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Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War

by Anthony B. Sanders*

INTRODUCTION

Perhaps the greatest questions of modern constitutional law are “Does the Constitution protect unenumerated rights, and, if so, what are those rights?” The United States Supreme Court has repeatedly, yet haphazardly and often reluctantly, answered “yes” to the first question, and essentially “it depends” to the second.¹ The Court has proceeded with basically the same approach concerning the Constitution’s unenumerated protections against both the federal government and the states.²

* Senior Attorney, Institute for Justice. There are a great many people to thank for their role in making this Article a reality. For research assistance, I must thank Maxwell Czerniawski, Rebecca Furdek, Jonathan Gammon, Cameron Gower, Chris Hanson, Bryan Huntington, and Dan Loeser for their hours of unrequited investigation. For editing, huge thanks to Margaret Daggs. Many others have kindly given feedback on this subject as my thinking has evolved, including IJ colleagues Dana Berliner and Clark Neily, as well as Professors Steven Calabresi, Louis Seidman, and Robert Williams. Lastly, I must thank my wife Amy Hackbarth for always believing in my work, however many late nights it takes.

1. *See, e.g.*, *Glucksberg v. Washington*, 521 U.S. 702, 720-21 (1997) (determining that some unenumerated rights are protected by the Due Process Clause of Fourteenth Amendment if deeply rooted in the nation’s history); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding penumbras and emanations from the Bill of Rights protect other liberties); *Lochner v. New York*, 198 U.S. 45, 57-58 (1905) (holding the right to contract protected by due process); *Slaughterhouse Cases*, 83 U.S. 36, 80-81 (1873) (holding Privileges or Immunities Clause of Fourteenth Amendment does not protect the right to earn a living).

2. *Compare Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (holding that an unenumerated right protected by substantive due process applied to federal statute) *with* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878-79 (1992) (plurality opinion) (determining unenumerated rights protected by substantive due process applied to state statute).

Criticism of the Court has been relentless and from all sides. Many defenders of the concept of unenumerated rights have criticized the Court for relying on the doctrine of "substantive due process" in protecting unenumerated rights instead of other, more appropriate, provisions in the Constitution, most notably the Ninth Amendment (when concerning the federal government) and the Fourteenth Amendment's Privileges or Immunities Clause (when concerning the states).³ These critics also often disagree among themselves as to what the actual rights *are* that these provisions protect.⁴ Others—including judges—have heatedly argued that the Court should not recognize unenumerated rights at all⁵ (although *literal* proponents of *no* unenumerated rights are harder to find on close inspection).⁶ Skeptics of unenumerated rights not only pile onto the criticism of substantive due process, but also argue that provisions such as the Ninth Amendment and the Privileges or Immunities Clause do not protect them either, even going as far as labeling them "inkblots."⁷

This multi-fronted fight is the only game in town for protections against the federal government. For the most part, those looking for protections of unenumerated rights that apply to the United States itself only have the Fifth Amendment's Due Process Clause and the Ninth Amendment to turn to. But for those seeking redress against their state or local governments—where most governing still happens—there is a whole separate layer of protection: state constitutions.

Every state gets a constitution.⁸ Additionally, every state has a constitution with language that can protect rights in addition to those explicitly

3. See, e.g., RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 191-252 (2004); DANIEL FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* *passim* (2007).

4. Compare BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 3, at 253-54 (arguing right to choose a profession is protected by the Ninth Amendment and Privileges or Immunities Clause), with FARBER, *supra* note 3, at 96-97, 153 (positive right to an education is protected, but right to contract is not).

5. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 179-85 (1990); Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 STAN. L. REV. 1019, 1044 (1992); *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (holding that rights recognized by the Ninth Amendment are not enforceable).

