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Mark Niles

NINTH AMENDMENT ADJUDICATION: AN ALTERNATIVE TO SUBSTANTIVE DUE PROCESS ANALYSIS OF PERSONAL AUTONOMY RIGHTS

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Notwithstanding decades of significant legal scholarship focusing on the Ninth Amendment to the U.S. Constitution, a large portion of the practicing legal community, and even a substantial percentage of legal scholars, are unfamiliar with the provision. The primary reason for this phenomenon is the striking absence of an identifiable body of Ninth Amendment adjudication. In this Article, Mark Niles focuses on this phenomenon and endeavors to develop an interpretative theory of the amendment upon which an adjudicative role can be founded.

In Part I of this Article, Niles outlines the traditional judicial treatment of the Ninth Amendment, or more precisely, the remarkable lack of judicial treatment. He asks why courts have been willing to interpret and apply other "open-ended" constitutional language, but have all but completely left the Ninth Amendment alone. He concludes that the feature that sets the Ninth Amendment apart from other constitutional provisions, and which has resulted in its jurisprudential dormancy, is its lack of an apparent interpretive "theme."

In Part II, relying on the political theory of John Locke and a review of the intent of the drafters and ratifiers of the amendment, Niles identifies this hidden theme, arguing that the Ninth Amendment is essentially about the proper balance between personal freedom and government action that seeks to infringe upon that freedom. The "rights retained by the people," discussed in the amendment, are rights to act in ways that pose no threat of harm to others or the community as a whole, and the amendment stands for the proposition that government action that seeks to restrict or regulate such "private" acts is illegitimate. In Part III, Niles suggests

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an adjudicative mechanism for resolving Ninth Amendment claims. The Ninth Amendment mechanism mirrors that employed in resolving disputes regarding the application of the Equal Protection Clause of the Fourteenth Amendment to the extent that it also seeks to identify government action that is motivated by an invalid motivation—in the case of the Ninth Amendment, an intent to restrict private activity—and to preclude such action.

In Part IV, Niles compares this new adjudicative mechanism to the device currently used to address disputes over the proper extent of personal freedom "substantive" due process analysis. Niles argues that Ninth Amendment jurisprudence would be a significant improvement over substantive due process adjudication of issues of personal freedom and government regulation, because it would provide the textual and normative foundations for a concept of personal autonomy that substantive due process cannot provide. In Part V, he applies the Ninth Amendment adjudicative mechanism to two major substantive due process cases of the twentieth century, Bowers v. Hardwick *and* Lochner v. New York, *to demonstrate both the vitality of the Ninth Amendment mechanism and its advantages over substantive due process. Niles concludes that in addition to providing a more satisfactory result in the sample cases, Ninth Amendment adjudication, regardless of the outcome in any particular case, would allow the legal community to better address the balance between personal freedom and legitimate government action, and therefore, facilitate the creation and preservation of the freest (and safest) possible society.*

> *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*[1]
>
> *To every suggestion concerning a bill of rights, the citizens of the United States may always say, We reserve the right to do what we please.*[2]
>
> *Know your rights . . . all three of 'em!*[3]

INTRODUCTION

Mention the Ninth Amendment to an attorney and you are bound to elicit a confused and somewhat embarrassed frown. After an awkward moment, the hapless colleague will usually pretend he did not hear you, unless he is uncommonly curious, in which case he might just smile and tentatively respond: "Right, the *Ninth* Amendment. Which one is that again?"

The Ninth Amendment's obscurity among attorneys, although quite understandable thirty years ago, is more difficult to explain today. Since its somewhat dramatic emergence into the jurisprudential spotlight in the second half of the twentieth century, first in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*[4] in 1965, and then in the well-publicized Senate

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1. U.S. CONST. amend. IX.
2. 2 ELLIOT'S DEBATES 437 (Jonathan Elliot ed., 2d ed. 1836) (quoting James Wilson).
3. THE CLASH, *Know Your Rights*, *on* COMBAT ROCK (Epic Records 1982).
4. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring). In his concurring opinion, joined by Chief Justice Earl Warren and Justice William J. Brennan, Justice Arthur J. Goldberg argued that the Ninth Amendment provides constitutional protection for certain fundamental rights not mentioned explicitly in the U.S. Constitution. Justice Goldberg argued for a revitalized Ninth Amendment, explaining:

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment . . . .

Id. at 491.

confirmation hearings for U.S. Supreme Court nominee Robert Bork in 1987,[5] what started out as a stream of occasional discussion about the amendment has grown into a relative gusher of comment in an impressive number of law review articles[6] and books,[7] capped most recently by the extensive discussion of the Ninth Amendment in Professor Charles Black's recent study of the U.S. Constitution and its role in the protection of human rights.[8]

But this growing academic interest[9] has not spilled over into the practicing legal community. In the case of the Ninth Amendment, unlike other

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5. Indeed, it has been convincingly argued that Judge Robert Bork's discussion of the Ninth Amendment was a crucial factor in his ultimate rejection by the Senate. *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 115, 119 (Randy E. Barnett ed., 1993) [hereinafter THE RIGHTS RETAINED BY THE PEOPLE]. Later candidates for the U.S. Supreme Court have had more success and have taken a more open view of the meaning and importance of the Ninth Amendment. *See id.* at 119–20 ("The subsequent hearings concerning the confirmation of now-Justice Anthony Kennedy also included significant references to the Ninth Amendment, and his seemingly more favorable references to the amendment helped to warrant the view that he is distinctly more 'moderate' than Bork.") The Ninth Amendment was also a topic of discussion between Justice David H. Souter and Senator Joseph Biden in the former's confirmation hearings for the Supreme Court. Whether Souter's views on the amendment had any impact on his ultimate confirmation cannot be determined but it is notable that he took a significantly more optimistic view of the amendment's usefulness than Judge Bork. *See* 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra*, app. B at 478 (Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States) (quoting Justice Souter's explanation that while the Framers' intent is not entirely clear, he "count[s] [him]self a member of that school" that views the Ninth Amendment as an acknowledgement that the enumeration of rights in the Bill of Rights was not intended to be "exhaustive"); *see also* Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 63 (1996) (noting that the Senate's rejection of Judge Bork appeared to be in part the result of his views on the Ninth Amendment).

6. *See, e.g.*, Robert M. Hardaway, *The Right to Die and the Ninth Amendment: Compassion and Dying after* Glucksberg *and* Vacco, 7 GEO. MASON L. REV. 313 (1999); Symposium, *Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988); Randy Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988); Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment*, 5 SETON HALL CONST. L.J. 435 (1995); Chase J. Sanders, *Ninth Life: An Interpretive Theory for the Ninth Amendment*, 69 IND. L.J. 759 (1994).

7. *See, e.g.*, MARSHALL L. DEROSA, THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE: DISPARAGING THE FUNDAMENTAL RIGHT OF POPULAR CONTROL (1996); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5.

8. *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM (1997).

9. Professor Sanford Levinson has provided an explanation for the increased attention that legal scholars have paid to the Ninth Amendment in the past decade. *See* Levinson, *supra* note 5, at 123. He explains that there are several "contending modalities" of arguments used by constitutional scholars to express their opinions and convince their colleagues. He contends that the two most dominant of these are the "textual" and "historical" modalities. He argues that the emergence of Ninth Amendment scholarship can be viewed, at least in part, as an attempt by certain adherents of the textual and historical modalities to prevent certain influential purveyors of the new original intent orthodoxy, namely,

> the Meeses and Borks [from claiming] victory in regard to their claim that there is no textual or historical warrant for certain doctrines like that of "privacy." As a political matter,

notable instances, scholarly focus has not translated into an identifiable increase in Ninth Amendment adjudication.[10] Although a few Supreme Court justices have mentioned the amendment—usually to provide a kind of indirect thematic support for the assertion of an unenumerated right identified in another provision of the Constitution[11]—no Supreme Court decision,[12] and few federal appellate decisions, have relied on the Ninth Amendment for support.[13]

> such a concession is simply stupid, something to be done only if no one believes that there is no alternative. Thus, the revival of the [N]inth [A]mendment, for many of the arguments made by its proponents rely precisely on what Meese and Bork purportedly respect—constitutional text and historical intention.

Id. Levinson's perception of the intellectual and political motivation for study of the Ninth Amendment accurately describes much of this author's fascination with the subject, even if it does not characterize the interest of others.

10. Various scholars have addressed the question of whether legal scholarship has a significant impact on actual adjudication. These scholars have generally reached the conclusion that one of the major motivations for the publication of law review articles is "their influence and impact on the development of the law" and also that "law reviews of the late nineteenth and early twentieth centuries had an especially significant impact on the development of the law." Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 22, 26 (1996).

11. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 n.15, 579–80; (1980); Roe v. Wade, 410 U.S. 113 (1972).

> The right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153; Griswold v. Connecticut, 381 U.S. 479, 486–87 (1965) (Goldberg, J., concurring).

12. In addition to the cases cited *supra* note 11, the Ninth Amendment has received substantial treatment in only three majority decisions of the Supreme Court. In two of those cases, the Ninth Amendment claims were quickly rejected. *See* United States v. Orito, 413 U.S. 139, 140–41 (1973) (rejecting summarily the argument that the Ninth Amendment protects individuals from prosecution for placing obscene films in interstate commerce); Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 143–44 (1939) (holding that a federal effort to create hydroelectric power with dams on the Tennessee River did not violate the constitutional right of private companies to sell electricity in the region). In the third case, *United Public Workers v. Mitchell*, 330 U.S. 75, 95–96 (1947), the Court provided the most extensive pre-*Griswold* discussion of the Ninth Amendment, articulating a limited, ultimately untenable interpretation of the amendment that survives today in the form of the "right-powers" theory, which is discussed at *infra* note 30.

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

United Pub. Workers, 330 U.S. at 95–96.

13. With a few notable exceptions, judges of the United States Courts of Appeals have not engaged in significant analysis of the Ninth Amendment. Even in cases in which the amendment has been discussed, it has not been central to the court's decision, and has rarely provided the sole, or even the most important basis for a decision. *See* Hardwick v. Bowers, 760 F.2d 1202, 1211–12 (11th Cir. 1985) (holding that the Ninth Amendment and "the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment" "prevents the States from

Indeed, federal courts that have discussed the Ninth Amendment have almost exclusively held that it does not confer any substantive rights.[14]

Professor John Hart Ely observed twenty years ago, and it remains true today, that "[i]n sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh," and the Ninth Amendment is far more likely to be the punch line of a sarcastic joke—"'What are you planning to rely on to support that argument, Lester, the Ninth Amendment?'"[15]—than to be relied on in an attorney's argument or a judge's opinion.

This Article is a response to this perception, and an attempt to alter it by articulating both a theoretical foundation for the Ninth Amendment and a practical mechanism for its judicial application. It argues that the Ninth Amendment, now a subject of significant legal scholarship, should also play a meaningful role in constitutional adjudication. It demonstrates that the development of an active Ninth Amendment jurisprudence is not only possible as a theoretical matter but is essential to the development of an effective and responsive body of law governing issues of privacy and personal autonomy.[16] Ninth Amendment adjudication would fill a critical void in our personal autonomy jurisprudence by providing courts with a more appropriate and effective means of resolving some of the major individual rights disputes of this century.

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unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society"), *rev'd*, 478 U.S. 186 (1986); United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) (holding that the First Amendment guaranteed the claimants a right to immediate access to transcripts of a pretrial hearing but also referring to the Supreme Court's discussion of the Ninth Amendment in *Richmond Newspapers*).

The only notable exception to this judicial treatment of the Ninth Amendment comes from a decision of the three-judge district court panel in *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970) (relying on Justice Goldberg's interpretation of the Ninth Amendment, the court held that "[t]he essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals").

14. *See, e.g.*, Green v. Hill, 73 F.3d 361 (6th Cir. 1995); Quilici v. Vill. of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982) ("Since appellants do not cite, and our research has not revealed, any Supreme Court case holding that any specific right is protected by the [N]inth [A]mendment, appellants' argument has no legal significance.").

15. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34 (1980).

16. In the remainder of this Article, I use the terms "privacy" and "personal autonomy" in a manner that might suggest that I consider them substantially synonymous. To the contrary, the terms identify two different concepts; the former defined perhaps most directly by proximity and the quantity of companionship and qualities of spatial relationships, while the latter is more closely related to broader and more esoteric issues of personal identity, and spiritual and intellectual freedom. In addition, I believe that the concept of privacy can be readily subsumed as a smaller subset of the broader concept of personal autonomy. So, based on this understanding, I use one of the terms as opposed to the other when necessary, and I use the more general term "personal autonomy," in the interest of brevity, when the general term is sufficient.

An additional goal of this Article is to demonstrate the advantages that Ninth Amendment adjudication of privacy disputes would have over the traditionally applicable mechanism—substantive due process analysis. Since the turn of the twentieth century, judges have consistently relied on the judicially created mechanism of "substantive" due process to provide legal support for decisions finding that some government action violates the "liberty" interest of an individual or group of individuals.[17] Under substantive due process analysis, state actions that burden so-called "fundamental rights" are presumed to be unconstitutional, while state actions that otherwise infringe on personal autonomy are generally reviewed under the Equal Protection Clause's much less exacting rational basis standard.[18] The awkwardness of this analysis has created controversy on many levels,[19] from those arguing that there is no textual basis for substantive due process in the Constitution,[20] to those

17. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (holding that a statute prohibiting teaching in any language other than English infringed upon the liberty to make educational decisions and thus was a violation of the Due Process Clause of the Fourteenth Amendment); Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a New York statute requiring that employees not be required to work more than a specified number of hours infringed upon "the freedom of master and employee to contract with each other in relation to their employment" and thus violated the Due Process Clause of the Fourteenth Amendment); Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (holding that a Louisiana statute prohibiting residents from procuring insurance from out-of-state insurers violated their liberty to contract and thus violated the Due Process Clause of the Fourteenth Amendment).

18. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end").

19. As Professor Charles Black noted in his recent book,

> [The application of substantive due process] follows no sound methods of interpretation (how could it, given the nature of the phrase itself?) and is therefore neither reliably invocable in cases that come up, nor forecastable in result by anything much but a guess. This kind of non-standard is not good enough for a systematic equity of human rights. It everlastingly will not do; it is *infra dignitatem*, it leaks in the front and leaks in the back.

BLACK, *supra* note 8, at 3.

20. Black also makes the following point:

> The Fourteenth Amendment guarantee of "due process of law: can and to a large extent does combine with the same clause of the Fifth Amendment to ground a developing series of national rights to 'fair *procedure*.'" But this does not, on its face or in the normal meaning of its words, or in its natural implications, guarantee any *substantive* human rights. It says, for example, that you cannot be tried before a bribed judge, or without being informed of the charge against you. But it does not say that you cannot be sent to prison by an unbribed tribunal for marrying before the age of forty, if a state statute sets that as the minimum age—provided only that the trial, by which you are found guilty in fact of marrying at thirty-nine, is *procedurally* fair.

Id., at 2–3; *see also* ELY, *supra* note 15, at 18 ("Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 493–94 (1997).

> A reader of the Supreme Court's substantive due process cases can come to feel like a moviegoer who arrived late and missed a crucial bit of exposition. Where is the part that

complaining that the mechanism calls on judges to act in a manner that is inconsistent with both their skills and their role in our tripartite system of government.[21]

An active Ninth Amendment adjudicatory mechanism would provide an alternative for resolution of personal autonomy disputes unfettered by these problems. First, Ninth Amendment adjudication would provide the textual foundation for the somewhat ephemeral (and consequently tenuous) constitutional right to personal autonomy. Second, Ninth Amendment adjudication would significantly alter the actual adjudication of personal autonomy claims. Properly conceived and applied, it would require a new focus on neglected but essential questions surrounding and infusing these disputes. These questions include: What is the appropriate limit on individual freedom in our society, and when does this freedom unduly infringe on the rights of others; what is the legitimate role that government can play in restricting this expression of freedom; and finally, what are the appropriate justifications for such restrictions?

Substantive due process adjudication tends to ignore these questions and to obscure the conflict between individual freedom and legitimate government action. Instead, it focuses on positive descriptions of the historical treatment of such disputes exemplified by judges' decisions and legistures' provisions.

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explains the connection between this doctrine and the text of the constitutional provisions from which it takes its name? This is not a piece of exposition that a reader can easily supply. In fact, the whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because "process" means procedure, substantive due process is not just an error but a contradiction in terms.

Id.

21. Professor John Hart Ely and others argue that judges who identify fundamental principles by way of substantive due process are playing the role properly played by popularly elected legislatures in a democracy. *See* ELY, *supra* note 15, at 4–5, 11, 14–15. In addition, Ely argues that the entire foundation of unenumerated rights jurisprudence in the Supreme Court—facilitated primarily by substantive due process analysis—is built upon the notion that when judges identify rights that are not expressly listed in the Constitution, they are "expressing contemporary norms" or a "consensus" of moral/political thought or, in other words, are ascertaining "the weight of the principle in conventional morality and [converting] the moral principle into a legal one by connecting it with the body of constitutional law." *Id.* at 63. Ely explains that while "in theory" this concept of judging is acceptable and not "undemocratic," there is a growing "literature that argues that in fact there is no consensus to be discovered (and to the extent that one may seem to exist, that is likely to reflect only the domination of some groups by others)." *Id.* Ely goes on to caution that "[e]ven if we assume . . . that there *is* a consensus lurking out there that contradicts the judgment of our elected representatives, there would still remain the point, sufficient in itself, that that consensus is not reliably discoverable, at least not by courts." *Id.* at 64.

Indeed, the substantive due process adjudicative mechanism, which is generally perceived as the fountain of modern constitutional privacy protection,[22] actually serves as a weak foundation for "privacy" rights because there is no normative acknowledgment of the essentiality of personal freedom at its core.

Ninth Amendment adjudication, on the other hand, would strengthen the privacy rights of individuals by providing this missing normative foundation, by carving out a sphere of personal autonomy, and by necessarily calling into question the validity of autonomy-infringing government action. Pursuant to this framework, governments would be forced, in a way they have never been, to provide valid justifications for intrusions into the lives of their citizens.[23] And perhaps most importantly, as a practical adjudicative matter, the Ninth Amendment mechanism proposed in this Article would shift the burdens of persuasion built into the substantive due process mechanism. Instead of forcing individual citizens to demonstrate why the activities that they want to participate in are so fundamental that a government may not proscribe them, governments would be obliged to demonstrate why the activities are of a character that would justify government regulation. This change could drastically alter the way in which personal autonomy issues are reviewed by courts and thus result in a substantially freer society.

Part I of this Article provides a brief survey of the mainstream legal community's treatment of the Ninth Amendment throughout our history. It then identifies the major theoretical obstacle to an active Ninth Amendment jurisprudence—the lack of an apparent interpretive theme—and demonstrates how this obstacle can and should be overcome. Part II proposes an adjudicative theory of the Ninth Amendment. In brief, this Article demonstrates that the Ninth Amendment was intended to do two identifiable things: first, to avoid the conclusion that the rights expressly enumerated in the Constitution were the only ones enjoyed by the people and second, to protect specific

22. *See* E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 585 (1996) (explaining that the Due Process Clause is the constitutional provision that makes "the infringement of certain liberties [] outside the scope of the government's authority to legislate"); Robert Goodman, Note, *Substantive Due Process Comes Home to Roost: Fundamental Rights*, Griswold *to* Bowers, 10 WOMEN'S RTS. L. REP. 177, 181 (1988) (discussing the Supreme Court's privacy jurisprudence); *see also* Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723 (1990).

23. As Professor Sotirios Barber put it, the Ninth Amendment can benefit our legal discourse by "signaling responsibilities beyond conventional standards . . . [and shifting] the focus of our concerns away from all concrete versions of justice and other norms to the real things and relationships of which the versions are versions." Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 86 (1988).

rights "retained by the people." These rights are best understood as individual rights to self-determination, rights that allow individuals to engage in activities that pose no threat of harm to others without the threat of government intervention. Invigorated by this understanding of retained rights, the Ninth Amendment can provide what the Fifth and Fourteenth Amendments never could: a textual basis (and normative foundation) for a strong constitutional personal autonomy jurisprudence.

