criminal appellants in another Rhodesian case to argue that their indictments were invalid because they charged offenses under the regime of law declared unconstitutional by the Privy Council. This placed the Rhodesian judiciary in the position of choosing up. Buttressed by lengthy and learned opinion the Rhodesian judges (with explicit reference to their own situations as employees of the new constitutional regime) did the inevitable. *R. v. Ndlovu*, 4 S.A. 515 (1968).
instructive. But when dilemmic moments like this crop up within the precincts of a real-world program for interpreting the Constitution, the logical paralysis they carry becomes a matter of no little concern. To appreciate the bleak options open to text-as-tether theorists who confront the ninth amendment, imagine that we had their assignment.

We could, of course, simply ignore the ninth amendment; but, without more, that would be an unjustified lapse from our commitment to serve the explicit provisions of the Constitution. Or we could struggle to interpret our way around what our interpretive methodology would otherwise indicate was the full and fair meaning of the ninth amendment in order to avoid embarrassment to our entire enterprise; but that would simply be another form of lapse, of course. However tempting, these courses could not commend themselves as compatible with our responsibilities.

So suppose we just give in. It might seem instinctually wrong to float away from the text of the Constitution as the ninth amendment dictates, but after all a text-specific order is a text-specific order. Why not simply obey this one? Unfortunately, things are not so simple. If our commitment to explicit text is for some good reason, like the foundational view that the exclusive grounds of legitimate governmental choice is conformity with the popular will, then that reason itself will be confounded by obedience to the ninth amendment's interpretive command. The majoritarian provenance of the ninth amendment is not sufficient, any more than would be that of a ratified constitutional amendment which created a feudal monarchy. As majoritarians we could not accept the perfectly enacted command to give ourselves over to a monarchy, and as majoritarians we cannot accept the directive of the ninth amendment, since it insists that we consult some source other than the enacted constitutional text to inform constitutional decisions that will prevail over the will of contemporary social majorities.

If we cannot join the ninth amendment, suppose we try to beat it: in light of our foundational commitment, we could disavow the message of the ninth amendment with regret, and continue with our general enterprise of text-specific constitutional interpretation of everything else in the Constitution. We would not be simply ignoring the amendment, but rather making a studied judgment that the same foundational commit-

34. Interested lay readers owe themselves the pleasure of R. SMULLYAN, WHAT IS THE NAME OF THIS BOOK? (1986).
35. See Sager, supra note 26, at 443-44.
ment which draws our allegiance to the Constitution requires that we disregard some of its stipulations.

This seems a relatively cheap way out of our bind. True, a piece of the Constitution has to be jettisoned, but this would not be the first time. (The contracts clause is one instance that comes to mind. Even after its second coming\(^3\) it is much reduced from its once vital form.) The model for this proposal is the situation in which a statute provides for \(X, Y,\) and \(Z\), a court finds that \(Z\) is invalid, the court severs and nullifies the invalid part, and then the court proceeds to enforce the balance of the statute. But the ninth amendment, unfortunately, is not a discrete branch which can be pruned leaving the rest of the constitutional tree intact. The ninth amendment has general implications for the liberty-bearing provisions of the Constitution which cannot be ignored without unseating our project of text-specific interpretation.

Let me make the point by shifting the story for a moment. Imagine a game of constitutional interpretation—"The Unenumerated Powers Game"—with the following instructions:

Assume that the tenth amendment has been replaced by an amendment stipulating that the enumerated powers of the federal government are only instances or examples of a general police power possessed by the national government. Everything else about the Constitution is the same. This one change aside, you are to construe the provisions of the Constitution—including, of course, the first three articles—with strict regard to the intent of the framers.

The instructions to this game are not only bizarre, but incoherent. Construing article I "with strict regard to the intent of the framers" is impossible once the enumerated powers structure is turned inside out. The best we could do, in one sense, would be to read the list of congressional powers in article I, section 8 as narrowly and consistently as possible in order to see them as instantiations of a comparatively limited understanding of the "general police power" possessed by the federal government. Even this modest move in the direction of the actual intent of the framers would have its problems, since whatever was gained would be at the expense of the generous spirit of the initial rule of the game.

Reading the ninth amendment out of the Constitution in order to remain faithful to our (assumed-for-purposes-of-playing-this-possibility-out) majoritarianism is futile in the same way as is the unenumerated powers game. The ninth amendment confirms that the liberty-bearing

provisions of the Constitution and Bill of Rights were responsive to notions of political morality; that they were not disembodied acts of capricious will that somehow gained widespread support; that they were linked as part of a more general understanding; and that they were not exhaustive of the fabric of which they were a part. To read them as self-contained and exhaustive is to badly misread them, if one is in pursuit of the enacted text as a tether to the will of the enacting generation. To be sure, it is logically possible to blind ourselves to the ninth amendment and reject the picture of the liberty-bearing provisions of the Constitution that it advances: we can read and interpret the Constitution clause by independent clause, eschewing links and respecting lacunae. But what could we possibly hope to gain by the exercise? Surely not our majoritarian objective of conformity with the enacted Constitution: the trauma to the interpretive milieu of the liberty-bearing provisions of the Constitution caused by the repudiation of the ninth amendment is simply too great. In effect, we have just pushed the paradox of the majoritarian reader of the ninth amendment to another level; we have not surmounted it.