6. See CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT* 155 (2013).

7. BORK, *supra* note 5, at 166.

8. The Author is indebted to his colleague at the Institute for Justice, Laura Maurice, for this phrase, in turn inspired by Oprah Winfrey's famous maxim, "Everybody gets a new car!"

protected in the state constitution's bill of rights. This includes due process clauses, which most states' constitutions contain.⁹ But if state courts protect unenumerated rights with due process clauses—as, in fact, many have—the same arguments about the appropriateness and legitimacy of substantive due process arise.¹⁰ In short, if you are trying to avoid the jurisprudential and academic controversy at the federal level, it will follow you into state court if you examine state due process clauses for unenumerated rights.¹¹

But you *can* avoid this controversy if you look elsewhere in state constitutions. There are two most obvious examples: “Baby Ninth Amendments”¹² and “Lockean Natural Rights Guarantees.”¹³ The former is the subject of this Article. The latter is the subject of a recent, comprehensive article by Professor Steven Calabresi and Sofia Vickery discussed below.¹⁴ Whether either of these types of provisions protect unenumerated rights and which rights they protect may be contentious questions—and

9. Benjamin Rothmel, *Note: Deep Freeze: Thawing Rate of Development Growth Quotas after Zuckerman v. Town of Hadley*, 20 WASH. U. J.L. & POL'Y 375, 381 (2006). In addition, many states have a “law of the land” clause that is interpreted to be equivalent to a due process clause. See Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 467 (2005).

10. See, e.g., *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 31-39 (Tenn. 2000) (Barker, J., dissenting) (criticizing use of Tennessee's equivalent of a due process clause to protect substantive rights); *Bolden v. Doe*, 358 P.3d 1009, 1017-20 (Utah 2014) (denigrating use of substantive due process); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726-27 (Wyo. 1985) (applying same deferential rational basis test to state substantive due process claim as to federal ones).

11. By this I do not claim that state due process clauses do *not* protect unenumerated rights. I believe they do, just like the Fifth Amendment's Due Process Clause and the Fourteenth Amendment. I just mean that the controversy over whether state due process clauses protect unenumerated rights will be a similar controversy to the one at the federal level.

12. The term “Baby Ninth” was coined by Professor John Yoo in his article *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993). It perfectly fits the clauses—as they were all derivative of and inspired by the Ninth Amendment itself—and I therefore embrace the term herein with full credit, and thanks, to Professor Yoo.

13. “Lockean Natural Rights Guarantees” is the name given to a set of constitutional provisions ultimately derived from George Mason's first draft of the Virginia Declaration of Rights of 1776. A typical provision is Massachusetts': “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.” MASS. CONST. pt. I, art. I.

14. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299 (2015).

they are—but they are different questions than those surrounding the U.S. Constitution, involving different histories and different constitutional language. They are consequential questions, as forty-one states have one of these clauses in their constitutions.¹⁵ Baby Ninth Amendments alone are present in thirty-three.¹⁶

If these, or other “non-due process clauses,” protect unenumerated rights in state constitutions, Americans may have many more protections against their state and local governments than they—or even state judges—realize. For those who want state constitutions to protect unenumerated rights, then avoiding the seemingly intractable debate over federal unenumerated rights doctrine would be extremely helpful.

This Article makes a small step toward demonstrating that at least most state constitutions protect unenumerated rights by focusing on Baby Ninth Amendments. Calabresi and Vickery recently demonstrated some of the unique and rich jurisprudence of Lockean Natural Rights Guarantees in their invaluable and outstanding article.¹⁷ This Article has a parallel focus, but with a slightly different approach. Similar to Calabresi and Vickery’s article, the present one only discusses the period

15. The thirty-three contemporary Baby Ninths are: ALA. CONST. art. I, § 36; ALASKA CONST. art. I, § 21; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; CAL. CONST. art. I, § 24; COLO. CONST. art. II, § 28; FLA. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 29; HAW. CONST. art. I, § 22; IDAHO CONST. art. I, § 21; ILL. CONST. art. I, § 24; IOWA CONST. art. I, § 25; KAN. CONST. B. of Rts. § 20; LA. CONST. art. I, § 24; ME. CONST. art. I, § 24; MD. CONST. Decl. of Rts. § 45; MICH. CONST. art. I, § 23; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 32; MONT. CONST. art. II, § 34; NEB. CONST. art. I, § 26; NEV. CONST. art. I, § 20; N.J. CONST. art. I, para. 21; N.M. CONST. art. II, § 23; N.C. CONST. art. I, § 36; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. I, § 33; R.I. CONST. art. I, § 24; UTAH CONST. art. I, § 25; VA. CONST. art. I, § 17; WASH. CONST. art. I, § 30; WYO. CONST. art. I, § 36.