Part III details a mechanism for presenting Ninth Amendment claims to courts. Instead of asking individuals to show why they have suffered an infringement of a fundamental right, this mechanism will oblige courts reviewing a challenged government action allegedly infringing on personal autonomy to determine whether the challenged government action regulates primarily public activity (or activity that poses some threat of harm to another individual or the society as a whole) and is primarily motivated by an identifiable, and substantial, public (or public-protecting) concern. If the government fails to demonstrate that its action addresses public activity and is motivated by public concerns, it will be invalidated pursuant to this mechanism.[24]

Part IV then compares Ninth Amendment adjudication to substantive due process analysis and demonstrates the jurisprudential benefits of the former. This part argues that Ninth Amendment adjudication can improve the legal analysis of privacy issues by providing a textual foundation for the normative concept of personal autonomy and limited government authority. The absence of such a foundation has resulted in serious limitations on the kinds of rights that might be considered protected by the Constitution. Much of this limitation has been based on an identification of those rights that might be considered "fundamental" as a result of a tradition of protection by governments. But

24. In this Article, the notion of the private sphere, which is at the core of this interpretation of the Ninth Amendment, is defined primarily by the concept that private activity, at least as it is relevant to Ninth Amendment analysis, is activity that poses no threat of harm to other, non-consenting, individuals. Clearly, this conception does not begin to address all the complexities inherent in reasoned distinctions between the public and the private. Although I address some of these complexities in this article, they are not its primary focus, and therefore, do not receive anything resembling comprehensive treatment. But it is important to note here, and I reassert it when helpful, that the distinctions made in this Article between what is essentially private and what is essentially public are all rooted in the notion that what makes something "public" for the purposes of assessing the validity of government regulation is the extent to which the activity poses the reasonable threat of causing harm to another individual, or the society as a whole. Although issues of spatial relations and proximity certainly play a role in the Ninth Amendment's public/private analysis, they are only relevant to the extent that they inform the broader analysis of the impact of the activity, and whether it is properly considered public because of the nature and extent of that impact, or private because of the limitations on its impact.

as this Article demonstrates, the fact that governments have traditionally failed to acknowledge the proper extent of their citizens' personal autonomy does not justify perpetuation of this error. Ninth Amendment analysis would free personal autonomy adjudication from this historical anchor.

Finally, Part V discusses two of the major substantive due process cases of the twentieth century, *Lochner v. New York*[25] and *Bowers v. Hardwick*,[26] in an attempt to demonstrate both the limits and the potential benefits of the proposed Ninth Amendment adjudicative theory.

I. A TRADITION OF NONINTERPRETATION

A. A Brief Survey of Judicial Treatment of the Ninth Amendment

The mainstream American legal community has all but ignored the Ninth Amendment. Although a growing number of legal scholars have discussed the amendment—with some concluding that it protects individual rights in some form,[27] others using the Ninth Amendment as a foundation for application of an unwritten constitution infused with aspects of the Anglo/American natural law tradition,[28] and still others adhering to a complex,

25. 198 U.S. 45 (1905).

26. 478 U.S. 186 (1986).

27. *See* BLACK, *supra* note 8, at 13; Randy E. Barnett, *Implementing the Ninth Amendment*, *in* 2 RIGHTS RETAINED BY THE PEOPLE, *supra* note 5, at 12.

28. Professor Thomas Grey, for example, argues that the Ninth Amendment demonstrates "that we have a judicially enforceable unwritten constitution as well [as a judicially enforceable written one], made up of certain constitutional customs and practices, and their associated values and ideals." Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 211 (1988). Professor Suzanna Sherry has made a similar argument. *See* Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1002–07 (1988) (arguing that the Ninth Amendment protects judicially enforceable unenumerated rights). This argument is ably supported by the Ninth Amendment's statement that the rights listed in the Constitution are not the only rights enjoyed by the people. Sherry also argues that the unenumerated rights referred to in the Ninth Amendment are natural rights that find their basis in the British natural law tradition. *See id.* at 1003. Faithful to her rejection of textual interpretation (indeed, Sherry notes that even without the Ninth Amendment, courts would be justified in identifying and enforcing natural rights), Sherry does not seek to explain the meaning or identify the category of rights referred to in the amendment as those "retained by the people." For this reason, Sherry's Ninth Amendment discussion stands as an extension of her broader arguments in support of natural law jurisprudence, and it does not seek to provide a textual understanding of the provision. For reasons discussed more fully in the body of the Article, I argue that the Ninth Amendment, perhaps more than any other provision of the Constitution, demands a textual analysis and understanding if it can ever play its appropriate role in our broader jurisprudence. For that reason, much of this Article addresses a question that is beside the point for both Sherry and Grey, namely: What does the Ninth Amendment mean when it refers to rights retained by the people?

yet ultimately unconvincing, theory of the amendment that leaves it as little more than a redundant twin of the Tenth Amendment[29] and Article I, Section 8 of the Constitution[30]—the practicing legal community has experienced no parallel emergence of Ninth Amendment interest over the past few decades.

One presumes that from the earliest point in our legal history, those legal practitioners who have focused more than fleeting attention on the one sentence provision have been somewhat intrigued by its clear reference to "rights . . . retained by the people," but then quickly paralyzed by its failure

29. "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." U.S. CONST. amend. X.

30. Under this view, the Ninth Amendment was another in a set of provisions in the Constitution that ensured that the power of the federal government would be limited expressly to those powers listed in the first two articles. Even though this concept is clearly stated in the pre-amended Constitution, the "right-powers" theory argues that the Ninth Amendment was inserted in the Constitution so that "no one [could] use the existence of the Bill of Rights to argue that the federal government has powers which the Constitution does not specifically list . . . . [that] the Ninth Amendment clarified that the Bill of Rights in no way altered the federal system of enumerated powers." Cameron S. Matheson, Note, *The Once and Future Ninth Amendment*, 38 B.C. L. REV. 179, 185, 187 (1996); *see also* Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 23 (1980) (arguing that the Ninth Amendment "was not custom-made to enlarge federal enforcement of 'fundamental rights' in spite of state law; it was merely declaratory of a basic presupposition: all powers not 'positively' granted [to the federal government] are reserved to the people"); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63 (1987) (asserting that the Ninth Amendment establishes both a federal government of limited powers and the "unenumerated, and therefore innumerable" rights held by the people); McAffee, *supra* note 5, at 83–84 (outlining the traditional view—articulated by Justices Potter Stewart and Hugo L. Black in dissent in *Griswold*—that the Ninth Amendment was placed in the Constitution by the Framers to serve as a bulwark against the expansion of federal power and not to provide constitutional protection for specific individual rights).

Critics of this theory have rejected its conclusions on various grounds. First, the right-powers theory requires a formulation of the Ninth Amendment that makes it indistinguishable from the Tenth Amendment. *See* ELY, *supra* note 15, at 31–35. In addition, the right-powers interpretation involves a theory of rights, as being formed out of the gap left when the government has no express powers, which would drastically and improperly alter the prevailing conception of constitutional rights—namely, that rights are not merely the residual left after the enumeration of powers, but also provide a limitation on government power, even enumerated powers. *See* Barnett, *supra* note 27, at 4–11. Finally, as is demonstrated *infra* Part II.B., the available information concerning the intent of the Ninth Amendment's author, James Madison, undermines the right-powers interpretation. *See* Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 637 n.38 (1956).

> Madison, in his *Report on the Virginia Resolution*, reviewed the argument that a bill of rights was not needed because the Constitution contained only enumerated powers. In a long and discursive refutation, he made no mention of the [N]inth [A]mendment. This would tend to confirm [that] he had not intended the [N]inth [A]mendment for this purpose.

Id. See Levinson, *supra* note 5, at 125–26, for a more in-depth discussion (and critique) of the "right-powers" thesis.

to provide any guidance as to exactly what these "rights" are.[31] This perspective has apparently fostered the interpretation that the Ninth Amendment is simply a mistake, a kind of rhetorical accident that somehow wound up in the Constitution.[32] Judge Robert Bork expressed this perspective on the Ninth Amendment most emphatically during his 1987 confirmation hearings for the Supreme Court when he stated that the Ninth Amendment should be viewed as nothing more than "'an amendment that says "Congress shall make no" and then there is an inkblot, and you can't read the rest of it, and that is the only copy you have.'"[33]

Judge Bork's rejection of any expanded interpretation of an amendment, which at least bears the possibility of the acknowledgement of unenumerated constitutional rights, is certainly not surprising.[34] But even for those legal scholars less tied to a conservative adherence to the supposed original meaning of constitutional provisions than Judge Bork—scholars who have sought other

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31. U.S. CONST. amend. IX. The Ninth Amendment's early relegation to a jurisprudential afterthought has been explained, at least in part, by the unwillingness of early Supreme Court Justices to rely on the Ninth Amendment to support their decisions, particularly decisions identifying unenumerated constitutional rights. *See* Levinson, *supra* note 5, at 129.

> [E]arly [Supreme Court] decisions that did clearly rest on a notion of unenumerated constitutional limitations of government, such as *Calder v. Bull*, did not cite the amendment.... Did Justice Chase, for example, fail to cite the Ninth Amendment because he viewed it as irrelevant to the case, which, after all, arose at the *state* level and had nothing to do with the actions of the national government? Or did he fail to cite it because it literally went without saying that the principle of construction applied to all cases that were otherwise properly before the courts. One might, of course, ask similar questions about Marshall's and Johnson's failure to cite the amendment in *Fletcher v. Peck*, which is otherwise full of tips of the judicial hat to the existence of natural justice as a limitation on government.

Id. (citations omitted).

32. As Black notes,

> The only hitch is, in short, that the rights not enumerated are not enumerated. We are not told what they are. So the question is, "What do you do when you are solemnly told, by an authority to which you owe fidelity, to protect a generally designated set of things in a certain way, but are, in the very nature of the case, not told what particular things this set comprises?"

BLACK, *supra* note 8, at 14.

33. Barnett, *supra* note 27, at 1 (quoting Judge Bork).

34. *See* Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163, 165 (1988).

> [P]roponents of original intent typically use the resort to history as part of an argument that construes judicially enforceable individual rights as only those specifically enumerated and originally intended. The New Right's narrow and specific approach to constitutional rights was precisely the sort of error that the framers of the [N]inth [A]mendment sought to guard against. It is, then, not surprising that Bork, Meese, and company ignore the [N]inth [A]mendment.

Id.

provisions upon which to base identification of unenumerated constitutional rights—the Ninth Amendment's rights reference seems so open-ended as to provide an insufficient starting point for a successful rights expedition.[35]

A response to this interpretation, or more precisely, lack of interpretation is crucial to the development of a viable adjudicative theory of the Ninth Amendment. The response is required not because the "inkblot" theory is theoretically justifiable (which it is not) or popular among constitutional scholars who call for a restrictive reading of the amendment (which it clearly is).[36] The inkblot interpretation is important because it is almost certainly the dominant understanding, and consequently the overwhelming treatment, of the amendment by legal practitioners and judges. Serious interpretive attention to the Ninth Amendment, however, demonstrates the fallacy of this approach.

The completeness of the inkblot theory's dismissal of the amendment is inconsistent with conscientious constitutional analysis. Although it is conceivable that a constitutional provision could be so interpretively obscure as to preclude any reasonable understanding or adjudicative reliance, respect for the document and its authors (and for the endeavor of constitutional analysis itself) requires that we reach this "obscurity" conclusion only when there is no reasonable alternative interpretation. As Chief Justice John Marshall wrote in *Marbury v. Madison*,[37] "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."[38] And, similarly, as one Ninth Amendment scholar has observed in response to the inkblot theory, "we cannot prefer such an interpretation of a constitutional enactment if one that contemplates a potential role is also available."[39] Although we have no choice but to ignore a constitutional provision for which we can develop no coherent understanding, we cannot simply choose to ignore a provision that presents some kind of serious interpretive challenge. The interpretive difficulties presented by the Ninth Amendment may properly give rise to caution, but they

35. *See, e.g.*, Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 107 (1987) (stating that "read properly, the [N]inth [A]mendment *creates* no rights at all. There are *no* '[N]inth [A]mendment rights' in the sense in which there are, for example, [F]irst [A]mendment rights or [F]ourth [A]mendment rights").

36. *See, e.g.*, *supra* notes 14, 30, 35.

37. 5 U.S. (1 Cranch) 137 (1803).

38. *Id.* at 174.

39. Barnett, *supra* note 6, at 27.

cannot support complete exclusion of the amendment from constitutional discourse.[40]

But this observation is hardly novel. There is nothing particularly controversial about the notion that a constitutional provision should be given meaning whenever possible. So how can it be explained that the Ninth Amendment has fostered no significant adjudicative application? Are the vagueness of the "rights retained by the people" language and the fact that it is clearly subject to more than one interpretation sufficient to mandate the amendment's obscurity?

B. The Interpretive Barrier: The Lack of an Apparent "Theme"

The Ninth Amendment is not the only language in the Constitution that poses substantial interpretive challenges. Indeed, the document is full of language that is subject to more than one reasonable definition. Consequently, if the lack of a single obvious interpretation of the Ninth Amendment was the reason for the paralysis that marks the inkblot theory's attitude of capitulation, other interpretively difficult provisions, presumably, would have fostered similar inertia over the past 219 years.

Of course, this has not been the fate of the other interpretively vague provisions of the Constitution. In response to interpretive challenges arising in provisions other than the Ninth Amendment, judges have attempted to find meaning in the provisions and, more importantly, to apply their reasoned (or at least, purportedly reasoned) interpretations to resolve actual disputes. When judges have been presented with cases involving these provisions, they have generally asked "how do I do this" questions such as: "How should I go about deciding what the language means?" "Should I rely on 'plain meaning'?" "Is there a 'plain meaning' that I can identify?" "If there is no indisputably clear meaning, should I take the intent of the authors of the language into account, or can I rely on my own values and beliefs to fill in the gaps?" "If not my own personal values, is there some identifiable set of modern values that I can apply?" "How would I determine what they were?"

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40. *See* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 316–17 (1987).

> Construing the [N]inth [A]mendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise. This view is at odds with the contextual historical evidence and the specific, articulated concerns of its framers, and violates the premise of *Marbury v. Madison* that the Constitution contains judicially discoverable and enforceable principles.

Id. (footnotes omitted).

When confronted with the Ninth Amendment, however, the interpretive question has always been a "should I do this" question: "Should I (can I possibly) find a way to interpret this provision?" And the answer has invariably been some form of: "No. Why bother?" The key to unlocking the adjudicative potential of the Ninth Amendment is understanding why it has received this idiosyncratic response—why it and only it has fostered such cautionary reluctance to even posit a reasoned interpretation.

Clearly, the answer is not that (or at least not exclusively that) the Ninth Amendment includes language that is subject to more than one reasonable interpretation. Indeed, the Constitution includes at least two identifiable types of language: (1) somewhat, or primarily, "objective" and specific references whose meaning are all but indisputable, and (2) more open-ended, subjective, and value-laden provisions that require some kind of interpretation to give them effect. And these interpretations by their very nature involve a choice from among at least two, but usually innumerable, possible reasonable articulations of meaning.[41]

Examples of the first category of language include much of the Constitution's first seven articles, which provide the blueprint for the structure of the new government,[42] and even many of the amendments that address specific requirements relating to voting, apportionment, and terms of office (the Twelfth, Fifteenth, Seventeenth, Nineteenth, Twentieth, Twenty-Second, and Twenty-Fourth through Twenty-Sixth Amendments);[43] and the restriction (or repeal of restriction) of practices referenced in indisputable fashion (the Thirteenth, Eighteenth, and Twenty-First Amendments).[44]

The second category includes the First Amendment's reference to "an establishment of religion,"[45] the Fourth Amendment's reference to "unreasonable" searches,[46] the Eighth Amendment's prohibition of "cruel and

41. Of course, the problems created by language subject to more than one reasonable interpretation is not the exclusive province of legal discourse. As Judge Richard A. Posner explains,

> Legislative enactments that become the subjects of celebrated or controversial judicial decision are often deeply ambiguous texts, as are many works of imaginative literature. Such enactments raise the question of objectivity in interpretation, a question that has long preoccupied literary critics and scholars as well as judges and legal scholars. The specter of hopeless indeterminacy, of rampant subjectivity, hovers over the key texts of both fields.

RICHARD A. POSNER, LAW AND LITERATURE 5 (2d ed. 1998).

42. *See* U.S. CONST. arts. I–VII.

43. *See* U.S. CONST. amends. XII, XV, XVII, IXX, XX, XXII, XXIV–XXVI.

44. *See* U.S. CONST. amends. XIII, XVIII (repealed 1933), XXI.

45. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

46. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

unusual"[47] punishment, and the Fourteenth Amendment's reference to the "privileges or immunities of citizens."[48] These provisions, like the language of the Ninth Amendment, are susceptible to more than one interpretation.[49] But the potential for various interpretations of the language of these provisions has lead to the "how" interpretive questions, not the "should" questions reserved solely for the Ninth Amendment. The important difference between these provisions and the Ninth Amendment, at least for the purposes of this Article, is that these other amendments play a major role in resolving real legal disputes while the Ninth Amendment does not.

The adjudication of constitutional claims relying on interpretively vague or open-ended constitutional language, not to mention the proliferation of constitutional theory, has been made possible by judicial interpretation of these provisions, and by the adherence of latter courts to the prior conclusions. It is in this way that a jurisprudence has developed around these provisions, creating a body of law that parties can rely on in framing their legal disputes and ordering their lives. Through this process, the courts have given meaning to murky constitutional language by deciding consistently, for instance, that the Establishment Clause prohibits state-sponsored prayer in school;[50] that a search will be per se reasonable if the law enforcement official obtains a warrant from a disinterested magistrate;[51] first, that capital punishment must be considered cruel and unusual,[52] and then, four years later, that it should not be;[53] and that the right to equal protection of the laws includes the right to be free of the oppression of public segregation based on race.[54]

The point here is not that these interpretations are somehow mandated or obvious—or even that the interpretive processes used to reach these conclusions are sound. Indeed, these are among the most controversial

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47. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

48. U.S. CONST. amend. XIV, § 1 "(No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .").

49. *See* ELY, *supra* note 15, at 13.

> At one extreme—for example the requirement that the President "have attained to the Age of thirty five years"—the language is so clear that a conscious reference to purpose seems unnecessary. . . .
>
> Still other provisions, such as the Eighth Amendment's prohibition of "cruel and unusual punishments," seem . . . to call for a reference to sources beyond the document itself . . . .

Id.

50. *See* Lee v. Weisman, 505 U.S. 577, 599 (1992).

51. *See* Ker v. California, 374 U.S. 23, 33 (1963).

52. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

53. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976).

54. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

constitutional interpretations within our jurisprudence.[55] The point is that even in the midst of the winnowing debate over the meaning of open-ended constitutional language, it has rarely (if ever) been suggested that we should simply ignore all provisions that contain language subject to more than one interpretation. The vigorous debate concerning the meaning of our Constitution generally focuses on different theories of interpretation (and consequently, on disagreements about meaning)[56] not on arguments about whether the provisions should be interpreted at all. Those who disagree about the proper textual interpretations of the Establishment Clause, or with the judicially created warrant requirement, capital punishment, or even the constitutionality of "separate but equal" public schools, for example, base their arguments on

55. *See, e.g.*, David W. Frasher, *Quieting the Controversy: A Rule Utilitarian Solution to the Capital Punishment Dilemma*, 1 SAN DIEGO JUST. J. 365 (1993); Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)Constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153 (1996); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1066–67 (1986); Michael A. Middleton, Brown v. Board *Revisited*, 20 S. ILL. U. L.J. 19 (1995).