Somewhat more complicated is the status in light of the ninth amendment of sophisticated versions of majoritarianism. John Ely, for example, has argued for an interpretive regime pursuant to which the explicit text of the Constitution is augmented by judicial doctrine, but only to the limited end of perfecting the majoritarian process.37 Consider two arguments on behalf of Professor Ely's claim, one foundational and the other substantive:38

*Foundational:*

(a) We begin with majoritarianism as our foundational account of the Constitution, and conclude accordingly that we are bound to the explicit text of the document as a tether to the will of the ratifying population.

(b) Then we observe the lesson of the ninth amendment that the explicit rights-bearing provisions of the Constitution are instantiations of a broader understanding of the proper relationship between a government and its citizens, a relationship secured in part by unenumerated positive legal rights.

(c) Finally, we conclude that the only way we can make sense of these apparently conflicting demands is to let loose of the text as required by (b), but at the same time to confine our interpretive free-flights to the project of perfecting the majoritarian process, in order to avoid doing violence to (a).

38. See * supra* note 4, for a discussion of the distinction between foundational and substantive accounts of the Constitution.
Substantive:

(a) We start with a non-majoritarian foundational account of the Constitution, an account which does not bind us to the explicit text of the document, but rather directs us to fit the rights-bearing provisions of the Constitution and the tradition which pends to them into a general understanding of the proper relationship between a state and its citizens.

(b) In response to the metaconstitutional mandate of (a), we develop the required understanding of our tradition of constitutional rights, pursuant to which it emerges that the object of the individual rights aspects of the Constitution is the protection of the majoritarian process.

(c) Accordingly, the project we assign to the constitutional judiciary is the perfection of the majoritarian process.

The problem with the foundational argument should be familiar: it perpetuates the paradox of the ninth amendment and majoritarianism. The move from a majoritarian foundational account directly to an insistence that interpretive access to the Constitution be confined to oversight of the majoritarian process suffers the embarrassment of Procrustes: there is simply too much left over. The majoritarian who follows Ely on foundational grounds remains in much the same quandary as the simple, text-bound majoritarian. By artificially truncating the scope of the interpretive enterprise, this move renders incoherent the ongoing commitment of the majoritarian to pursue the enacted intentions of the framers.

The substantive argument does not suffer from this difficulty. It is logically possible that an unrestricted inquiry into the project of the Constitution—the project of which the rights-bearing provisions of the Constitution are non-exhaustive instantiations—could result in the conclusion that it is all about the perfection of the majoritarian process. Were this the case, an exclusive commitment to that project would of course be entirely consistent with the metaconstitutional mandate of the ninth amendment. But this would not be majoritarianism in the foundational sense, a political theory brought to the Constitution; it would be a substantive interpretation taken from the Constitution. The difference is crucial. Suppose we were taking up the question of whether the constitutional recognition of an autonomy right along the lines of the right of privacy was appropriate. The argument in favor of recognition would have to include a substantive account of the Constitution's project pursuant to which the right of privacy was essential; that account would of

39. Ely himself relies on the foundational claim from majoritarianism (though he appears to believe the substantive claim to be true as well). See J. Ely, supra note 6, at 4-9; cf. id. at 88-101.
course contradict the perfection of the majoritarian process account, and we would have to choose between these competing interpretive renditions of the Constitution. What would not be on the table, though, is a disposing foundational claim from majoritarianism that would rule the right of privacy account out of order.

In the end, majoritarian objections to the ninth amendment simply cannot work. To the contrary, it is majoritarianism which is imperiled by the witness of the ninth amendment. This is an important proposition, of course, since it disqualifies support for a prevalent understanding of the Constitution. (The ninth amendment is not the cause of the difficulty, but merely an insistent reminder of the important structural reality of the Constitution which is the cause of the difficulty—just as the tenth amendment is a reminder rather than a cause of the enumerated powers structure of the Constitution.) If the ninth amendment does nothing more than help defeat majoritarian misunderstandings of the rights-bearing provisions of the Constitution, it will have served well.

It does not follow from the defeat of majoritarianism, however, that the ninth amendment prevails. All we have done is dispatch what may have seemed like a formidable objection to taking the amendment at face value and pursuing the methodology it commends. For the ninth amendment's understanding of the rights-bearing provisions of the Constitution to command our analytical allegiance, we must arrive at a foundational view of the Constitution that leads to an interpretive stance consistent with the amendment's reminder of the nature of the constitutional enterprise. Since we know that majoritarianism and other text-as-tether foundational views are unable to make peace with the Constitution itself, the incentive to develop such a foundational view is great.