56. Constitutional scholars have approached the endeavor of constitutional interpretation in various ways. Although there are any number of theories of constitutional interpretation and countless permutations of these theories, I believe the various perspectives can be efficiently separated into three camps: (1) "Pure" or "Original Intent" Interpretivists, (2) what could be called the "Open" or "Flexible" Interpretivists (both (1) and (2) fitting within the larger definition of "Textualists"), and (3) Noninterpretivists (or Nontextualists). See ELY, *supra* note 15, at 1–14, for a discussion of the distinction between the Interpretivist and Noninterpretivist camps, and Grey, *supra* note 28, at 211–12, for a discussion of the distinction between "originalism" and "textualism." There are various benefits and drawbacks of each of these methods of constitutional interpretation. The Original Intent Interpretivists are hindered by a practical and normative complaint about their endeavor—even assuming that the original intent of a provision can be identified with reasonable accuracy, why should we care? And would the Framers even want us to care? The Open Interpretivist, on the other hand, carries the burden of proposing an interpretive mechanism that allows judges to superimpose their own personal beliefs or value determinations when reviewing democratically enacted legislation. Again there is a critical concern with this phenomenon—even if we were convinced that judges were the best individuals to assert their value judgements and make them binding law, how could such a system be justified in what is otherwise considered to be a democratic society? This concern is only magnified in relation to Noninterpretivist theories that go one step further than the Open Interpretivists—taking away even the language of the Constitution as a potential limiting boundary of the power of judges.

But the primary goal of this Article is not to discuss the relative value of the various theories of constitutional interpretation. The goal here is to arrive at an understanding of the Ninth Amendment that will facilitate its use in actual adjudication. In this specific instance, if not generally, textualism provides the most appropriate interpretive device. Given its lack of an apparent interpretive theme, the Ninth Amendment is open to expansive interpretation—it is a kind a textual call for an expanded nontextualism (look at the Ninth Amendment—it *says* that we should not be limited to what the document *says*). But, as is discussed more fully in Part II, it is this phenomenon that most directly requires some kind of textualist analysis, at least if the mission is the development of an adjudicative model. Given the absence of theme, the Ninth Amendment needs an interpretive foundation perhaps more than any other provision in the document.

alternative interpretive theories not on the assertion that we should leave confusing, vague provisions alone.[57]

So how can the marginalization of the Ninth Amendment be explained in light of the expansive interpretation of other open-ended provisions? The answer, it appears, is that the other open-ended provisions, regardless of their susceptibility to various interpretations, all have at least one thing that the Ninth Amendment does not have: an immediately identifiable "theme"—something (or some group of things) that provides a reliable indication, not necessarily of what they mean (particularly as applied to all possible circumstances), but at least of what they are essentially *about*. These various themes are produced, apart from the actual language, in some instances by the subject matter of the provision, and in other cases, by historical context. Each interpretively vague provision's theme plays a crucial role in framing the extent of the dispute over the interpretation of the language, allowing for judicial interpretation, and consequently, the development of a jurisprudence. The theme does this by providing both a foundation upon which interpretation can be built and also a limitation on the extent of the interpretation. Each provision's theme identifies a specific type of right that is within the Constitution's protective umbrella, and, at the same time, limits the types of claims that might reasonably seek to rely on the language for support.

The Second Amendment, for example, which has been variously interpreted,[58] and has fostered continuing and passionate debate concerning the extent of the right it protects, has an undeniable theme—it is about "arms" (that is "firearms") and the "right" of "people to keep and bear" them.[59] While the acknowledgement of the amendment's subject matter will not answer the question of whether eighteen-year-olds have the constitutional right to own a gun, whether adults have the right to own a handgun, an automatic weapon, or an assault rifle, or whether adults should be allowed to carry concealed weapons in public, the clear theme of the amendment does prevent an argument, at least one relying on the text of the Constitution, that there is no

57. *See* Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789 (1996) (arguing that a "moral reading" of the Eighth Amendment would render the death penalty unconstitutional); *see also* George E. Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 (1982); James A. Washburn, Note, *Beyond* Brown*: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1120 (1994) (arguing that courts need to determine if states are providing equal opportunities in higher education rather than being bound by the level of racial integration in the schools).

58. *See generally* Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995).

59. U.S. CONST. amend. II.

broadly defined right to own a gun protected by the Constitution. The debate that arises out of the Second Amendment, as broad and divisive as it may seem, is actually limited when compared to the scope of a potential debate over the meaning of the Ninth Amendment, in the absence of an apparent theme. The disagreement does not extend to the question of whether there is a constitutional right to bear arms, but instead focuses on the proper boundaries of that right and on the circumstances under which a government is justified in burdening that right with specific regulations or prohibitions. Although attorneys and judges are free to disagree about its boundaries, they are not required to posit the existence of the right itself, and they are not free to deny its existence either.[60]

By limiting the extent of the potential disagreement about what is protected by the amendment, the theme provides practitioners and judges with a bounded playing field on which to resolve the disputes that arise concerning the specific application of the language. The theme provides the basic rules and leaves the specific development of the issues, within a limited spectrum, to the attorneys' arguments and the judges' evaluation. Without limiting themes, the development of a jurisprudence around interpretively vague provisions would be impossible. Attorneys would generally be unable, or unwilling, to posit the categorical protection of rights without a thematic foundation upon which to base their claims. And the claims of those few attorneys who were willing to assert such untethered rights would be rejected by courts unwilling to make such a leap.

With limiting themes, however, an attorney will be able to develop a useful argument if she can find a way to articulate her claim in a manner that fits the theme of the chosen provision. Although this does not guarantee

60. In much the same way, the defining theme of the Fourth Amendment plays a crucial role in its adjudicative vitality. This amendment is *about* governmental searches of individuals and their homes. As noted, there is no end of debate over what constitutes a reasonable search, allowing for reference to the amendment to both challenge and justify a particular search. But the Fourth Amendment indisputably provides constitutional protection against a search that is "unreasonable." Even the famously open-ended language of the Privileges and Immunities Clause of the Fourteenth Amendment, which makes reference to a minimally defined set of rights that are realized by citizens as opposed to by the people, has a far more obvious interpretive context than the Ninth Amendment. As open-ended as the Privileges and Immunities Clause is, it has the benefit of its presence within the Fourteenth Amendment, whose language, and perhaps most usefully, whose *historical* context, provide a substantial starting point for the interpreter in determining the category of rights that are arguably subject to protection. In discussing the difficulties presented in interpreting the Privileges and Immunities Clause, Ely argues that

> One possibility, which deserves some attention in the light of the historical setting of the Reconstruction Amendments, is that the Privileges and Immunities Clause (and for that matter the whole of the Fourteenth Amendment) should be construed entirely in the light of the amendment's overall animating purpose, the cause of equality for blacks.

ELY, *supra* note 15, at 23.

success, it does allow for the adjudication of claims and for the possibility of success. Judges, like attorneys, need only find a way to attach their determination to the theme of the cited provision to support a ruling that a certain specific right is actually protected by the Constitution. Consequently, the identifiable theme of an interpretively vague provision allows for litigation and subsequent adjudication that will result, over time, in the development of a defining jurisprudence. This is the gift (or perhaps curse) that these types of provisions—interpretively open but thematically grounded—have bestowed upon our adjudication and legal discourse.[61]

In addition to allowing for the assertion of claims that otherwise would not be brought, this bounding effect of the theme has an important exclusionary impact as well that also plays an essential role in the development of interpretive jurisprudence. The apparent theme of the interpretively vague provisions prevents attorneys from relying on a specific provision to support an assertion of a right that is not in the same category.[62] It is relatively easy

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61. For various perspectives on the efficacy of text-based constitutional interpretation, see also Symposium, *Textualism and the Constitution*, 66 GEO. WASH. L. REV. 1081 (1998). Professor Jed Rubenfeld provides an articulate defense of textualist interpretation, arguing that textual reliance resolves the central difficulty confronting constitutional theory of this century—"the 'countermajoritarian difficulty' according to which constitutional law must answer to the charge of being 'undemocratic' because it deliberately thwarts the will of representative majorities in the 'here and now.'" Jed Rubenfeld, *The Moment and the Millenium*, 66 GEO. WASH. L. REV. 1085, 1094 (1998) (footnote omitted). In addressing one strain of nontextualist theory that the Constitution should be read "in light of contemporary popular consensus," Rubenfeld argues that

> One difficulty with such a view is that it leaves the Court with virtually no ground for striking down acts of Congress or any other laws, for that matter, that can claim the support of a national majority. To interpret the Constitution in light of present popular feeling is to surrender constitutionalism itself, part of whose very point, at least as Americans understand it, is to erect guarantees that stand against current majority will.

Id. at 1101.

Then, addressing another nontextualist conception, the process-based theory articulated most notably in Ely's *Democracy and Distrust*, Rubenfeld notes that the Constitution is imbued with both procedural rules and substantive values, and makes the point (a point, incidentally, with which I cannot imagine Ely disagreeing) that

> constitutional law is suffused with substantive principles laid down from the past—principles of liberty, justice, and power. Written constitutionalism is a means of laying down and holding the polity over time to deeply held, substantive, national commitments—like the commitment against slavery or the commitment to the equal protection of the laws.

Id. at 1102.

This Article argues that the Ninth Amendment constitutes one of these substantive commitments: a commitment to a governmental system that allows for the expression of personal freedom to the extent that expression does not threaten others.

62. For example, as Ely explained,

> The Cruel and Usual Punishment Clause does invite the person interpreting it to freelance to a degree, but the freelancing is bounded. The subject is punishments, not the entire range of government action, and even in that limited area the delegation to the interpreter is not entirely unguided: only those punishments that are in some

to posit and enforce a limited view of the Fourth Amendment, for example, that would preclude someone from successfully arguing that the right to be free from unreasonable searches includes the right to picket the police chief's house to protest some controversial search policy. Although such a reliance has a rational theoretical basis (that is, "anything that serves to protect my rights to be safe in my person—including political action or speech—is part of my Fourth Amendment package of rights"), such an argument could be reasonably rejected based not simply on the fact that there was another amendment that seemed more appropriate to provide support for such a claim, but that the Fourth Amendment simply is not *about* protesting but is instead about searches and seizures.

It is important to note, lest this discussion of theme be perceived as indistinguishable from the broader issue of language interpretation, that not all interpretation-facilitating themes are found in the language of the provision. Some are provided by historical and other kinds of contexts that surround the provision. The Fourteenth Amendment, for example, has traditionally been infused with meaning by both courts and scholars based on the historical context of its drafting and passage. Even beyond the specific interpretive device of reliance on recorded legislative history, the legal community's understanding of the Fourteenth Amendment has been dependent on the obvious conclusion that it was essentially about the necessity that post–Civil War America bridge the gap between a slave society and a postslave society. Consequently, Chief Justice William Rehnquist's conclusion that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment,"[63] and the conclusions of scholars that the Fourteenth Amendment must be viewed as preclusion against perpetual subordination of identifiable groups,[64] both

way serious ("cruel") and susceptible to sporadic imposition ("unusual") are to be disallowed.

ELY, *supra* note 15, at 14.

63. Seminole Tribe v. Florida, 517 U.S. 44, 65–66 (1996).

64. *See generally* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). *See also* Amy H. Nemko, *Single-Sex Public Education After* VMI*: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 31 (1998) ("The anti-subordination approach flows from the original intent of the Fourteenth Amendment, which was enacted in the aftermath of the Civil War to redress the harms caused by institutionalized slavery." (footnote omitted)); Laurence C. Nolan, *Unwed Children and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 49 (1999) ("[The] Equal Protection Clause was also meant to eliminate laws that either branded people because of race with the stigma of inferiority or with the stigma of caste or acted to stimulate racial prejudice and subordination." (footnote omitted)).

rely as much on the clear theme of the amendment as they do on its actual language.

The Ninth Amendment's great handicap—the feature that explains its jurisprudential marginalization—is its lack of an immediately obvious theme. It provides a clear statement that there are rights that are enjoyed by people beyond those listed in the Constitution, but because it does not provide any obvious indication of what kinds of rights these are—no indication of what the amendment is essentially about—there is no thematic foundation to reasonably support an assertion that any specific right is protected (or even contemplated) by the amendment. Absent the essential factor that allows for actual litigation of claims relying on other open-ended provisions, there has been no measurable litigation of Ninth Amendment claims, and therefore, only an extremely limited Ninth Amendment jurisprudence. Accordingly, if the Ninth Amendment is to play an adjudicative role, what is needed is a thematic anchor to limit the potential expansion of Ninth Amendment rights.[65]

II. A NINTH AMENDMENT ADJUDICATIVE THEORY: FINDING THE MISSING THEME

A careful review of the Ninth Amendment, and of the Framers' intent in drafting and ratifying it, demonstrates that its reference to the "rights" "retained by the people" is an acknowledgement of the nature of personal freedom enjoyed by the people in a civil society and the limits on legitimate government authority to restrict that freedom. The Ninth Amendment is, consequently, *about* this freedom and its relationship to legitimate government action. There is convincing documentary evidence that the Ninth Amendment

65. Accepting the contention of Sherry and Grey that the Constitution allows (or even obliges) judges to enforce unwritten "natural law" rights in the course of their review of democratically enacted legislation, it cannot be reasonably denied that such a reading allows judges a vast expanse of authority to determine what is, and what is not, protected by the natural law. Indeed, scholars and judges have made references to a broad expanse of "rights" that they argue find their foundation in the natural law tradition. For instance, as Ely noted,

> If there is such a thing as natural law, and if it can be discovered, it would be folly, no matter what our ancestors did or didn't think, to ignore it as a source of constitutional values. It's not nice to fool Mother Nature, and even Congress and the President shouldn't be allowed to do so. The idea is a discredited one in our society, however, and for good reason. "[A]ll theories of natural law have a singular vagueness which is both an advantage and disadvantage in the application of the theories." The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that. Thus natural law has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue.

ELY, *supra* note 15, at 50 (quoting C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS vii–viii (1930)).

was drafted to ensure that the new government for which the Constitution was the blueprint would preserve the balance between personal autonomy and the legitimate authority of government endemic to a political and civil theory, expressed most characteristically, and influentially for James Madison (the amendment's author) and his colleagues, by the work of John Locke. This part demonstrates that this Lockean notion of legitimate government was central in Madison's mind when he drafted the Ninth Amendment and sought to protect a specific category of rights retained by the people from governmental denial or disparagement.

A. John Locke's Social Contract and the Framers

The British colonists who founded the United States developed their theory of self-government within the philosophical framework of the British seventeenth and eighteenth century "natural law-social contract" movement.[66] Surveys of the holdings of colonial libraries demonstrate that the work of one of these theorists, John Locke, was particularly well represented.[67] Indeed, while the political pamphlets and pronouncements of the era are rife with explicit references to the works of both Locke and his social contractarian peers and successors,[68] at least three historians have concluded that "'Locke on Government' was *by far* the nonbiblical source" in the American political writings most frequently cited from 1760 to 1775.[69]

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66. *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (1983).

67. Historian Michael Zuckert has observed that

> Locke's complete *Works* or a separate edition of the *Treatises* appeared in a full 50 percent of the libraries (thirteen out of twenty six), slightly more than Sidney's *Discourses*, which appeared on twelve lists, and Cato's *Letters*, which appeared in eleven. Sidney's and Cato's are the only political works that appear in the libraries with anywhere near the frequency of Locke's books.

MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 20 (1994) (footnote omitted).

68. *See* Caplan, *supra* note 66, at 230 ("The colonists premised their fight for independence, when the time came, on the natural law-social contract theory expounded by numerous writers, foremost among them John Locke.").

69. STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 34–35 (1990); *see also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 139–47 (1988) (discussing the influence of Montesquieu, William Blackstone, Locke, and David Hume on the thinking of the Framers); ZUCKERT, *supra* note 67, at 21 (refuting recent scholarship from Garry Wills and others casting doubt on the connection between Locke and the political thought of the English colonies).

> [T]here is evidence to suggest that the colonists were reading Locke early and seriously. Dunn himself recounts the use of Locke's name and political doctrines in a prominent trial for seditious libel in 1724; in the same year Locke's discussion of property was used in an essay on the relations between the whites and Indians in America; by 1728 an edition with a widespread circulation was abroad in America.

Id.

For example, in his 1764 pamphlet entitled "The Rights of the British Colonies Asserted and Proved," James Otis made specific reference to the writings of Locke "on almost every page,"[70] and the pamphlet "was almost altogether of Lockian provenience."[71] In addition, one of the earliest resolutions from the First Continental Congress expressed a natural rights adherence and borrowed Locke's famous formulation of the inalienable rights of man when it asserted that the English colonists in America, based on the laws of nature, the principles of the British constitution, and the several charters of the various colonies, "are entitled to life, liberty, [and] property, and [that] they have never ceded to any sovereign power whatever, a right to dispose of either without their consent."[72]

This same characterization of natural rights formed the thematic basis for the most prominent of the contemporary expressions of the burgeoning American revolutionary mind: the Declaration of Independence, and its famous paraphrase of Locke, that all men enjoy the "inalienable rights" of "life, liberty, and the pursuit of happiness."[73] Indeed, although Locke was an important figure in the political upheaval of the Glorious Revolution in eighteenth century England, "Locke's political doctrine shares almost nothing with the official theory of the [British] 'revolution' set forth in the Declaration of Rights, but instead contains all the defining doctrines of the American Declaration of Independence."[74] "It is clear that by the time of the Revolution the American Whigs had adopted the Lockean political philosophy."[75]

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70. Caplan, *supra* note 66, at 231.

71. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5, at 67, 81.

72. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 67 (Library of Congress 1904).

73. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Thomas Jefferson's affinity for the ideas of John Locke is well documented and can be seen in his "repeated practice of recommending Locke's *Treatises* as basic reading in politics to friends and relatives, as well as for the University of Virginia curriculum" as well as in his comment, "Locke's little book on Government is perfect as far as it goes." ZUCKERT, *supra* note 67, at 19.

74. ZUCKERT, *supra* note 67, at 16.

> Locke not only accepts the doctrine of equality, but expresses it in the *Two Treatises* in language nearly identical to the Declaration of Independence and related American documents. Human beings, he says, are "naturally in . . . a state . . . of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another." Equality is the natural or original condition of human beings, the condition prior to the institution of civil government, for it is what must be first understood in order "to understand political power right."

Id. (quoting John Locke).

75. *Id.* at 18.

So what were John Locke's theories of civil society and government that became relevant to the development of the American political mind? Locke developed his political theories a generation after publication of *Leviathan*,[76] the groundbreaking work of his most influential predecessor, Thomas Hobbes. In *Leviathan*, Hobbes set the parameters and coined much of the terminology used by his successors. In the mid–seventeenth century, Hobbes observed that pregovernmental human society was defined by the unchecked free will of individuals, noting that "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man."[77] Hobbes characterized the "life of man" within this pregovernmental "state of Warre" as "solitary, poore, nasty, brutish, and short."[78] To avoid this unwelcome fate, Hobbes observed that men are obliged, by "[p]assions that incline [them] to [p]eace" to give up their freedom to do whatever they want in defense of themselves "and be contented with so much liberty against other men, as he would allow other men against himself."[79] And in order to secure this ordered community a "Covenant" is entered into

> of every man with every man, in such manner, as if every man should say to every man, I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up the Right to him, and Authorise all his Actions in like manner.[80]

This "Man" to whom all other men mutually give up their right to full control over their lives, is the "Leviathan," or monarch, in whom supreme power is vested, and from whom power, once given, cannot be taken away.[81]

Thirty-eight years after the publication of *Leviathan*, Locke published his *Two Treatises of Government*.[82] Although the specific motivation for their publication had little to do with Hobbes,[83] Locke's *Two Treatises* nonetheless

76. THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin Books 1968) (1651).
77. *Id.* at 185.
78. *Id.* at 166.
79. *Id.* at 188, 190.
80. *Id.* at 227.
81. *See id.* at 227–29.
82. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Mark Goldie ed., Everyman 1993) (1689).
83. While it has been commonly noted that Locke published the *Two Treatises* as a argument in support of the Glorious Revolution of 1688, it has been more convincingly argued that the real purpose of Locke's seminal political writing was to respond to the contemporary works of a leading "Tory" apologist, Sir Robert Filmer. *See id.* at xv–xix. Filmer, whose work was more characteristic of the mainstream promonarchy thought of the period than the somewhat radical teachings of Thomas Hobbes, had written that political power did not arise from the consent of the people, but was bestowed by God, first to Adam and subsequently, through succession, to divinely ordained monarchs. *See id.* at xviii–xx.

used Hobbes's social theory, or more precisely the terminology of his theory, as a springboard. Locke, like Hobbes, began his discussion of civil society with a description of the states of nature and war. For Locke, however, the state of nature was not quite the nightmare envisioned by Hobbes. Locke characterized the state of nature as "a state of perfect freedom [for men] to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."[84] In the state of nature, all men have equal authority to govern their own lives and to prosecute transgressions against them. Locke acknowledged the obvious problems that this level of freedom fostered and agreed with Hobbes's conclusion that the duty of civil government is to limit much of this freedom.[85] But Locke proposed a very different civil government than did Hobbes and the other absolutists. Locke argued that "civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great, where men may be judges in their own case,"[86] but objected to those who proposed a monarchy as the proper form of civil government because

> absolute monarchs are but men, and if government is to be the remedy for those evils, which necessarily follow from men's being judges in their own cases, and the state of nature is therefor not [to] be endured, I desire to know what kind of government that is, and how much better it is than the state of nature, where one man commanding a multitude, has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, with the least liberty to anyone to question or control those who execute his pleasure.[87]

Instead of vesting sovereign power in a hereditary monarchy, Locke proposed a civil community in which all men, who in the natural state have complete sovereignty over their own lives, enter into a consensual agreement—a social contract—with the other men in their community. Pursuant to their contract, men agree to surrender certain, specifically limited aspects of their individual liberty to the hand of a "legislative" authority that would wield supreme, though limited, power. As Locke wrote,

> Man being born . . . with a title to perfect freedom and uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, hath by nature a power . . . to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men . . . . But because no political society can be, nor

84. *Id.* at 116.
85. *See id.* at 121.
86. *Id.*
87. *Id.*

> subsist, without having in itself the power to preserve the property, and in order therein to punish the offenses of all those of that society; there, and there only, is political society, where every one of the members hath quitted his natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded, the community comes to be umpire by settled standing rules, indifferent, and the same to all parties . . . .[88]

As Professor Calvin Massey has observed, the Founding Fathers embraced the ideas of John Locke, in large part, because he "sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights."[89] Thus, Locke described the development of the civil society as the process of each individual vesting his natural right to complete personal autonomy into the hands of the government so that it may protect his "life, liberty, and estate." But this surrender of personal autonomy is not complete, as the "private judgement of every particular member," which poses no threat to the "property" of others, is "excluded" from that grant to the governmental authority, and consequently, retained by the people when the public rights are surrendered. Locke explained that "[w]hosoever, therefore, out of a state of Nature unite into a community, must be understood to give up all the power, necessary to the ends for which they unite into society to the majority of the community."[90] Pursuant to this understanding, Locke wrote that "all men may be restrained from invading the rights of others, and from doing hurt to one another."[91] But because the power of self-determination—a power that poses no threat of invading the rights of, or causing harm to, others—need not be surrendered to promote the ends for which people enter into society, people do not give up this right when they enter the social community.

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88. *Id.* at 157.

89. Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987, 991 (1988).

90. LOCKE, *supra* note 82, at 164. Michael Zuckert has characterized this concept as arising from Locke's concept of God and God's relationship to man. *See* ZUCKERT, *supra* note 67, at 218.

> If human beings belong to God, they cannot belong to one another, or even to themselves. Since God is the true proprietor, no one else has the right to damage or destroy his property. From this thought Locke derives a general "no-harm" principle. They may not "take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."

Id. (quoting John Locke).

91. ZUCKERT, *supra* note 67, at 221.

This power of self-determination is, therefore, retained by the citizens when they form the civil government.[92]

Consequently, the legitimate authority of the legislative body, which wields only the powers bestowed upon it by the people, is limited to public aspects of the lives of citizens.[93] Or, as Locke framed the limitation, "the power of the society [to govern men] can never be supposed to extend farther than the common good."[94] Legislative power cannot

> possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is the legislator, it can be no more than those persons had in a State of Nature before they entered into society, and gave up to the community.[95]

Therefore, legislative power, "in the utmost bounds of it, is limited to the public good of society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects."[96] In discussing the role of law—the main product of the legislative authority—in this civil society, Locke argued that its purpose is to protect individuals against "violence from others"[97] and that "law, in its true notion, is not so much the limitation as the direction of a free and intelligent

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92. As Professor Caplan noted:

> Under [Locke's] theory, individuals are born into a "state of nature," that is, without organized government, and agree out of "strong Obligations of Necessity, Convenience, and Inclination" to live in political communities. In so contracting, individuals must give up some of their natural rights so that the rest of those rights may be more effectively secured. The sole legitimate purpose of government, therefore, is the good of the contracting parties—the public. Accordingly, government has a right only to act for the benefit of the governed, to protect its citizens from rebellion within and invasion without.

Caplan, *supra* note 66, at 230 (footnote omitted).

93. "In all these cases, it is the freedom (and in some instances so-called freedom) of society which requires and justifies the restraint of political authority. Freedom is located in the realm of the social, and force or violence becomes the monopoly of government." HANNAH ARENDT, THE HUMAN CONDITION 31 (1958).

94. LOCKE, *supra* note 82, at 180. Locke's rejection of "paternalism" has been characterized as arising from his belief that

> when persons acquire the understanding and control to know the law of nature and keep their actions within its bounds, they are no longer subject to paternal authority. They are then free and equal rightholders, subject to no authorities but God, those appointed by God, and those they make by their own consent . . . . It is not appropriate for government to "take care of" free persons, interfering with their choices solely for their own good. Politics is unlike medicine, except in this: that the patient must consent to the surgery before the cutting begins, even if the surgery is in the patient's best interests (footnote omitted).

A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 218–19 (1992).

95. LOCKE, *supra* note 82, at 183.

96. *Id.* at 184.

97. ZUCKERT, *supra* note 67, at 273.

agent to his proper interest, and prescribes no further than is for the general good of those under the law."[98]

The remaining individual rights, the expression and enjoyment of which do not threaten harm to others or undermine the general good, are retained by the people.[99] In *A Letter Concerning Toleration*,[100] Locke speaks directly to the proper extent of individual freedom, and the illegitimacy of government interference in the private lives of its citizens.

> In private domestic affairs, in the management of estates, in the conservation of bodily health, every man may consider what suits his own convenience, and follow what course he likes best. No man complains of ill-management of his neighbor's affairs. . . . The care, therefore, of every man's soul belongs to himself, and is to be left unto himself. But what if he neglect the care of his soul? I answer: what if he neglect the care of his health or of his estate, which things are nearlier related to the government of the magistrate than the other? . . . Laws provide, as much as is possible, that the goods and health of subjects be not injured by the fraud and violence of others; they do not guard them from the negligence or ill-husbandry of the possessors themselves.[101]

As Professor Edward Corwin noted in his survey of the role of natural law-social contract theory in the formation of the Constitution, two features of Locke's political theory had the most abiding impact on the development of American law: (1) its limitations on legislative power, and (2) its respect for individual property rights.[102] Locke specified that legislative power, although effectively the supreme governmental authority, was not to be expressed in

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98. LOCKE, *supra* note 82, at 142.

99. Kirstie McClure provides an example of Locke's analysis of the legitimate authority of the government in regard to a specific action that might be undertaken by a citizen. *See* KIRSTIE M. MCCLURE, JUDGING RIGHTS: LOCKEAN POLITICS AND THE LIMITS OF CONSENT 259–60 (1996).

> Thus infant sacrifice and other such "heinous enormities" could be legitimately prohibited to religious congregations: such things "are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the Worship of God, or in any religious Meeting." Once again, it is not the strangeness or sinfulness of such practices that make them subject to political control, but their violation of the moral and civil prohibition of personal harm. . . . Whether such practices please God or not are topics of speculation, not matters of civil fact, and the function of the magistrate with respect to them "is only to take care that the Commonwealth receive no prejudice, and that there be no injury done to any man, whether in life or estate."

Id. (footnote omitted).

100. John Locke, *A Letter Concerning Toleration*, *in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 123 (J.W. Gough ed., 1947).

101. *See* SIMMONS, *supra* note 94, at 220–21 & 221 n.133 (quoting Locke, *supra* note 100, at 136–37 and noting that "[t]he magistrate should only protect citizens 'from being invaded and injured by others,' not 'force them to a prosecution of their own private interests'"(citation omitted)).

102. *See* Corwin, *supra* note 71, at 71.

an arbitrary manner, but was to be restricted by the real supreme authority: the law.[103] In addition to this notion that serves as the precursor to the most basic of Constitutional precepts—the requirement of due process under law—Locke notes that the legitimate authority of government is also limited by the fact that the purpose of government is to serve the interests of the people, not the other way around.[104]

As Locke explained, "[T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry designs against the liberties and properties of the subject."[105] And the primary interest that law must preserve is the freedom of the individuals within the society and the protection of their lives and property.[106] As Michael Zuckert notes, according to Locke:

> [T]he law is a means to an end variously described as "interest," "good," "happiness," and finally "freedom." . . . Locke goes further: "Where there is no law there is no freedom, because liberty is to be free from restraint and violence from others which cannot be where there is no law." Freedom is either the "interest" or "good" of human beings or the comprehensive means to these things and more generally to "happiness," and law, in turn, is the means to freedom.[107]

In addition, although Locke's work is properly viewed as primarily focused on the maintenance of individual property against arbitrary violation, it should be noted that Locke's theory provides a broad definition of property. When discussing property, Locke was not exclusively referring to material possessions. Locke defined the property of a man as his "life, liberty and estate."[108] As Mark

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103. *See id.* at 71–72.

104. As one scholar has summarized Locke's perspective:

> Since all persons, according to Locke, are equal and adequately endowed by nature for their "business" (each being "no better than other men") and people are likely to know best their own concerns and welfare, humankind will be best off (*as a rule*) leaving people a significant realm of personal liberty to pursue their own good in their own way. Paternalistic interference by government is likely not only to be done wrongly (since government is unlikely to know the particulars of an individual's case), but is likely as well to encourage more of the same by setting a dangerous precedent.

SIMMONS, *supra* note 94, at 220 (footnote omitted).

105. Corwin, *supra* note 71, at 72.

106. In the *Two Treatises*,

> political power appears as a particular sort of right with respect to two quite specific referents and activities. On the one hand, it is exercised in the preservation of property, in the broad sense of life, liberty, and worldly goods. On the other, it is expressed in the punishment, with death if necessary, of any who violate the law.

MCCLURE, *supra* note 99, at 130.

107. ZUCKERT, *supra* note 67, at 273.

108. LOCKE, *supra* note 82, at 157.

Goldie notes, Locke "speaks of having property in one's person, life, liberty and religion, as well as estates. To have a right to property is to exact from others the duty of recognizing our personhood."[109]

Thus, we find in Locke's political writing a concept of civil society in which the legitimate authority of government is limited. In Locke's vision, people enter into society so that their personal rights and possessions may be protected from the unchecked freedom of others, and in exchange for that protection they surrender those natural rights that otherwise would have allowed them to impose their will on others. But this is the full extent of the surrender of individual rights. People do not divest themselves of authority in purely private matters—matters that pose no threat of harm to other individuals or the society as a whole. Thus, in the society that Locke conceived, individuals retain their autonomy in regard to any decision or act that poses no threat to others. And, because the government has no more authority than that granted by the citizens, the government has no legitimate authority to interfere with this retained right of individual freedom. For Locke, the role of government is limited to the protection of individuals from other individuals and the ordering of the "public" community.[110] All other rights that involve the nonpublic, or perhaps more precisely the "non–publicly threatening," are not the province of government, and are, indeed, retained by the people for their enjoyment.[111]

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109. *Id.* at 11.

110. Locke's articulation of the civil society calls for a diligent analysis of the legitimacy of government action, and calls for justification of that action based on its impact on the common good.

> [O]ne issue this presents is how the "right of the political society to regulate and articulate the property rights of individuals" can credibly be squared with "their right to do with it whatever they wish." Locke's answer to this, fragile though it may seem, is that such regulation must conform to the public good as the only proper and legitimate end of all actions undertaken by civil authority. . . . Locke has constituted his civil subjects as creatures both wary of incursions upon that which the law has established as their own and justified in opposing such political tampering with this propriety as they do not see and feel to be consistent with the public good. This suggests that the problem cannot be conceptually contained in the difficulties attending Locke's notions of consent or representation, but extends as well into a consideration of the grounds upon which political regulation can be demonstrated as necessary or desirable for the good of the whole. . . . [T]he question [is] how are Lockean civil agents . . . to distinguish between arbitrary interferences with their propriety and reasonable regulation for the public good. What, in other words, are the criteria of judgment upon which political intervention in citizens' proprieties can be credibly justified as contributing to the good, prosperity, and safety of the community itself?

MCCLURE, *supra* note 99, at 257–58 (footnote omitted).

111. Although Locke does not address the issue in quite the same nomenclature, his identification of the private rights retained by the people in civil society, and the limits on legitimate government action arising from this limited surrender, is eloquently mirrored in the "harm principle" articulated by John Stuart Mill in *On Liberty* and the discussion of the public/private distinction. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 6–8 (John Gray ed., 1991). Mill noted

B. James Madison and Retained Rights

The relevant statements of James Madison, essentially the sole author of the Ninth Amendment, make clear that the retained rights referred to in the provision are the same Lockean rights to self-determination that are retained by the people when they agree to the formation of civil government. In describing the reason for the amendments that would ultimately become the Bill of Rights, Madison, in terminology directly mirroring Locke's, acknowledged that "[i]n [some] instances . . . [the amendments] specify those rights which are retained when particular powers are given up to be exercised by the Legislature."[112] The story of the motivation for the inclusion of the Ninth Amendment in the Constitution demonstrates that Madison sought to ensure that these retained rights would be enjoyed by the people and not violated by the government.

The circulation of the original draft of the Constitution fostered certain common criticisms from representatives of the thirteen states of the American Confederation. Many in the state delegations to the Constitutional Convention complained that the document did not include a statement of the rights that individual citizens would enjoy under the new government. In an attempt to respond to these concerns, and to ensure the ratification of the Constitution, Madison began drafting a set of provisions that would eventually become the Constitution's first ten amendments.[113] Although some minor alterations were made to his language, most of Madison's suggested amendments were ratified, and no provisions other than those that he proposed were included among the initial amendments.[114]

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that the mere fact of "'self-government'" does not preclude the possibility of oppression, as the people "*may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power . . . [A]nd in political speculations 'the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard." *Id.* at 8 (footnote omitted). He proposed what he referred to as a "very simple principle" for determining when government action that seeks to restrict freedom is legitimate and when it is not:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of any one, for which he is amendable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Id. at 13–14.

112. 1 ANNALS OF CONGRESS 454 (Joseph Gales ed., 1789).

113. *See id.* at 630.

114. *See id.*

Addressing the importance of including a "Bill of Rights" in the document that created the structure and powers of the national government, Madison's statements mirrored those of Locke concerning limited government: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode."[115] In a contemporaneous letter to his friend and political adversary, Thomas Jefferson, Madison further expressed his concerns about the limits of governmental power:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.[116]

Although reluctant at first, Madison ultimately agreed to the inclusion of a specific list of rights in the new constitution.[117] But he was also mindful of another, notably contrary, objection raised by many of his contemporaries that such a list would constitute a different kind of threat to individual rights. In a speech introducing the proposal that would ultimately become the Ninth Amendment, Madison provided his characterization of this additional concern:

> 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 . . . but, I conceive, that it may be guarded against. I have attempted it, as gentleman may see by turning to the last clause of the fourth resolution [the Ninth Amendment].[118]

One express goal of the Ninth Amendment, therefore, was to ensure that the listing of a limited set of rights would not undermine any rights that also deserved protection but were not listed for whatever reason. Or, as Justice Joseph Story stated in discussing the Ninth Amendment: "'This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well

115. 1 ANNALS OF CONGRESS 432, 437 (Joseph Gales & William Seaton eds., 1836) (quoting James Madison).

116. 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 616 (compiled by Bernard Schwartz, 1971) (reproducing a letter from James Madison to Thomas Jefferson, written Oct. 17, 1788).

117. As a Federalist, Madison was a vocal opponent of the inclusion of a bill of rights until it became clear the Constitution would not be ratified by the states without one.

118. 1 ANNALS OF CONGRESS, *supra* note 112, at 456 (statement of James Madison in the House of Representatives on June 8, 1789).

known maxim, that an affirmation in particular cases implies a negation in all others.'"[119]

While drafting the original amendments to the Constitution, Madison was also mindful of still another distinct concern raised about a bill of rights from critics who already believed that the unamended Constitution had granted too much power to the federal government. Madison, a consistent proponent of a strong central government, was not sympathetic to further restrictions of federal power beyond those already set out in the Constitution's articles, however.[120] Madison responded to these concerns by noting that

> [T]he great mass of the people who opposed [the Constitution] . . . disliked it because it did not contain effectual provisions

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119. Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 5, at 93, 102 (quoting Justice Joseph Story). Or, as Levinson put it, the Ninth Amendment served as the "guard" against the problems suggested as arising from a bill of rights, "with its message, as plain as one might hope for given the vagaries of language, that the specification of some rights was not to be interpreted as denying the equal presence with the legal system of other, unenumerated rights." Levinson, *supra* note 5, at 126.

120. *See* Dunbar, *supra* note 30, at 634. Indeed, the Constitution was developed as a replacement for the original government framework devised by the Framers—the Articles of Confederation—that suffered from the terminal flaw of excessive decentralization of power. The Constitution's preamble, which speaks of forming "a more perfect Union," U.S. CONST. pmbl., is most reasonably interpreted as a cautionary commentary on the relatively loose confederation of states that directly preceded its drafting. In his history of American government, Reed West describes the motivations behind the drafting of the Articles of Confederation and the motivations for its replacement with the Constitution:

> The frame of government was rather simple. No executive appeared. The president of Congress was referred to as the titular head of the United States, although he was merely the presiding officer. . . .
>
> . . . .
>
> So fearful were the statesmen of that period of a strong central government like that of Great Britain that they went to the other extreme. The Articles declared that each state retained its sovereignty and every power and right which was not expressly delegated to Congress. . . .
>
> . . . .
>
> [But] Congress soon found that it could not regulate interstate or foreign commerce, that it could not compel the states to respect treaty provisions nor to furnish money. Congress had no taxing power. . . .
>
> Whether the inability of Congress to regulate interstate and foreign commerce or the lack of power to tax constituted the greater weakness may well be debated. Historically, it was the former that caused steps to be taken to bring about corrections.

W. REED WEST, AMERICAN GOVERNMENT 35–38 (1938); *see also* FLORENCE ELLINWOOD ALLEN, THIS CONSTITUTION OF OURS (1940).

> It was not a theoretical discussion from which proceeded the determination that at least out of the Constitution should come a "more perfect union." The Constitution, therefore, grew directly out of the determination to maintain the liberty and independence that the state had won . . . . The Constitution has been, and still is, an instrument of freedom. The proposal for the Constitutional convention had arisen out of the Interstate Commerce difficulties under Articles of Confederation, which allowed each state to go its own way . . . .

Id.

> against encroachments on particular rights. . . . [A]nd if we can make the constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men . . . .[121]

Aware of both strains of criticism of a bill of rights—the concern that the listing of specific rights would expand the power of the federal government, and the fear that any enumeration of rights, by its nature, would be incomplete—Madison initially proposed this language:

> 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.[122]

Ultimately the two issues addressed in this somewhat unwieldy formation were split into two resolutions, which would form the thematic basis for separate amendments. The concerns of those who saw the Bill of Rights as enlarging the powers delegated by the Constitution to the federal government were addressed in a separate provision that would be ratified as the Tenth Amendment to the Constitution. This provision provided that "[t]he 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."[123] The limitation of federal power exclusively to specifically enumerated powers was already the centerpiece of Article I. The point of the Tenth Amendment was to make clear that the listing of rights enjoyed by the people in this latter set of provisions should not be inferred as some sort of alteration of Article I or as a justification for an expansion of the powers of the federal government.