IV.

One question is bound to arise from a serious encounter with the ninth amendment: have we (judges, scholars, and other constitutional decisionmakers and commentators) been getting it wrong all these years? After all, the ninth amendment has been relegated to a dark corner of the constitutional closet into which almost no one seems anxious to poke. If such a neglected piece of the Constitution is really as central to the meaning of the rights-bearing provisions as I have suggested, it is reasonable to wonder whether we have bungled the business of constitutional interpretation in some chronic, endemic way. (There lurks the opposite point, as well: namely, that an interpretive adverse possession sets in after 200
There is no methodological generalization that holds over the run of our constitutional jurisprudence, of course, but I think that prominent features of our constitutional tradition can best be explained as reflecting rather than defeating the structural understanding of the Constitution for which the ninth amendment stands. The most distinct of these is the doctrine of incorporation, which is a chronic conceptual embarrassment to constitutional analysts. Nothing about the due process clause of the fourteenth amendment, of course, offers any comfortable support for imposing Bill of Rights limitations on the states; and the job of explaining ourselves in this regard is made if anything more difficult by the selective nature of the incorporation process, pursuant to which small parts of the Bill of Rights have been omitted. As troubling as these matters may be, they recede in the face of the baldly prochronistic doctrine that the due process clause of the fifth amendment incorporates the principles which underlie the equal protection clause (ratified roughly 100 years later). Salvaging operations have been mounted, in the form of the observation that the privileges or immunities clause would provide a better fourteenth amendment home for incorporation,40 and the suggestion that we ought in any event live with the mistake of incorporation in the name of stare decisis.41 But I think these analytical patches miss—indeed obscure—the point. Almost no one really believes that incorporation in either direction is a mistake; and the impulse to affirm incorporation owes little or nothing to a subliminal reading of the privileges or immunities clause message. Rather, we understand the liberty-bearing provisions of the Constitution to reflect a general view, or project, of political justice. In the face of that understanding, we are naturally moved to spread the reach of those provisions to all governmental entities; and in the face of that understanding, confinement to the explicit text of the Constitution is no virtue.42

The right to travel and the right of privacy (both of which happen to be infelicitously named43) are also prime exhibits, of course. Neither has an explicit textual basis in the Constitution. While the right of privacy has been the object of dispute, that dispute on the whole has been about

42. See supra text pp. 249-50.
43. The right to travel is close, but Professor Gunther’s “right to interstate migration” is surely more to the point. G. GUNThER, CONSTITUTIONAL LAW 832 (11th ed. 1985). The right to privacy is simply misleading; it is of course an autonomy right, not a privacy right.
the application of the right, not its basic legitimacy as a strand of constitutional analysis. The right to travel is perhaps a more compelling example for those who have yet to come to terms with the right-of-privacy-based notion that there are some matters of personal choice not involving speech or religion which are simply outside the reach of governmental fiat. No one seems troubled by the right to travel. To the contrary, the Supreme Court—correctly I think—points to the absence of an explicit textual home for the right with pride, as a kind of evidence of the centrality of the right to the constitutional project of which it is indisputably a part.44

Beyond discrete prominences like incorporation, the right to travel and the right of privacy, there is a more general pervasive way in which constitutional law is compatible with the ninth amendment. Equal protection has been fortified to bar racial segregation, protect voting rights and apportion electoral power, and restrain discrimination on grounds of gender, legitimacy and alienage; the establishment clause has been rediscovered and given a strangely variegated life of its own; a broad and complex tapestry of speech centered liberty has been woven; the contract clause has waxed, waned, waxed and waned again. Everywhere in the jurisprudence of constitutional rights there runs the sense of a sustained project to define and maintain the proper relationship between government and its citizens. The text of the Constitution itself is seldom more than a point of departure in the effort.

V.

There is a tendency among those who choose to read the ninth amendment to mean what it says to be rather picky with their own choice of language; these concerns with terminology are wrapped up with more basic matters, and merit attention. The phrase "ninth amendment rights", for example, is disfavored, since what the amendment actually does is offer an interpretive gloss for the liberty-bearing facets of the Constitution as a whole. This raises the question of just where the non-textual claims of constitutional right countenanced by the ninth amendment are to find their constitutional home. It is not at all clear that rights which lack the support of explicit text are advantaged by being assigned to catch-all textual phrases. The right to travel and the right to privacy, for example, do just fine on their own. Claims of this sort cannot float in the air; they are woven into the fabric of constitutional justice, with sig-

significant ties to the explicit liberty-bearing provisions of the Constitution. But banding them with text as general as "privileges or immunities of citizens of the United States" or as misused as "due process" neither aids nor usefully records the process of evaluating these claims in light of our constitutional jurisprudence.

VI.

Our titular point of departure was the question of what you can do with the ninth amendment. The answer, I think, is simply this: you can remember the ninth amendment. (Once you have done so, it is not at all clear what you can do with majoritarianism as a foundational account of the Constitution.)