The remaining concern of the critics of the Bill of Rights—that a limited mention of rights would suggest exclusivity—was covered by new language that would ultimately become the Ninth Amendment. Once the original formulation was split into two provisions, Madison's language was pared down to language almost identical to that ultimately ratified: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[124] Once the "this" was changed

121. 1 ANNALS OF CONGRESS, *supra* note 112, at 459.
122. *Id.* at 452.
123. U.S. CONST. amend X.
124. 1 ANNALS OF CONGRESS, *supra* note 112, at 754.

to a "the," and a comma was placed after "Constitution," the final version of the Ninth Amendment was complete.[125]

The body of Madison's commentary about the Ninth and other amendments indicates that part of his objective was the acknowledgment that the enumeration of rights in the Constitution was not an exhaustive list of the rights of citizens.[126] It is also clear from Madison's statements, however, that the Ninth Amendment's reference to rights retained by the people focused on a specific category of rights. Madison, like Locke, saw the restriction on the extent of legislative power as a cornerstone of the preservation of a free society, and he and his colleagues sought to set up a governmental system that would avoid the abuses of majoritarian government power—the most important abuse being the invasion of private rights. The Ninth Amendment, and the rest of the Bill of Rights, became key components to ensuring the creation of a limited government that would not unduly threaten the freedom of its citizens.

In 1788 in the Virginia State Constitutional Convention, when asked about the meaning and purpose of the Ninth Amendment, Madison described the provision as a mechanism to create and preserve a concept of limited government and the limited surrender of power by citizens to their government that matched the Lockean model.

> 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 principle of the adoption—that everything not granted is reserved.[127]

125. Although significant changes were made in the language of the earliest proposals, passage of the amendment produced almost no debate in the House of Representatives. *See* Dunbar, *supra* note 30, at 632 (noting that passage of the Ninth Amendment "through the House occasioned practically no debate," while the amendment's treatment in the Senate is unknown because deliberations in that chamber were closed to the public).

126. In *Griswold*, Justice Goldberg noted that the Ninth Amendment was "almost entirely the work of James Madison," and that it was "proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." Griswold v. Connecticut, 381 U.S. 479, 488–89 (1965) (Goldberg, J., concurring).

127. THE COMPLETE BILL OF RIGHTS 655–56 (Neil H. Cogan ed., 1997). Proponents of the view that the only purpose of the Ninth Amendment was to reaffirm the limitations of federal power proscribed by the Constitution perpetuate the error of ignoring the Tenth Amendment and the separate goal it sought to address. In the Ninth Amendment, Madison is certainly discussing

It is with this concept of limited government in mind, that Madison's use of the language of "retained rights" must be understood. The notion that dominated Madison's understanding of civil society and proper limits of government is the same concept expressed by Locke: that individuals give up their rights to impose their will on others to the state, so that others will not be able to impose their wills on them, but all remaining rights—all rights that do not pose a threat to other individuals, or the community as a whole—are retained by the people. As Professor Leslie Dunbar argued, Madison, in proposing the amendment, was seeking "an affirmation of the principle that, as rights in the United States are not created by government, so they are not to be diminished by government, unless by the appropriate exercise of an express power."[128] In other words, the Ninth Amendment represents the constitutional principle that there are rights outside the Constitution and outside the authority of government—rights enjoyed by the people before they entered into society, which the society has played no role in providing—that the government is obliged to honor and is precluded from infringing upon.

This analysis of Locke and Madison uncovers the hidden but definite theme of the Ninth Amendment. The available information concerning the reason for its proposal and passage indicates that the Ninth Amendment is *about* the right to personal freedom and autonomy. Ninth Amendment rights are rights to act freely to the extent that the actions do not harm others or the society as a whole. And they are rights to be free from the illegitimate expression of governmental power that seeks to restrict personal freedom for any reason other than the protection of the public good.[129]

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the federal government, but he is not making reference to its potential expansion of power at the expense of the states. Instead he is concerned with the impact of broad legislative powers on the individual rights of citizens. The Tenth Amendment, on the other hand, is clearly intended to address and specify the nature of the Federal-State relationship.

128. Dunbar, *supra* note 30, at 638.

129. In his articulate critique of "bare assertions of public morality" absent some empirically identifiable impact on the "public good" as "legitimate government interests," Professor Peter Cicchino argues convincingly that

> First, moral interests unrelated to an empirical effect on public welfare are not, in principle, distinguishable from irrational prejudice and private bias. Second, bare moral interests are, for the purposes of discourse in a pluralistic democracy, analytically and practically indistinguishable from theological or sectarian assertions. Therefore, third, such bare moral interests are irremediably unsuited to the public discourse of those who make and interpret the law.

Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 173 (1998). In support for the third of these critiques, Cicchino invokes John Rawls, noting that

> In a democracy like our own, Rawls finds it essential that "[c]itizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds

Armed with this theme, we can now seriously examine the possibility of Ninth Amendment adjudication. A justicable Ninth Amendment claim would have to involve an alleged conflict between a private activity and some restrictive governmental regulation. Acts that are not essentially private or that pose some real threat to another person, would not come into the Ninth Amendment purview; they would not qualify as the type of rights that were retained because entry into civil society did not require their surrender. On the other hand, when an individual engages in an essentially private activity or makes a purely private determination, that action is of the class protected by the Ninth Amendment, and any government action that substantially abridges such expression amounts to an illegitimate expression of governmental authority. With this defining, yet limiting, concept of the extent of Ninth Amendment rights, we can imagine how a litigant might present a Ninth Amendment case in a courtroom, and what mechanism would be appropriate for resolving the dispute.

III. A NINTH AMENDMENT ADJUDICATIVE MECHANISM

The interpretation of the Ninth Amendment detailed above suggests that a specific kind of mechanism would be most effective for adjudicating Ninth Amendment claims. Like claims alleging violations of the Fourteenth Amendment's Equal Protection Clause, the central focus of Ninth Amendment adjudication should be the impact of the underlying government action and the motivation for it. Just as in equal protection analysis, government action based on an invalid motive—in the case of the Ninth Amendment, any motive that is not based on protecting or enhancing the public welfare—should be struck down. Pursuant to Ninth Amendment adjudication, the question would not be whether a distinction made by a governmental action was based on a classification considered inherently suspect because of the unavoidable inference of unconstitutional racial or gender animus or prejudice that the classification suggests. Rather, in Ninth Amendment adjudication,

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of reasons they may reasonably give one another when fundamental political questions are at stake." Bare assertions of public morality, like sectarian theological assertions, fail the test of public reasonability precisely because they are unrelated to human experience and are independent of any observable effects on public welfare.

Defenders of the constitutional legitimacy of bare assertions of public morality accuse their detractors of "relativism" and "nihilism." . . .

In fact, to defend bare assertions of public morality as legitimate government interests requires a relativistic view of constitutional morality. By contrast, the requirement that all public morality interests be empirically related to the public welfare establishes a universal, publicly accessible, and rationally intelligible limit on the sorts of moral interests that can serve as the legitimate objectives of law.

Id. at 177–78 (alteration in original) (footnote omitted).

the question will be whether government action that places a significant burden on the expression of personal autonomy or freedom is motivated by an unconstitutional interest in controlling private action or private choices. Like classifications based on race, government action that imposes substantial restrictions on private activities raises the presumption that the action is motivated not by a legitimate public interest, but by an illegitimate objective to regulate activity not within the proper scope of governmental power.

Accordingly, an appropriate mechanism for Ninth Amendment adjudication would resemble that used to resolve equal protection claims. First, the court would make an initial determination at a postpleading/prediscovery motion stage as to whether the government action giving rise to the challenge is the kind of activity that the Ninth Amendment protects. If the court concludes that it is not, the case would be dismissed at that stage. If, however, the court concludes restriction of the activity would impose on the personal autonomy of the individual or group of individuals involved, the case would move on to the second stage, during which the reviewing court would subject the governmental action to a heightened scrutiny similar to that applied in equal protection cases. To survive this review, governmental action that restricts personal autonomy, like an action that classifies on the basis of gender, must serve an important and legitimate government interest, and must be substantially related to achievement of the legitimate objective.[130]

This mechanism arises from the core principle of the Ninth Amendment that not all government action is legitimate, and that when the government seeks to restrict the expression of personal freedom, absent an appropriate justification based on the protection of public welfare, it is illegitimate and unconstitutional. Pursuant to this proposed mechanism, reviewing courts will be obliged to determine exactly when government action that seeks to regulate private activity is legitimate. This analysis involves a determination

130. *See* United States v. Virginia, 44 F.3d 1229, 1235 (4th Cir. 1995). Cicchino summarizes the basic structure of, and reason for, the standards applied to claims challenging legislative enactments based on the Equal Protection Clause in this way:

> [D]epending on the harm inflicted and the characteristics of the classification at issue, the Court inquires into: (1) the importance of the alleged or, in the case of the rational basis test, conceivable government interest realized by the classification ("compelling," "substantial," or "legitimate") and (2) whether and how the classification at issue is likely to realize that interest (that is, strict scrutiny requires the statute be narrowly tailored and essential to achieving a compelling government interest; intermediate scrutiny requires that the statute substantially advance an important government interest; and rational basis review requires that the statute be rationally related to some conceivable legitimate government interest). What distinguishes the various standards of review from each other is the level of deference accorded to the government's rationale to justify the statute under the Equal Protection Clause.

Cicchino, *supra* note 129, at 144–45.

of how private that activity really is, and it must address both the extent of the government regulation involved and the motivation for the action. The more private the activity involved, the less justified the government is in regulating it. To justify regulation, the government must show that there are sufficient public consequences of the activity that justify government regulation.

It is important to note once again that the references to private and public that are relevant to this Ninth Amendment analysis conceive of private acts as those that pose no threat of harm to other individuals or to the public welfare, while public acts are those that pose a threat to either or both. This simplistic delineation of the public/private distinction is chosen, in part, because it is mandated by the understanding of the nature of personal liberty and legitimate government action in the Lockean framework. The concept of rights retained by the people upon which this Ninth Amendment interpretation is based flows from Locke's notion that legitimate government action focused on only those aspects of individual action that posed a threat to others or the community as a whole. Those private acts that did not pose such a threat were not the subject of legitimate government regulation. So, to the extent that the terms public and private are used in the discussion of the Ninth Amendment adjudicative mechanism in the remainder of this Article, they should be viewed as conveying the distinction between acts that pose a potential public threat and acts that do not.[131]

The question of the legitimacy of government regulation pursuant to the Ninth Amendment is the same as the question Professor Kirstie McClure conceptualized as central to the determination of legitimacy in Locke's political theory. What a Ninth Amendment adjudication must do is "distinguish between arbitrary interferences with the[ ] propriety [of individual citizens on the one hand] and reasonable regulation for the public good [on the other]."[132] When a challenged government regulation is found not to be a reasonable regulation for the public good, but merely an arbitrary interference with individual autonomy, it will be invalid under the Ninth Amendment.

A. Stage One: Gatekeeping

At the initial stage of a claim based on the Ninth Amendment, instead of asserting that a federal or state[133] law or government action violates a

131. For more in-depth discussions of some aspects of the public/private distinction that are not discussed in this Article, see NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 69–120 (1997), and Symposium, *Privacy and the Law*, 67 GEO. WASH. L. REV. 1097, 1207–64 (1999). *See also supra* note 24.

132. MCCLURE, *supra* note 99, at 257–58.

133. Even those who argue that the Ninth Amendment should be actively applied disagree about whether it should be applied to actions of state governments. *See* Levinson, *supra* note 5, at

fundamental right protected by the Fifth or Fourteenth Amendment's due process clauses, an individual would file a complaint alleging that the government action constitutes an illegitimate intrusion into her personal freedom by restricting or precluding an essentially private activity or interfering with a private choice. The complaint would identify the specific activity or activities involved and the way in which the government action either restricted or precluded them. The complaint would not argue that the plaintiff had a specific positive right to engage in the activities in question. It would allege instead that regardless of the importance or fundamentality of the activities, the activities were private, or involved the expression of the personal autonomy of the plaintiff, and that they were therefore protected from government regulation by the Ninth Amendment.

In response to the plaintiff's complaint, the government defendant could seek to terminate the case by filing a motion to dismiss the claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (or a state court analog), arguing that even if the factual allegations made by the plaintiff were true, the claim would still fail to state a claim upon which relief could be granted. To make this argument, the government would contend that the activities identified in the complaint were not the kinds of activities that are protected by the Ninth Amendment because they are essentially public rather than essentially private. The reviewing court, either sua sponte or in response to a government motion, would make the initial determination, as a matter of law, as to whether the relevant activity was sufficiently private (or non–publicly threatening) to fall within the protection of the Ninth Amendment. This type of determination is appropriate for a court at the motion to dismiss stage. The dismissal option would allow the court to determine whether the plaintiff had identified

128–30. The Supreme Court in both *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), seemed to ignore the issue, as both cases address the effect of the Ninth Amendment on the activities of state governments without discussing the possibility that the amendment does not apply to the states. This treatment seems reasonably justified by Justice Black's long-acknowledged (if not universally accepted) conclusion that the Privileges and Immunities Clause of the Fourteenth Amendment which prevents the states from undermining the constitutional rights of its citizens, serves to incorporate the Bill of Rights (or at least the first eight amendments) into the Fourteenth Amendment and to require that state governments not restrict these rights. *See* Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring). In the same vein, various scholars have argued that whatever rights the Ninth Amendment protects (and whether or not it should be considered part of the Bill of Rights), the states are obligated by the Fourteenth Amendment not to violate rights enjoyed by citizens of the United States, including Ninth Amendment rights. *See* Levinson, *supra* note 5, at 133 ("[O]ne can extend the ambit of 'full incorporation' to the part of text overlooked by Justice Black namely, the Ninth Amendment itself."). It must be noted, however, that although Justice Black expressed no such limitation, the legislative history upon which he based his incorporation conclusion speaks of the Bill of Rights as the "first eight amendments of the Constitution." *See* ELY, *supra* note 15, at 26 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866)).

a plausible instance of illegitimate government intervention before extensive resources were expended balancing the extent of the harm suffered against the government interests served.

Under this proposed adjudication mechanism, if the reviewing court concludes that the activity is not substantially private—that its character is primarily public in nature[134]—the court would properly dismiss the case on the grounds that the plaintiff had failed to state a claim upon which relief could be granted under law.[135] This early stage determination would have the benefit of quickly disposing of frivolous assertions of Ninth Amendment rights,[136] of identifying valid constitutional claims that simply are not Ninth Amendment claims, and saving the courts and the government the time and expense of excessive discovery and protracted litigation. Only if the reviewing court concluded that the activity involved was substantially private in character would the case move on to the next stage—the application of a heightened level of scrutiny to the government's action and motivations. At the initial stage, the court would not provide an in depth evaluation of the extent of the public consequences of the action. It would merely determine whether the activity involved in the claim was basically private or basically public.

A judicial determination of whether a certain activity was public or private could pose serious challenges for courts just as it does for philosophers and other theorists.[137] But this unavoidable difficulty does not justify rejection

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134. An example of a claim that is primarily public in nature would be an assertion of a right to receive public assistance payments based on the Ninth Amendment. Notwithstanding the importance of this right and the basis for finding constitutional protection for it elsewhere, the Ninth Amendment would have nothing to say about this claim as it would involve a primarily public act—the provision of funds by a government entity—and not an assertion of a zone of protection from government regulation. This same restriction of Ninth Amendment claims would apply equally to any claim that a government had managed its provision of an entitlement in an inappropriate manner.

135. *See* FED. R. CIV. P. 12(b)(6) (Rule 12(b)(6)).

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Id. The Rule 12(b)(6) determination would of course apply only to the claim as it relates to the Ninth Amendment allegations. The fact that the claim did not state an act sufficiently private to fall under the protections of the Ninth Amendment would not prevent a court from concluding that it stated a sufficient cause of action under some other legal theory in order to survive a motion to dismiss.

136. A claim from an individual that the rights retained by the people in the Ninth Amendment included the right to have the government provide him with a Mercedes-Benz (in his choice of color) need not burden the courts under this mechanism any longer than any similarly ridiculous claim based on some other legal theory.

137. Hannah Arendt has provided a particularly lucid discussion of the difficulty of making a reasoned and consistent public/private distinction, particularly given the complexities of modern society.

> In the modern world, the social and the political realms are much less distinct. That politics is nothing but a function of society, that action, speech, and thought are primarily superstructures

of this adjudicative model. Indeed, such judicial determinations are commonplace in the evaluation of many claims. And, given the character of the privacy right protected by the Ninth Amendment, the overriding question would be a comparatively simple one: Does the action pose a threat of harm to another individual or to the public welfare?

As the Supreme Court has demonstrated, it is capable of addressing the issue of the potential public impact of an arguably private activity. In *Stanley v. Georgia*,[138] for example, the Supreme Court reviewed a challenge to a Georgia criminal prosecution for the possession of obscene materials.[139] The challenging party argued that the state obscenity law "insofar as it punishes mere private possession of obscene matter, violates the First Amendment."[140] The Court agreed, holding that "the mere private possession of obscene matter cannot constitutionally be made a crime."[141] Although the lower court had

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> upon social interest, is not a discovery of Karl Marx but on the contrary is among the axiomatic assumptions Marx accepted uncritically from the political economists of the modern age. This functionalization makes it impossible to perceive any serious gulf between the two realms; and this is not a matter of a theory or an ideology, since the rise of society, that is, the rise of the "household" . . . or of economic activities to the public realm, housekeeping and all matters pertaining formerly to the private sphere of the family have become a "collective" concern. In the modern world, the two realms indeed constantly flow into each other like waves in the never-resting stream of the life process itself.

ARENDT, *supra* note 93, at 33 (footnote omitted).

FRASER, *supra* note 131, summarizes some of the difficulties encountered in feminist discourse concerning the private and public sphere. Fraser notes that the work of Jürgen Habermas is "an indispensable resource" in addressing the distinction, particularly his concept of "the public sphere" described in JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., MIT Press 5th prtg. 1993) (1962). She notes that "Habermas's concept of the public sphere provides a way of circumventing some confusions that have plagued progressive social movements and the political theories associated with them." FRASER, *supra* note 131, at 69. She starts off with some of the difficulties encountered by Marxist theorists, but focuses her primary attention on

> a confusion one encounters at times in contemporary feminisms. I mean a confusion that involves the use of the very same expression "the public sphere," but in a sense that is less precise and less useful than Habermas's. This expression has been used by many feminists to refer to everything that is outside the domestic or familial sphere. "The public sphere" in this usage conflates at least three analytically distinct things: the state, the official-economy of paid employment, and arenas of public discourse. It should not be thought that the conflation of these three things is a merely theoretical issue. On the contrary, it has practical political consequences, for example, when agitational campaigns against misogynist cultural representations are confounded with programs for state censorship, or when struggles to deprivatize housework and child care are equated with their commodification.

Id. at 70 (footnote omitted).

138. 394 U.S. 557 (1969).

139. *See id.* at 558.

140. *Id.* at 559.

141. *Id.*

relied on the Supreme Court's decision in *Roth v. United States*,[142] which held that obscenity was not protected by the First Amendment, the Court distinguished this case by noting that *Roth* dealt with the distribution of "objectionable material or with some form of public distribution or dissemination."[143] In its opinion, the Court addressed the extent of the right to privacy that citizens enjoyed in their homes.[144] After noting the importance of receiving information, regardless of its "social worth," the Court noted the right "takes on an added dimension" in a case involving protection for the mere possession of obscene material: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[145]

The Court based its holding on its understanding of how the Constitution limits the authority of government to invade the privacy of its citizens and the consequent rights that citizens enjoy in order to protect this privacy.

> These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels

142. 354 U.S. 476 (1957).

143. *Stanley*, 394 U.S. at 561.

144. As one federal court summarized the holding in *Stanley*:

> The Supreme Court has clarified that *Stanley* "depended not on any First Amendment Right to purchase or possess obscene materials, but on the right to privacy in the home." It has also recognized that the right to possess obscene materials in the privacy of one's home does not create a "correlative right to receive it, transport it, or distribute it" in interstate commerce even if it is for private use only.

United States v. Thomas, 74 F.3d 701, 710 (6th Cir. 1996) (citation omitted).

145. *Stanley*, 394 U.S. at 564.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.

Id. (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Brandeis, J., dissenting)).

> at the thought of giving government the power to control men's minds.[146]

In *Stanley*, the Court identified two crucial aspects of a reasoned definition of privacy. First, and most obvious, the Court held that actions that occur in an individual's home and that do not involve contact with the rest of the community are private and deserve a different treatment than conduct that occurs outside the home. But, second, and perhaps more important, particularly in regard to Ninth Amendment adjudication, the Court notes that the real invasion that resulted from the government's action in *Stanley*—the real violation of the First Amendment and "[o]ur whole constitutional heritage"[147]—was the attempt by the state to invade the mind of one of its citizens. Worse even than the invasion of the appellant's home in this case, according to the Court, was the attempt to legislate his personal preferences, beliefs, and morality. The decision stands for the proposition that the sphere of privacy that legitimate government action cannot invade includes both one's home and one's personal beliefs and values.[148]

As strong as the Court's holding was in *Stanley* that the government action constituted an undue invasion of privacy, the majority was not unmindful of the types of complications that arise when an activity in our complex and interconnected society is identified as private. In response to arguments from Georgia that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence,"[149] the Court noted that there is "little empirical basis for"[150] such an assertion, but noted that even if such a connec-

146. *Id.* at 565.

147. *Id.*

148. As one federal court noted in applying the *Stanley* holding to a similar case:

> Although *Stanley* could have been decided on the narrow [F]irst [A]mendment ground that the state could not prevent the receipt of information, its holding is in fact considerably broader: the state may not attempt to control the minds of its citizens, whether the targeted thoughts and feelings are intellectual or emotional. This "freedom to be one's self," which encompasses spiritual, emotional and intellectual thoughts and feelings, is protected, at least in some contexts, by a constitutional right of privacy, which may only be overridden by a compelling state interest.

Shields v. Burge, 874 F.2d 1201, 1212 (7th Cir. 1989) (Cudahy, J., concurring) (footnote omitted).

149. *Stanley*, 394 U.S. at 566. Feminist scholars have advanced similar (yet distinct) arguments as a justification for criminalizing "pornography," which is distinguished from the mainstream characterization of "obscenity" by the focus on the endemic objectification of and violence against women depicted in pornography, as opposed to the focus on sexual titillation in the analysis of obscenity. *See* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304 (1995); Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 101–08 (1996); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 323–24 (1984) ("[P]ornography causes attitudes and behaviors of violence and discrimination.").

150. *Stanley*, 394 U.S. at 566–67.

tion could be drawn, it would not justify the extent of the intrusion involved in *Stanley*, particularly in light of other mechanisms that serve to discourage the expression of personal beliefs in a manner that will threaten the society as a whole.

> [W]e believe that in the context of private consumption of ideas and information we should adhere to the view that "among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . ." Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.[151]

Just as in *Stanley*, the identification of what is sufficiently private to garner Ninth Amendment protection will be complicated by arguments concerning the potential public impact of essentially private conduct.[152] One of the key aspects of this proposed Ninth Amendment adjudicative mechanism is that it takes these possible arguments seriously and factors them into its analysis. The point of this mechanism is not to identify some actions as purely private and mandate that courts protect them from any kind of state regulation, but rather to identify those activities that are substantially or primarily private and to require a government that seeks to regulate such activities to justify regulation based on the public impact of the action.

The *Stanley* Court's analysis of the private and public sphere, and of the illegitimacy of government action that invades the former, demonstrates at least some of the activities that would be appropriately considered to be essentially private by a court reviewing a Ninth Amendment claim. Actions involving only one person that occur in the privacy of one's residence would be considered private under this analysis, partially because of the location of the action and partially because of the complete absence of reasonable threat of harm to another. Although slightly more controversial, it can be demonstrated that actions involving apparently consenting adults within a

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151. *Id.* (citations omitted).

152. *See* United States v. Orito, 413 U.S. 139, 142–43 (1973) (holding that "[t]he Constitution extends special safeguards to the privacy of the home" and acknowledging that there are a "myriad [of] activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public"); *see also* Procunier v. Martinez, 416 U.S. 396 (1974) (holding that a policy of reading and censoring the mail of prison inmates violates their First Amendment rights). In his concurring opinion, Justice Thurgood Marshall argued that

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and [to] affront the individual's worth and dignity.

Id. at 427 (Marshall, J. concurring) (citation omitted).

private residence would also be considered private, again both because of location and the lack of threat of some unwanted, and consequently harmful, intrusion.[153] And the act of forming and expressing one's personal preferences and beliefs—the defining characteristic of personal autonomy—would also be properly considered private in nature.

The discussion of privacy in *Stanley* provides two important keys to the development of an effective Ninth Amendment jurisprudence: (1) It demonstrates that courts can (and do) make distinctions between public and private activity, and (2) it provides a basic indication of how a reasoned distinction between the public and the private can be made. Though *Stanley* and similar cases are insufficient to conclusively resolve the difficulties in determining at exactly what point the public/private line should be drawn in every case, this realization is not fatal to the development of this jurisprudence. The point of the Ninth Amendment mechanism is not to mandate resolutions of disputes over the legitimacy of government regulation of private acts, but rather to place those disputes at the forefront of adjudication and to tip the current balance inherent in judicial evaluation of personal autonomy claims away from the governmental entities and in favor of individuals. As the remainder of this Article demonstrates, the difficulties inherent in identifying which actions can be reasonably considered to be primarily public will rest with the governmental entity as it seeks to justify its regulation of the activity in the second stage of the Ninth Amendment adjudication mechanism. Pursuant to this mechanism, the government will only be allowed to regulate activity when it can provide a convincing demonstration that the activity has some kind of significant impact on the public welfare. If the government cannot make such a showing, its regulation will be properly invalidated as violating the Ninth Amendment.

B. Stage Two: Heightened Scrutiny for Privacy-Invasive Government Action

Pursuant to the second stage of this proposed mechanism, if a court concluded that the regulated act is essentially private, a government could not successfully respond to the plaintiff's claim by noting that there is a public consequence, or consequences, arising from the activity in question. This argument would be insufficient, on its own, to justify the regulation. If the government seeks to legitimately regulate the activity in question, it must demonstrate that the public impact of the act is substantial enough, and the public interest in regulating it compelling enough, to justify the extent of

153. The "private" character of activities engaged in by consenting adults is more fully addressed *infra* Part V.B (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)).

the privacy invasion involved. In the second stage of this Ninth Amendment analysis, the government would be obliged to demonstrate why its regulation of the activity is legitimate. To do this it must identify the public interest that is served by the regulation or preclusion, and show that the specific regulation is substantially related to that public interest. Similar to the "fit" analysis applied by courts in cases involving classifications based on sex under the Equal Protection Clause,[154] the government would be required to demonstrate that the interest it seeks to protect is a valid interest—in this case a public welfare interest—and that the challenged regulation is narrowly tailored to achieve that permissible goal.

This Ninth Amendment fit analysis will treat as inherently suspect any governmental action that invades the privacy of individuals. The mere fact that the government has instituted a regulation of private activity supports the assumption that the government's motivation is nonpublic in nature, and therefore invalid.[155] Consequently, as in the case of suspect racial and gender classification, the government would be required to show that the means it has chosen to meet its express objective is the one that poses the least reasonable threat to the constitutional rights of the citizens involved and is reasonably related to a valid government interest.

This mechanism serves to protect the personal autonomy of citizens, and to identify circumstances in which the professed motivation for a regulation is actually a pretense obscuring some kind of unconstitutional purpose.[156] Under this analysis, the government's proffered justification for

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154. *See* Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

155. In discussing the role that "suspect classification" analysis plays in uncovering the real motivation behind legislative action, Ely notes that

> The goal the classification in issue is likely to fit most closely, obviously, is the goal the legislators actually had in mind. If it can be directly identified and is one that is unconstitutional, all well and good: the classification is unconstitutional. But even if such a confident demonstration of motivation proves impossible, a classification that in fact was unconstitutionally motivated will nonetheless—thanks to the indirect pressure exerted by the suspect-classification doctrine—find itself in serious constitutional difficulty. . . . The "special scrutiny" that is afforded suspect classifications . . . insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of "flushing out" unconstitutional motivation, one that lacks the proof problems of a more direct inquiry . . . .

ELY, *supra* note 15, at 145–46 (footnotes omitted).

156. The reason that the fit analysis is applied to equal protection determinations is that otherwise ostensibly permissible classifications made by legislatures are appropriately invalidated if the motivation for the classification is impermissible—"that the very same governmental action

its action could fail on two separate grounds. First, if the interest that the government seeks to protect is insufficiently public, it will not be justified in regulating private activity based on that interest. Second, if there is a legitimate government interest that can be identified, but the regulation in question is not substantially related to promoting that interest, the government would be obliged to find some other, less privacy-intrusive, manner to promote that objective. This fit analysis will require that the government regulate activities only in appropriate circumstances, and seeks to assure that the specific regulations actually arise out of, and reasonably serve, appropriate governmental interests.

What is specifically precluded by this part of the mechanism are any governmental interests that do not serve to protect the public good. Pursuant to this analysis, the government cannot impose a community-defined code of morality regulating the private lives of its citizens unless the regulation ostensibly protects the public welfare.[157] As shown above, the rights referred to in the Ninth Amendment as being retained by the people are rights to personal self-determination and autonomy. The central core of these retained rights, what Locke referred to as the right to make "private judgment,"[158] is the right to govern one's life without the imposition of an external, and necessarily alien, belief structure, at least to the extent that these personal moral choices pose no threat to others.[159] Even though it cannot be disputed

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can be constitutional or unconstitutional depending on why it was undertaken." *Id.* at 137; *see also* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("'Acts generally lawful may become unlawful when done to accomplish an unlawful end . . . .'" (quoting United States v. Reading Co., 226 U.S. 324, 357 (1912))). As Ely noted in 1980, this point is by no means uncontroversial, and he also acknowledged the difficulty of finding a single motivation for a legislative act. But he argues that

> The considerations that make motivation relevant argue not for the discovery of the "sole" motivation (is there ever just one?) or even the "dominant" motivation (whatever that might mean), but rather for asking whether an unconstitutional motivation appears materially to have influenced the choice: if one did, the procedure was illegitimate—"due process of lawmaking" was denied—and its product should be invalidated.

ELY, *supra* note 15, at 138 (footnotes omitted).

157. As Cicchino observed:

> [W]hile it is entirely appropriate, and indeed unavoidable, that legitimate government interests reflect judgments about what is good for the political community and for individual citizens, for equal protection analysis, the only value judgments that qualify as legitimate government interests are those that are observably connected to the public welfare. A bare assertion of public morality, divorced from any empirical effect on the public welfare, cannot constitute a legitimate government interest.

Cicchino, *supra* note 129, at 142.

158. LOCKE *supra* note 83, at 158.

159. The concept that the role of the government is the prevention of harm to each individual and his property is central to Locke's concept of retained rights. *See supra* Part II.A (explaining Locke's understanding of retained rights in civil society). Mill provided a more detailed analysis of the concept of harm and the legitimate authority of government in relationship to its prevention.

(at least not under the constitutional or Lockean frameworks) that governments may impose a concept of public morality on its citizens in the course of its regulation of public activity, governments have no legitimate authority to impose a majority-defined concept of personal or private morality on individuals in a way that substantially impacts their private lives.[160] Ninth Amendment adjudication would invalidate any such governmental attempt.

IV. THE NINTH AMENDMENT VS. SUBSTANTIVE DUE PROCESS

Now that the theme of the Ninth Amendment has been identified, and an adjudicative mechanism devised, there is at least one obvious question that must be addressed: "Why do we need a Ninth Amendment adjudicative mechanism when we already have substantive due process to address the same kinds of questions and protect the same kinds of rights?" The answer is that we need this Ninth Amendment analysis as a replacement for substantive due process, at least to the extent that the doctrine is applied to disputes concerning personal autonomy. Substantive due process is a weak and flawed doctrine, and the Ninth Amendment mechanism discussed above—which avoids at least some of the weaknesses and flaws of substantive due process—would significantly improve our personal autonomy jurisprudence.

In a recent Supreme Court decision, Chief Justice Rehnquist described the substantive due process methodology in detail, noting that, in addition to its more obvious procedural protections, the "[C]lause also provided

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Mill's analysis demonstrates that the determination of when an action can be seen to create "harm" is another complex issue that courts will be forced to wrestle with pursuant to this adjudicative mechanism. For a discussion of Mill's "harm" principle, see *supra* note 111.

160. As Mill put it,

> Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.

MILL, *supra* note 111, at 8–9.

heightened protection" of certain "fundamental rights" and went on to note that the Court has

> "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court. . . .
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> . . . [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.[161]

There are two dominant categories of criticism of this substantive due process analysis. First, many judges and scholars have noted that there is no textual basis for the doctrine, and that substantive due process—a contradiction in terms—was not contemplated by the Framers.[162] Second, and more broadly, critics have noted that the type of analysis that substantive due process requires of judges obliges them to act in ways that are inappropriate in our system—either because judges are not equipped to make the types of determinations required or because these determinations should be resolved by the political branches of government, not the courts. As Charles Black recently noted, substantive due process

> follows no sound methods of interpretation (how could it, given the nature of the phrase itself?) and is therefore neither reliably invocable in cases that come up, nor forecastable in result by anything much but a guess. This kind of non-standard is not good enough for a systematic equity of human rights. It everlastingly will not do; it is *infra dignitatem*, it leaks in the front and leaks in the back.[163]

161. Washington v. Glucksburg, 521 U.S. 702, 719–21 (1997) (citations omitted).

162. *See* BLACK, *supra* note 8, at 3 ("This paradoxical, even oxymoronic phrase—'*substantive* due *process*'—has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution.").

163. *Id.*

But while much of the criticism of substantive due process analysis has come from observers who lament what they see as the excessive and inappropriate power it provides for judges, the focus of criticism in this Article, and the critical flaw that Ninth Amendment adjudication may serve to remedy, is the reluctance and restraint endemic to substantive due process treatment of actual disputes referenced by Chief Justice Rehnquist in the above cited language. As demonstrated below, the lack of textual support for the types of rights protected pursuant to substantive due process, and the corresponding reliance on tradition and fundamentality to restrict the doctrine, result in a weak and ultimately unsatisfactory mechanism for the protection of personal freedom.

The lack of a textual foundation for substantive due process has supported a wide range of critiques. Perhaps the main concern identified is that the doctrine gives rise to excessive judicial activism,[164] or what is often referred to as "legislation from the bench."[165] Notwithstanding the numerous and convincing challenges to the notion that so-called liberal judges have a monopoly on activism from the bench,[166] the problems with substantive due process that

164. For discussion and criticism of judicial activism, see Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1087 (1997), and Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After* Bowers v. Hardwick*: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1302 (1989).

165. Robert P. George discussed the advent of substantive due process analysis, and the response of Justice Oliver Wendell Holmes to its emergence, noting:

> Although Holmes was, in his politics, "a moderate, liberal reformer," he was resolutely determined, as a judge, not to "legislate from the bench." Indeed, during a period of unprecedented "judicial activism," he became the symbol of opposition to the judicial usurpation of legislative authority under the guise of interpreting the Constitution. As a Justice of the Supreme Court of the United States, he drew as sharp a line as any jurist of his time between "law" and "politics"—even when the politics in question concerned political economy. In what is perhaps his most celebrated dissent, Holmes castigated the majority in the 1905 case of *Lochner v. New York*, which invalidated a state law setting maximum working hours for employees in bakeries on the ground that such a regulation violated the "freedom of contract" that was held to be implicit in the Due Process Clause of the Fourteenth Amendment. Holmes argued that this so-called "substantive due process" doctrine was an invention designed to authorize what was, in fact, the illegitimate judicial imposition of a theory of economic efficiency and the morality of economic relations on the people of the states and the nation.

Robert P. George, *One Hundred Years of Legal Philosophy*, 74 NOTRE DAME L. REV. 1533, 1538 (1999) (footnotes omitted).

166. Indeed, many decisions that are viewed as "conservative" in the most obvious political sense, because they involve a limitation on the role that government can play in society, are undeniably "activist" in the interpretive sense in that they involve unelected judges striking down laws enacted by the political branches of government. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (holding that a federal law making states subject to suit in federal court violated the Eleventh Amendment and principles of state sovereign immunity).

are the concern of this Article involve undue judicial reluctance, not excessive judicial action.

As demonstrated by Chief Justice Rehnquist's discussion in *Washington v. Glucksberg*,[167] the lack of textual support for substantive due process has resulted in weakness and uncertainty on the part of judges when applying substantive due process analogies to actual disputes. Most judges, well aware of the dangers posed by the open-ended doctrine[168] and the potential for innumerable rights that could be identified and enforced, have retreated to a kind of rights-identifying shell, searching for a way to limit the impact of the substantive due process adjudication. As Chief Justice Rehnquist explained, one problem with substantive due process analysis is that in the absence of some kind of guidepost (even an open-ended one) in the language of the Constitution, judges, mindful of their role in our democratic system of government must "'exercise the utmost care whenever [they] are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[169]

Generally, this somewhat ironic rights-limiting conception of the supposedly rights-expansive mechanism of substantive due process has been ascribed to conservative jurists, like Chief Justice Rehnquist and Justice Scalia, who see substantive due process as a mechanism for identifying and protecting only those rights or liberties that can find a firm foundation in the murky legal or historical or moral or ethical tradition of Britain and the United States.[170] But

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167. 521 U.S. 702 (1997).

168. Ely characterizes the abiding judicial reluctance in this way:

> But once "due process" is reinvested with serious *substantive* content, things get pretty scary and judges will naturally begin to look for ways to narrow the scope of their authority. The reaction is one that might have suggested that the error was in resurrecting substantive due process, but instead it seems to have meant that due process, properly so called, has been constricted.

ELY, *supra* note 15, at 20.

169. *Glucksberg*, 521 U.S. at 720 (citation omitted).

170. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 293–94 (1990) (Scalia, J., concurring).

> The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty "without due process of law." To determine that such a deprivation would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether "due process" includes substantive restrictions. It is at least true that no "substantive due process" claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference.

Id. In his concurrence, Justice Antonin Scalia makes a characteristic inquiry into the common law treatment of the issue in question—in this case suicide—with references to Blackstone and others,

as one observer has noted, the more mainstream, or perhaps even liberal, conception of substantive due process[171] is not so different from the conservative model,[172] and it results in a similar restriction of the expanse of what will be viewed as protected under the doctrine. The key similarity between the approaches is that both see the necessity for judicial restraint in applying due process[173] and specifically, on tying that restraint to a reliance on "tradition to decide whether a right deserves protection under the Due Process Clause."[174]

It is this need to find some kind of restraint to impose on the substantive due process—necessary because of the doctrine's lack of a textual foundation

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to support his conclusions that suicide was a traditionally criminal offense under the common law and continued to be one in both the British colonies and the early United States. *See id.* at 294–302.

171. Anthony Cicia points to Justice Harlan's vision of substantive due process as the mainstream counterpart to Justice Scalia's more conservative conception. *See* Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241 (1996). In particular, Cicia points to Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961).

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is . . . . a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Id. at 543 (Harlan, J., dissenting) (citations omitted).

Cicia notes that this is the mainstream view because it "has received praise from both liberal and conservative fundamental rights theorists." Cicia, *supra*, at 2242.

172. "Justice Scalia's substantive due process formulation would thus appear to be very different from Justice Harlan's formulation adopted by the joint opinion [in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)]. This, however, is not the case. In fact, upon close examination, the two formulations are strikingly similar." Cicia, *supra* note 171, at 2243.

173. As Cicia notes, in *Casey*,

> Justice Harlan cautioned that "if the supplying of content to [due process] has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them." Instead, judges should "exercise limited and sharply restrained judgment" in applying Justice Harlan's due process formulation. This concept of restraint compliments Justice Harlan's view of the slow evolution of a living tradition because, for tradition to evolve slowly, judges must exercise restraint in their judgments.

Id. at 2249 (footnotes omitted).

174. *Id.* at 2246 (capitalization removed). As Cicia continues,

> To Justice Harlan, due process represented "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."
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> . . . Throughout the opinion, however, Justice Harlan tempered his language with emphasis on the common law tradition. Justice Harlan severely limited the scope of his substantive due process formulation by grounding it in tradition. Justice Harlan believed that the liberty due process secures, despite being a "rational continuum" that protects against "all substantial arbitrary impositions and purposeless restraints," cannot break from the nation's longstanding traditions. The traditions Justice Harlan emphasized were not abstract, aspirational traditions, but rather, historical realties.

Id. at 2247 (footnotes omitted).

that would otherwise provide some effective limitation—that results in its great failure as a mechanism to protect individual privacy rights and check illegitimate government power. This restriction results in the identification of an unduly limited sphere of personal autonomy primarily because it requires individuals to demonstrate that what they intend to do is so fundamental and sacrosanct in the history of the English speaking world that any government attempt to regulate the activity should be closely scrutinized by a court. Indeed, the Supreme Court has repeatedly noted that the Fourteenth Amendment's due process analysis results in protection of "only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty."[175]

Consequently, there is no normative constitutional personal autonomy right pursuant to substantive due process analysis. There is only a qualified, and historically identified, right to privacy in various circumstances considered fundamental enough to require protection. If a specific dispute involves a claim of violation of privacy in one of these circumstances—marriage, family, or procreation, for example—then courts may well consider the situation important enough to call the state's intrusion into question.[176] It is not enough, however, under this analysis, to assert that the activity is private and poses no threat to the public welfare, and that the government, therefore, has no business interfering with it. In effect, substantive due process provides no protection for individual freedom per se; it merely requires ongoing adherence to traditional concepts of individual freedom—an inherently conservative (and tentative) endeavor.[177]

Although there are manifold critiques of a tradition-based jurisprudence[178]—the basic problem posed by resolving disputes over personal

175. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973) (internal quotation marks omitted).

176. The *Paris* Court outlines the extent of the "privacy right" that it had up to that time acknowledged, confirming that it was limited to "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Id.*

177. A judge reviewing a case pursuant to substantive due process is somewhat like a baseball pitcher who has lost faith in his control over his fastball, facing the clean-up hitter with the bases loaded. Because the pitcher cannot trust himself to throw his best pitch for a strike, he lets up, throwing his slower "batting practice" fastball instead, risking the critical hit that will break the game open. For the judge, the lack of "control" that the nontextual substantive due process promises requires the same kind of choice: Instead of making the "best pitch" of addressing the central issue of the case—whether the government action is sufficiently privacy invasive to make it illegitimate—he is forced to sell the issue short, falling back on the certainty and insufficiency of "tradition" as the limiting function for an adjudicative mechanism that has no textual limit.

178. Many of these critiques focus on the difficulty (or impossibility) of identifying a unified moral or legal tradition even within the relatively confined history of Britain and her colonies. *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1378 (1998); Kenneth Ward, *Alexander Bickel's Theory of Judicial Review Reconsidered*, 28 ARIZ. ST. L.J. 893, 894, 907 (1996).

autonomy and legitimate government action based on the way that governments have protected the personal autonomy of its citizens in the past is that it fails to acknowledge the possibility that our traditions involve instances or a pervasive pattern of unjustified violations of individual rights. The fact that governments have always intruded on the private lives of individuals does not support a conclusion that the intrusion is legitimate—only that it is long-standing. Indeed, as Madison and the other Framers were keenly aware, it is the very nature of governments to exceed the bounds of their legitimate authority, and it is this inescapable consequence of governmental control that requires the protection of individual rights even against the will of a popularly elected governing structure.[179] Therefore, references to instances of past government action that has restricted the personal autonomy of individuals cannot serve as conclusive evidence that similar modern restrictions are legitimate.

Substantive due process adjudication, constrained as it is by its reliance on tradition, serves to perpetuate past notions of the extent of legitimate government interference with the freedom of its citizens. And if these traditional norms involve illegitimate exertions of government power, no relief is available under substantive due process that serves only to perpetuate these norms. The current mechanism promises relief only when a government has erected a completely revolutionary restriction on the freedom of its citizens. The problem that this approach poses, particularly for individuals who may be traditionally and perpetually subject to identification and isolation in our democratic system based on their identifiable group membership, is demonstrated quite starkly by the Supreme Court's substantive due process treatment of the privacy claim in *Bowers v. Hardwick*.[180]

The key to the benefits of Ninth Amendment adjudication is that it promises to release the current restraint on the judicial identification of the appropriate limits of personal autonomy. Unlike substantive due process, Ninth Amendment adjudication would be founded on a specific textual ground—the Ninth Amendment's reference to the rights retained by the people. This language, properly understood, provides a specific, normative constitutional right—the right to personal freedom and autonomy—and provides that government action that goes beyond the sphere of legitimate regulation is unconstitutional. The textual theme of the Ninth Amendment is that government action that infringes upon the privacy of individuals is illegitimate. The focus of the amendment rests, therefore, not on a determination of the importance or the fundamental nature of a particular right, but

179. *See supra* note 116 and accompanying text.
180. 478 U.S. 186 (1996). For a discussion of *Bowers v. Hardwick*, see *infra* Part V.B.

on the legitimacy of the government's action. Courts reviewing Ninth Amendment claims will not be required to compensate for the lack of textual foundation by falling back on a crutch of historical analysis. They will simply determine whether the act involved is private and if so, whether the government was justified in regulating it, regardless of the historic importance or fundamentality of the act. Relieving jurists of the requirement of providing a qualitative valuation of individual rights not only frees them from the task of finding sufficiently fundamental rights in the vague penumbra and emanations of provisions that protect rights not directly at issue before them,[181] but allows them to address the dispute before them directly without becoming mired in futile and counterproductive attempts to identify the traditional treatment of the various subjects.

Pursuant to this Ninth Amendment analysis, the claimant would not be forced to conjure up an analogy to some express right to support his freedom to engage in private activity. The relevant right would be the freedom from illegitimate government interference, and the nature of the act in question would be relevant to the analysis only to the extent that the act posed (or did not pose) a potential threat to others. It would then be the state's obligation, when it saw fit to implement a privacy-violating provision, to show why it was appropriate to impose such a restriction by demonstrating the threat and showing that its intervention was the least invasive way of protecting against it. Our current substantive due process jurisprudence demands that litigants seeking protection from an intrusive government produce the constitutional equivalent of line, chapter, and verse to support their contention that the government has overstepped its bounds. The Ninth

181. As Levinson explained in discussing Justice Douglas's majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) which invoked the "penumbras and emanations" of the Bill of Rights,

> His attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade. For example, one may recognize that the [F]ourth [A]mendment protects privacy, but one must also recognize that the amendment speaks just as strongly in behalf of overriding privacy so long as another important value—protection of public security—and an important process—the granting of a limited search warrant by what we have come to call a "neutral and detached magistrate"—are followed. The protection against compulsory self-incrimination of the [F]ifth [A]mendment may at first appear to be a better example of a categorical vindication of privacy, save for the willingness of the Court (over Douglas's dissent) to allow the overriding of any privacy right via the grant of immunity to the otherwise silent witness. Such grants destroy any argument that the [F]ifth [A]mendment is a strong protection of privacy rather than, for example, a recognition of the distaste that we have for a person's being the agent of his or her own subjection to punishment or simply a protection against untoward police practices that we fear will result if we allow the police to seek confessions for use in subsequent criminal trials. One could similarly critique Douglas'[s] other citations to the constitutional text. I think it is fair to say that there is no constitutional scholar who endorses the Douglas opinion.

Levinson, *supra* note 5, at 120–21 (footnotes omitted).

Amendment, properly conceived, reverses this requirement, setting up an assumption of freedom and self-determination that must be rebutted by a strong showing by the government of the public character of the activity in question. There is a presumption of personal freedom endemic to this mechanism, and pursuant to its application, the government must demonstrate the legitimacy of its actions by showing that its regulation addresses the public and not the private realm. Pursuant to substantive due process analysis, the presumption is the exact opposite: The government action is considered legitimate, regardless of its invasiveness, unless the plaintiff can come up with some special and traditionally acknowledged category in which to place the activity in question.

Perhaps the most important benefit that the advent of an active Ninth Amendment jurisprudence could provide would be to tip the balance inherent in the substantive due process framework, assuming the right to act freely and making it just a bit harder for governments to justify limiting freedom. The jurisprudence would do this by providing a textual basis for the right to personal freedom and consequently freeing courts from the reluctance born of the reliance on tradition endemic to substantive due process analysis.

V. A TEST OF THE NINTH AMENDMENT ADJUDICATIVE MECHANISM

The remaining part of this Article applies the proposed Ninth Amendment adjudication mechanism to two of the twentieth century's most important substantive due process cases. The cases, *Lochner v. New York* and *Bowers v. Hardwick*, provide a vivid demonstration of the flaws inherent in substantive due process analysis and the benefits of the Ninth Amendment mechanism. An examination of *Lochner* demonstrates how the Ninth Amendment mechanism drastically limits the undesirable subjective judicial analysis inherent in substantive due process by focusing on legitimate spheres of government regulation and not on value-laden determinations of the propriety of specific regulations. The analysis of the dispute in *Bowers*, meanwhile, shows how Ninth Amendment adjudication would avoid the pitfalls associated with reliance on tradition to determine the extent of legitimate government action and its impact on individual freedom.[182]

182. There are various legal disputes, in addition to the two discussed in this Article, that would be particularly appropriate for Ninth Amendment adjudication. Three of the most obvious categories of laws that could foster Ninth Amendment challenges are laws criminalizing (1) the use of narcotics, (2) suicide and/or assisted suicide, and (3) abortion. These situations would all involve a complex Ninth Amendment analysis in that they all involve activities that have both a substantial "private" component and potentially significant "public" consequences. A useful review of these issues, therefore, must wait for a subsequent article.

A. *Lochner v. New York*

In *Lochner*, a bakery owner was convicted under a New York state law forbidding employers from requiring or allowing employees to work more than sixty hours per week or more than ten hours a day.[183] On appeal to the Supreme Court, the bakery owner argued that the labor law was an impermissible exercise of the state's police power because the regulation served to "invade the rights of persons and property under the guise of the police regulation."[184] The Court identified the issue presented as "a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[185]

The Court began its analysis by noting that there was no suggestion that the term "required to work" in the labor law referred to the use of physical force to obtain the work of the employee.[186] Instead, the term simply referred to "the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute."[187] The Court concluded that the state's restriction of this right for the employee to contract with the employer to work for as many hours as the two agreed interfered with the right of each to make a contract, and that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment."[188] The Court acknowledged that this right to enter into a contract is subject to regulation pursuant to the state's police power, to the extent that the regulation relates "to the safety, health, morals and general welfare of the public" and that the state "has the power to prevent the individual from making certain kinds of contracts."[189] Nonetheless, the Court held that there was "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."[190]

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183. *See* Lochner v. New York, 198 U.S. 45, 46 n.1 (1905).

184. *Id.* at 49.

185. *Id.* at 57.

186. *See id.* at 52.

187. *Id.*

188. *Id.* at 53. The Court went on to explain that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." *Id.*

189. *Id.* at 53.

190. *Id.* at 57. In reaching this decision, the Court held that the right to enter into an employment contract was a fundamental right and that the state of New York had interfered with that right without due process of law. But because the Court never addressed the "process" by which the defendant was deprived of his right to contract, but merely the fact that, regardless of the procedures by which it was implemented and enforced, the Court effectively held that the Due Process Clause of the Fourteenth Amendment protects the "substantive" rights of individuals,

By finding a substantive right to enter into an employment contract to be protected by "the liberty of the individual protected by the Fourteenth Amendment,"[191] the Court turned the procedural imperative of the amendment—that life or property could not be taken without sufficient procedural legal safeguards against arbitrariness—into a substantive form of due process upon which rights not expressly mentioned in the Constitution, like the right to enter into an employment contract, could be based. Although it was perhaps not the first time the Court applied this legal trick,[192] the *Lochner* decision effectively immortalized the substantive due process mechanism that is still the standard for analyzing claims regarding unenumerated constitutional rights nearly one hundred years later.[193]

This case provides a useful example of the differences between Ninth Amendment adjudication and substantive due process. The Supreme Court in *Lochner* correctly characterized the central dispute in the case as a conflict between the authority of the state to legislate and the right of the individual to be free to enter into a contract with another individual. Resolution of this conflict was sidetracked, however, by the Court's assertion that a right to enter into an employment contract was protected by the Fourteenth Amendment, which provides no such protection, at least not expressly. The majority of the Court, openly antagonistic to the relatively recent onset of government regulation of workplace conditions, and the relationship between employers and employees,[194] cast its formidable weight on the side of the right of employers to enter into any kind of hourly arrangement with their workers and manufactured a constitutional right for them to do so out of its substantive formulation of due process. Because the majority of the Court believed that a limitation on the ability of employers to contract for labor on their own terms without governmental restriction was a mistake, the Court imposed its subjective opposition to this specific labor regulation by invalidating a law passed by a state legislature to protect its citizens. The substantive due process mechanism allowed the Court this luxury by allowing it to

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not simply their right to a certain set of procedures before they are deprived of property or liberty. It is on this concept that the substantive due process theory has been based.

191. *Id.*

192. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897); Mugler v. Kansas, 123 U.S. 623 (1887); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

193. *See* Washington v. Glucksberg, 521 U.S. 702, 719–36 (1997) (applying substantive due process analysis in determining that there is no constitutional right to physician-assisted suicide); *see also id.* at 755–73 (Souter, J., concurring) (discussing the substantive due process doctrine).

194. In his opinion for the Court, Justice Rufus W. Peckham disapprovingly detailed many of the newly proposed labor laws of various states at the turn of the century and warned that "interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase." *Lochner*, 198 U.S. at 63.

identify the right to contract as a right so substantively important that a state government could not infringe upon it. But, as Justice Holmes lamented in his dissent in *Lochner*, the decision, devoid of a truly compelling textual foundation, stands as a startling example of judicial intervention into the political choices of an elected legislature, and consequently, as a cautionary tale of the inappropriate exercise of judicial power.[195]

Ninth Amendment adjudication would have denied the Court the freedom to impose its subjective opposition to labor regulation through a manufactured fundamental right of freedom of contract. Instead, the Court would have been obliged to focus on the nature of the employment relationship to determine whether it was sufficiently public to justify the specific government regulation imposed. The issue would not have involved the propriety of specific labor laws or the utility of limiting the hours laborers could be required to work (an issue properly left to an elected legislature to resolve), but the nature of the employment relationship, the extent of its public character, and the appropriate role of the state in regulating it in some fashion.

In bringing his claim under the Ninth Amendment, the employer (and conceivably the employee, if he wished) would assert that the act of entering into an employment contract with another individual is an essentially private activity that does not pose a threat to another individual or to the society as a whole. The state would presumably respond by seeking to dismiss the claim based on an argument that an employment contract is an essentially public relationship that the state is entitled to regulate.[196] In response to such a motion, at the first stage of the two-stage adjudicative process, the reviewing

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195. In his dissent, Justice Holmes argued that the majority opinion was based upon the Justices' views of the wisdom of state regulation of the economy rather than upon the Constitution. *See id.* at 75 (Holmes, J., dissenting).

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Id.

196. Part of the point of using *Lochner* as an example here is to demonstrate the limits of the Ninth Amendment as a foundation for a libertarian, antiregulatory doctrine. The notion that the Ninth Amendment could be used to support arguments challenging the authority of state and federal governmental entities to regulate commercial activity is belied by the basic concept behind the protection of retained rights. By its nature, government regulation seeks to affect and control the public consequences of what might otherwise be viewed as private activity. Whether government regulation seeks to protect the environment, endangered species, or human beings, the legitimacy of the government action is not threatened by the Ninth Amendment. It is exactly this kind of government activity, motivated by an interest in protecting citizens and the public welfare, not by an interest in managing the private lives of individuals, that is legitimate pursuant to the Ninth Amendment.

court would likely reject the government's characterization. An employment contract involves an agreement between two consenting adults, and can certainly be characterized as a significantly private matter. Consequently, pursuant to the analysis called for in the first stage of this adjudicative mechanism, the court would likely note that the type of claim asserted in this case was the kind of claim contemplated by the Ninth Amendment—a claim seeking acknowledgement of a sphere of personal autonomy into which the State, arguably, cannot legitimately intervene. This claim would survive the "gatekeeping" stage of this analysis as it provides a coherent personal autonomy argument.

But, pursuant to the second stage of the mechanism, once the prima facie validity of the Ninth Amendment assertion in this case was acknowledged, the defendant would be obliged to delineate the public consequences of this arguably private relationship, and to demonstrate why the regulation involved would be reasonably connected to avoiding those consequences. In *Lochner*, the state of New York could have justified its regulation by noting the public nature of commerce generally, and of the employer-employee relationship specifically, and by showing how the regulation involved served to address the State's valid public welfare concerns.

New York's argument in this case would go something like this: Even absent actual physical force, the employment relationship involves a certain identifiable level of coercion. The employer's control over the means of production and of the employee's access to a livelihood creates a situation that fosters subtle, or not so subtle, pressure on the employee to act in a less than purely voluntary manner. Just as a menacing brute with a club standing at the exit of a factory would undoubtedly effect an employee's actions, the less physical, but perhaps even more frightening threat of dismissal or other economically debilitating sanction serves as a constant potential for coercion. And in a world with inherently limited access to employment opportunities (there are, in fact, a limited number of total jobs available to citizens in general, and an even smaller number to any one individual in a limited geographic region), the promise of work in another bakery, or in some other field, would not serve to obviate this pressure, at least not completely.[197]

197. It could be contended at this point that the type of analysis that I have outlined here would involve a reviewing court in the very kind of "subjective" or "value-laden" adjudication that has led to much of the criticism of substantive due process, including, to some extent, some of the criticism focused on it by this Article. I would strongly suggest, however, that a determination by a court about whether an activity has public consequences or effects, regardless of whether those effects are necessarily harmful or whether the chosen regulation of the activity is prudent, may well be subject to dispute, but not primarily subjective or value-based dispute. The argument that a certain activity does or does not have a public consequence would involve a substantially empirical analysis of real world impact of the action. For an in-depth discussion of free market

This inherent coercive power can have the same ultimate effect as more obvious physical coercion. Both types of coercion undermine the possibility that all aspects of the employment relationship will be completely consensual, and qualify the employer-employee relationship as one involving a potential threat of one individual against another. It does not mean that all employer-employee relationships will involve the assertion of duress on the employee in reaching an accommodation with the employer. It does not even mean that all employees will be in a disadvantageous power relationship with all employers under all circumstances.[198] It simply means that this obvious potential for a power differential creates an inherent threat that the employee will enter into a bargain that he would not have chosen, all other things being equal. And given this potential for unequal bargaining, there is the

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economy and the relative power positions held by its different participants, see, for example, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). Professor Robert Hale notes that while there are a series of "bargains" that any and all parties in a market economy are obliged to enter into to survive,

> these bargains lead to vast differences in the economic positions of different persons, whether as producers or consumers, these differences have all resulted from transactions into which each has entered without any explicit requirement of law that he do so. But while there is no explicit legal requirement that one enter into any particular transaction, one's freedom to decline to do so is nevertheless circumscribed. One chooses to enter into any given transaction in order to avoid the threat of something worse—threats which impinge with unequal weight on different members of society. The fact that he exercised a choice does not indicate lack of compulsion. Even a slave makes a choice. . . . If he has the physical power to disobey, his obedience is not a matter of physical necessity, but of choice.

Id. at 605–06.

198. One could certainly envision a counterargument to that of Hale, *supra* note 197, contending that the employment relationship is completely private. That argument, however, would almost certainly rest on some sort of challenge either to Hale's empirical data or any inferences made from it. However, one is exceedingly more likely to be confronted with an acknowledgement that the employment relationship may have public aspects but that these aspects do not justify a specific regulation imposed upon it, or any regulation at all. As stated above, however, the conclusion that labor regulations are harmful to the economy, the society, or even workers themselves may be rationally and empirically supportable, but it is not the kind of decision that nonelected judges should be making in our legal system. The argument that labor regulation, or any other law for that matter, is not a good idea for any number of possible reasons is an argument to make before a legislature, not a court. The argument in *Lochner* occasioned by Ninth Amendment adjudication, however, would not involve the propriety of labor regulation, but the extent of the public character of the activity regulated, and therefore the legitimacy of any decision by a government to regulate it. By acknowledging the public character of the employment relationship pursuant to this Ninth Amendment analysis, a court would not be obliged to make any subjective determination about the propriety of the regulation in this case. The question would simply be whether the state had legitimate authority to regulate this activity. But when a court, as the Supreme Court did in *Lochner*, invalidates a democratically enacted employment regulation because of its express belief that it was not a good idea, and based not on any text of the Constitution, but on an ephemeral construction of their own, that court steps dangerously beyond the bounds of its proper function in our system.

possibility, perhaps even the likelihood, that the bargain reached will disadvantage the employee.

This potential for harm makes the private employment contract an issue of legitimate concern for the government. As noted above, the government may intervene in the lives of its citizens to the extent that it serves to protect individuals from harm caused by others, and to prevent individuals from causing harm. Thus, just as the act of threatening someone with a club is public enough to call for legitimate government regulation, other inherently coercive activity that may pose just as serious, albeit more indirect, threats is properly within the purview of legitimate government regulation.

In addition, even if the inherent coercion of the employment relationship were not enough to place it into a sufficiently public sphere, the public nature of the commercial enterprise itself would justify regulation of critical aspects of that enterprise, including relations between management and the labor force. An employer who runs a retail establishment that is open to the public, that relies on many aspects of government services to provide efficient mechanisms for commerce (for example, currency, licensing, sanitation services, highways, and police protection), and that seeks to derive a profit from the combination of this access to the public and these governmental services and protections, subjects itself far more reasonably to state regulation than an individual would in his noncommercial private life. An individual presumably does not elicit (or benefit from) public participation in his day-to-day, noncommercial affairs, and instead relies on government services for little more than protection of his person and property. Those seeking and obtaining the benefit of the public nature of commerce can be reasonably called on to bear certain responsibilities arising from this reliance and benefit, including certain restrictive rules imposed on it by the state. A commercial enterprise does not exist within a purely private sphere in which freedom from state intervention could be reasonably claimed.

The state of New York would therefore have sufficient justification to support regulation of the working hours of bakery employees in the face of a Ninth Amendment challenge. It would contend that the goal of the regulation was to prevent the abuse of workers in commercial establishments who, although willing in a certain sense to work long hours, must be protected from the inherently coercive nature of the employment relationship that leads them to accept the conditions of employment based on a lack of reasonable alternatives. And the regulation at issue here is directly related to avoiding the specific harm that can arise from this coercion.

Importantly, Ninth Amendment analysis, unlike substantive due process review, does not require a subjective, value-laden evaluation of the "fundamental" or "traditional" character of asserted rights, or the relative benefits

of a certain economic theory. One need not agree that it is a good idea for governments to enter the employment arena and seek to provide protection for employees to find the regulation in *Lochner* constitutional. All that need be acknowledged is that the commercial employment relationship has a sufficiently public character to make government regulation legitimate. Of course, the fact that the employment relationship is public does not require any specific regulation of it, or any regulation at all. But because the relationship is public, the government is entitled to make a decision about whether and how to regulate the relationship pursuant to the same factors that inform any other legislative decision. If the legislature is convinced that the appropriate way to regulate this relationship is to limit working hours, its choice to do so, although debatable as a matter of sound policy, is not unconstitutional. And although there may be contrary economic theories that would support a different kind of regulation, or no regulation at all, the reviewing court cannot invalidate this legislative action based on the majority's adherence to one of these other theories.

In sum, Ninth Amendment adjudication, unlike substantive due process review, would not involve choices between competing subjective theories, but would address the question of whether an activity had sufficient public consequences to justify governmental regulation. If it did not, then the government regulation would be invalid; if it did, and the government regulation was closely connected to the public consequences at issue, then the action would be a valid exercise of governmental authority, regardless of what the reviewing court thought of the propriety of the legislature's policy decision.

B. *Bowers v. Hardwick*

Bowers v. Hardwick involved the arrest of Michael Hardwick in the bedroom of his home for the alleged violation of a Georgia criminal law that prohibited "sodomy."[199] The relevant statute defined the criminal offense of sodomy as performing, or submitting to the performance of, "'any sexual act involving the sex organs of one person and the mouth or anus of another.'"[200] When arrested, Hardwick was allegedly committing a sexual act covered by this language with another adult man.[201] Although the sodomy charges were never presented to a grand jury, Hardwick brought suit in federal district court alleging that the sodomy statute was unconstitutional as applied to

199. Bowers v. Hardwick, 478 U.S. 186, 187–88 (1986).
200. *Id.* at 188 n.1. (quoting GA. CODE ANN. § 16-6-2 (1984).
201. *See id.* at 188.

consensual sodomy.[202] The district court dismissed Hardwick's action for failing to state a claim upon which relief could be granted. The Eleventh Circuit Court of Appeals reversed, however, holding that the sodomy statute violated Hardwick's fundamental right to privacy.[203] The court held that this right was protected by both the Ninth Amendment, and "the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment."[204]

The state of Georgia appealed to the U.S. Supreme Court. Identifying the issue for review as "whether the Federal Constitution confers a fundamental right upon homosexuals[205] to engage in sodomy," the Court held that there was no such right.[206] Relying on its conclusion that such a right was neither "implicit in the concept of ordered liberty" nor "deeply rooted in the nation's history and tradition," the Court held the claim that there was a fundamental right to engage in homosexual sodomy to be "at best, facetious."[207] The Court distinguished its decision in *Stanley v. Georgia*[208] by noting that its decision there "was firmly grounded in the First Amendment" and that the right involved in the present case "has no similar support in the text of the Constitution, and does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment."[209]

The majority decision in *Bowers* presents perhaps the best argument for application of Ninth Amendment adjudication. The case is a paradigmatic example of the failure of substantive due process to properly address disputes over personal freedom and government regulation. Evaluation of the case

202. Two additional plaintiffs, John and Mary Doe, were initially included in the action, alleging that although they had not been arrested pursuant to the statute, "they wished to engage in sexual activity proscribed" by it and that they "had been 'chilled and deterred' from engaging in such activity by both the existence of the statute and Hardwick's arrest." *Id.* at 188 n.2. The Does' claims were dismissed on standing grounds, and the dismissal was affirmed by the court of appeals. *Id.*

203. *See* Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

204. *Id.*

205. It is not clear from the case why Justice Byron R. White limited the discussion of the right to engage in sodomy to acts performed by homosexuals and did not address the propriety of the law in relation to all adults. As noted above, the law criminalized all acts of sodomy, and although the person challenging the law had engaged in homosexual activity, his challenge to the law's constitutionality did not make reference to this, it simply asserted instead that the law was invalid as applied to consensual sexual acts regardless of the gender of the participants. There are any number of possible explanations for the repeated reference to "homosexual" sodomy in the opinion—perhaps the most obvious being an attempt to distinguish the case from *Griswold* and its discussion of marital privacy—but it is clear that, for whatever reason, there was some reluctance to issue a holding that validated the same state-sponsored micromanagement of heterosexual activity that was found justifiable for homosexuals.

206. *Bowers*, 478 U.S. at 191.

207. *Id.*

208. 394 U.S. 557 (1969).

209. *Bowers*, 478 U.S. at 195. Apparently, the Court did not address the Eleventh Circuit's Ninth Amendment holding because the respondents did not defend the court's judgment on Ninth Amendment grounds. *Id.* at 196 n.8.

pursuant to the Ninth Amendment adjudicatory mechanism demonstrates that both the mechanism's focus on the central issue of the legitimacy of government regulation and the impact that the shift in the burdens of proof between individuals and the government in these kinds of cases can have on their resolution, will drastically improve our adjudication of issues of personal freedom.

Within the framework of substantive due process analysis, the cards were stacked against Hardwick. The majority's rejection of his assertion that the Georgia statute violated his constitutional rights was based primarily on its acknowledgement that there was no tradition of a right for homosexuals to engage in certain sexual acts, a historical interpretation that would appear all but impossible to refute. But the Court's analysis of the key issue in this case demonstrates the central problem with history or tradition serving as the focus of the analysis of the legitimacy of governmental action. The historical failure of governments to acknowledge or protect the rights of homosexuals, and to single them out for prosecution, can be explained in many ways, some having their foundation in a combination of moral admonition, fear, hatred, or bigotry, or others founded, presumably, on some less invidious motivation. But the fact that governments have traditionally failed to protect the rights of homosexuals and, much more frequently, gone out of their way to seek criminal prosecution of people based on their sexual orientation, does not indicate that these actions are, or ever were, legitimate. As a plaintiff in a case analyzed pursuant to substantive due process, Hardwick's argument was fatally weighed down by this tradition, and the Court, in reviewing the case, was never obliged to address what should have been the central question—not whether governments have traditionally had laws that criminalized sodomy, but whether this Georgia law was a legitimate exercise of government authority. Thus, two of the key flaws of substantive due process analysis—its reliance on history and its lack of focus on the central conflict of personal autonomy disputes—are starkly exemplified by *Bowers*.

Adjudication under the Ninth Amendment mechanism would have led to a different result in *Bowers*, but it also would have obliged the Court to more directly address the critical issue at the heart of the dispute. In making his claim under the Ninth Amendment, Hardwick would not have been forced to assert that the positive right to engage in certain specific sexual acts was implicit in some extended view of the Fourteenth Amendment or any other constitutional provision. Instead, his claim would simply have involved an assertion that the activity that was proscribed by the Georgia sodomy statute was substantially private and did not pose a threat to any other individual or the community as a whole. Pursuant to this Ninth Amendment analysis, the Court would have been unable to reject the notion with a reference to

the tradition of criminalizing sodomy or the assertion that the act of sodomy could not reasonably be viewed as "implicit in the concept of ordered liberty."[210]

At this first "gatekeeping" stage of the Ninth Amendment mechanism, the state of Georgia could argue that the activity involved in this case is insufficiently private to fall within the protection of the Ninth Amendment. But, as with New York's likely argument at this stage of the *Lochner* case, Georgia's argument would almost certainly be rejected. The fact that the act occurred between consenting adults[211] within a private residence would certainly qualify the act as sufficiently private to meet the first prong of the Ninth Amendment test.[212]

But unlike the state's argument in *Lochner*, Georgia's argument at the second stage of the adjudication would also have little chance of success. While New York would be able to identify a public welfare interest that was sufficiently related to the regulation in question in *Lochner*, it would be difficult

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210. *Id.* at 191 (internal quotation marks omitted).

211. Just as the state may be justified in regulating aspects of the employment relationship, given the inherent power differential and coercion involved, sexual relationships between adults and children, although certainly private in nature, would also be subject to state regulation based on the power differential between the participants. The assertion that intimate relationships between consenting adults are private and do not justify government intrusion does not preclude the acknowledgment that relationships involving at least one nonadult are subject to legitimate government supervision. As Mill noted,

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being take care of by others, must be protected against their own actions as well as against external injury.

MILL, *supra* note 111, at 14.

212. Much of the discussion of the difficulty in drawing a reasoned line between the public and the private has focused, quite understandably, around issues of sex and marriage. Many scholars have sought to reject, or at least cast a critical eye on, the prevailing notion of sex and marriage as issues of purely private interaction between equally powerful and consenting adults. *See, e.g.*, Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077 (1998); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). But much of this literature has focused on marriage and the public nature of this relationship. Without entering this hurricane of debate in a vessal unsuited for the current, I simply note here that an acknowledgement that the kind of sexual acts involved in *Bowers* were essentially private would not require the conclusion that all sexual activity, and all relationships defined either partially or primarily by the sexual relationship between the individuals, must be free from any government regulation. As with any other Ninth Amendment adjudication, the issue in a case involving different facts than those in *Bowers* would involve an argument from the government that the activities in question had substantial public consequences that justified the specific regulation involved. And, as with other Ninth Amendment adjudication, one of the primary benefits to be gained would be the requirement that the government, and not the individual, demonstrate exactly what these public consequences were, and why the regulation in question constituted a sufficiently tight fit with these concerns.

for Georgia to articulate a public interest that would allow the sodomy law to survive Ninth Amendment review. Although it is difficult to predict exactly what Georgia might present as a public interest involved in this case, it is conceivable that the State might argue, along the lines of the likely argument in *Lochner*, that the state has a legitimate role to play in protecting one of the two people involved in the proscribed sexual activity from harm. As the Court noted in *Stanley*, however, the mere fact that a substantially private act might increase the risk of some sort of harmful, nonprivate activity—like nonconsensual sodomy—may be insufficient to justify regulation of the private act, particularly when other alternatives exist to protect against the harm with a more limited privacy invasion. There are already laws in Georgia, and every other state for that matter, that criminalize nonconsensual sexual acts.[213] As noted above, the legal challenge to the Georgia provision in *Bowers* sought only to invalidate the regulation as it related to consensual sexual acts. Consequently, given its existing framework of laws addressing the public harm created by nonconsensual sexual acts, there is no independent legitimate reason for regulating the nonharmful sexual contact that could survive Ninth Amendment review. If the state did justify its regulation of the private act based on purely public consequences that are already proscribed in other regulations, there would be an insufficient connection between the regulation and the motivation to meet the Ninth Amendment's "fit" requirements.

The state might attempt to argue that even the consensual sexual act had some collateral public character that provided an independent justification for regulating it, but it is even more difficult to conceive of how such an argument would be presented. Perhaps the state would argue that acts of sodomy (consensual or otherwise) violate an accepted code of morality acknowledged by the legislature and based on its reading of the majority's beliefs about the nature of sexual activity. These beliefs could be expressed in numerous ways, including strongly held beliefs that sex should be a purely and exclusively procreative act, or that even if procreation is not a goal (or even a possibility), that only people of the opposite sex should be allowed to engage in sexual activity.

Analysis of the types of justifications that would be presented in a case like this demonstrate a critical benefit that Ninth Amendment adjudication would present. When the issue of state criminalization or regulation of a certain activity is addressed from the perspective of the legitimacy of the gov-

213. The state of Georgia has a complex set of statutory provisions criminalizing a wide array of nonconsensual sexual acts, including rape, sexual assault, and sexual battery. *See* GA. CODE ANN. § 16-6-1 to -24 (1999 & Supp. 2000).

ernment regulation, and is not focused on the fundamentality of the proscribed activity, the government is required to provide some sort of specific justification for the regulation. In *Bowers*, the only apparently available justification would seem to involve government micromanagement of not only the types of sexual acts that could be performed by citizens, but possibly the reasons the parties had for engaging in the acts. If one views *Bowers* not as an instance of individuals seeking to identify a specific right that many would be hard pressed to find in the language of the Constitution, but as an instance of a government exceeding the bounds of what it might legitimately hope to regulate in a free society, rejection of the legislation by a reviewing court would seem all but mandatory. And one of the great innovations of this Ninth Amendment adjudication is that it would require analyzing this case, and cases like it, as disputes over the legitimate extent of government power and the relationship of that power to personal freedom, and not as a debate about the relative importance and historical significance of specific individual acts.

Although one can conceive of a challenge to the kinds of motivations for restricting consensual sexual activity based on the First Amendment, given the unmistakably religious connotation of reasons for the limitation, Ninth Amendment adjudication would be a more direct and effective mechanism to address legislation that seeks to impose a majority-defined moral code on private activity but does not seek to establish or promote one set of religious beliefs as the community norm.[214] The enforcement of an external moral code on an individual to the extent that it limits that person's freedom to act in ways that pose no reasonable threat of harm to others or the community as a whole is an invalid exercise of state power under the Ninth Amendment.

The state is authorized to enforce moral standards for public activity and to restrict personal freedom to the extent that the activity poses a threat to an individual or the society as a whole, as in the regulation of the employment relationship. But the essence of the retained right protected by the Ninth Amendment from denial or disparagement by the government is the right to make personal moral decisions. Consequently, any justification offered by the state to support its contention that the private activity had some relevant public character could not be based on the state's interest in imposing an external moral code for private conduct on its citizens.[215] If the state's

214. This also supports the point that the Ninth Amendment promises to fill a void not addressed by the existing constitutional jurisprudence. Certainly a state legislature could conceivably support its moral/sexual precepts on nonreligious grounds and could therefore impose a moral doctrine without running afoul of the First Amendment's proscription on the establishment of religion.

215. One can envision a collateral public argument based on some connection between acts of sodomy and their effect on the spread of the HIV virus, or some other sexually transmitted condition or disease. Judicial analysis of such an argument would involve a somewhat serious fit analysis. But, if applied to the circumstances of this case, such an assertion on the part of the state would

justification for its regulation is to survive Ninth Amendment review, the justification would have to involve the identification of some public harm created by this action and a connection between that harm and the regulation involved, and it could not rest solely on the state's hope that it might legislatively mandate the moral choices of its citizens.

This focus on the potential motivations that a government might proffer for such a regulation demonstrates what is perhaps the most important benefit promised by Ninth Amendment adjudication. Pursuant to this mechanism, the government could not rest its argument in support of the regulation on the fact that past governments had thought it legitimate to single out homosexuals for criminal prosecution. The state would be obliged to show exactly what public interest was promoted by the regulation, and why the regulation was reasonably connected to the promotion of that interest. The Ninth Amendment's reference to rights retained by the people is an acknowledgment that governmental action is only justified in a limited set of circumstances. And to show a Ninth Amendment violation, one need not demonstrate that the government has invaded some dramatically central or vital interest. The mere act of regulating substantially private activity is an illegitimate government action, and regardless of the importance of the activity, government cannot regulate it without a sufficient demonstration that there is some public interest involved.

Pursuant to Ninth Amendment analysis, the only relevant question in *Bowers* would have been whether the acts in question, whatever they might be and however any judge or the majority of citizens might view them, were sufficiently private to preclude government regulation—whether the regulation went beyond the bounds of what our free society has created its government to do, which is to protect us from each other. When government action protects no one, and merely serves to take freedom away from some to do something that the majority does not want them to do, that action is an invalid use of governmental power and is unconstitutional under the Ninth Amendment.

CONCLUSION

The problem with substantive due process analysis—at least as it is applied to disputes concerning rights to personal autonomy—is that although it involves the application of the normative principle that the personal privacy of individuals should be protected against government regulation, it

likely result in invalidation of the statute if the law was applied to individuals who were not infected with the virus and who were not having contact with infected people, or to homosexual activity only and not to the presumably far more common incidence of heterosexual acts that carry the same threat of disease transmission, but that pose a dramatically greater public health risk based on the numbers alone.

does so without sufficient textual foundation or justification. As groundbreaking, important, commendable, and morally justified as many of the decisions that have relied on substantive due process are, the mechanism itself is so flawed that it provides no reasonable assurances that it will result in such laudatory jurisprudence in every case, or even in most cases. There is nothing inherent in the substantive due process mechanism that stands in the way of the Supreme Court doing either what it did in *Lochner*—undermining the democratically determined need for some reasonable restriction on the exploitation of workers—or what it did in *Bowers*—upholding a state regulation that involved an invasion of privacy and that had no apparent justification beyond the convention of the past and present. Thus, because of its heavy reliance on history and the subjective values of judges, substantive due process analysis is only as good as our nation's history of fairness and sagacity, and the value system of the judge or judges who employ it. Its application is therefore problematic in a democracy that has not given judges this kind of power. Its application is also somewhat terrifying given the uncertainties inherent in the political dynamics that result in the appointment of federal judges. And it leaves our national personal autonomy jurisprudence captive to what is a relatively unjust history of government protection of the freedom of all of its citizens.

Ninth Amendment analysis, meanwhile, would not require the subjective creation of fundamental rights. The right to personal autonomy free from undue government intrusion is the retained right referred to in the amendment. Consequently, once the language of the amendment is understood to provide this substantive protection of personal autonomy, analysis of disputes challenging government infringement of that autonomy will be grounded in the concept that the government can only legitimately regulate public activity. And while the determination of what is public and what is private is subject to debate, it will at least be the right debate this time, and the parties in the debate will play their appropriate roles. Viewed through the prism of the Ninth Amendment, the issue in personal autonomy disputes will be whether the activity at issue is public enough that a government in a free society should have anything significant to say about it, and not the dominant issue now, which is whether judges think that the activity is important enough to justify constitutional protection.

If nothing else, such a well-focused analysis will tell us more about ourselves, our governmental institutions, and the ways that the two should interact than current substantive due process analysis and its dithering about what is and is not fundamental. Freedom from undue governmental intrusion is the substantive subject matter of the Ninth Amendment, and Ninth Amendment adjudication would improve our understanding and analysis of the contours and boundaries of this freedom.

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