The thirty-one various contemporary Lockean Natural Rights Guarantees are: ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARK. CONST. art. II, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 2; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 1; KAN. CONST. B. of Rts. § 1; KY. CONST. § 1; ME. CONST. art. I, § 1; MASS. CONST. pt. I, art. I; MO. CONST. art. I, § 2; MONT. CONST. art. II, § 3; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 1; N.H. CONST. pt. I, art. I; N.J. CONST. art. I, para. 1; N.M. CONST. art. II, § 4; N.C. CONST. art. I, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, § 1; PA. CONST., art. I, § 1; UTAH CONST. art. I, § 1; VT. CONST. Decl. of Rts. art. I; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 1.

As a comparison of these lists demonstrates, the only states that, today, do not have either of these clauses in their constitutions are Connecticut, Delaware, New York, North Dakota, South Carolina, South Dakota, Tennessee, Texas, and West Virginia.

16. See *supra* note 15.

17. Calabresi & Vickery, *supra* note 14.

before the Civil War.¹⁸ However, the focus here is not on the jurisprudence of that period, although that is discussed, but on the actual adoption of Baby Ninths in state constitutions through constitutional conventions. Additionally, this Article differs from Calabresi and Vickery's in that its ultimate goal is aimed at the "original meaning"¹⁹ of state constitutions themselves, not the Fourteenth Amendment.

Although this Article primarily concerns Baby Ninths, I demonstrate that we cannot discuss their history without also examining the history of another common provision, one even less explored and understood than Baby Ninths. I have taken the liberty of calling these provisions "Baby Tenth's." After learning about Baby Tenth's, the purpose of Baby Ninths becomes clearer, further demonstrating that Baby Ninths protect unenumerated rights. Even more than that, the antebellum history of Baby Tenth's and Baby Ninths demonstrates that all rights, enumerated and unenumerated, are meant to be read broadly, not as narrow exceptions to state power.

What this Article does not attempt to do is provide the rich history of Baby Ninths—which includes their continuing adoption across the country as well as their interpretation—after 1860. Further, although I argue that Baby Ninths protect unenumerated individual rights, I do not argue in depth *which* rights Baby Ninths, or any specific Baby Ninth, protect, though I give some parting thoughts on that subject.

This Article begins in Part I with a review of the well-known story of the drafting and adoption of the Ninth and Tenth Amendments to the U.S. Constitution. This includes an outline of the various theories scholars have presented on the original meaning of the Ninth Amendment. In Part II, we move to how the Baby Ninths came to be, starting with the Baby Tenth's and then leading to the invention of the Baby Ninths in Alabama and Maine in 1819. Part III then provides an overview of how states slowly, but surely, began adopting Baby Ninths in the following decades, gathering steam in the run-up to the Civil War. It first discusses

18. Their article encompasses almost the same time period, up to the adoption of the Fourteenth Amendment in 1868. *Id.* at 1304.

19. I fully realize that using this term raises a host of clarifying questions, most importantly whether I am an "originalist" and, if so, which flavor of "originalism" I ascribe to. Because most of this Article simply presents the history of how Baby Ninths came to be and does not try to present a *comprehensive* answer to what they "mean," this issue is largely irrelevant. However, I do put forward an argument for how we should interpret Baby Ninths based upon their history, as presented here, and not based upon contemporary needs, subsequent *stare decisis*, or other non-originalist criteria. Therefore, to the extent it is relevant, I would like the reader to know I am an "original public meaning originalist" who believes we should interpret constitutional text according to the original public meaning it had when adopted. For state constitutions the "when" will differ, of course, between the states, and, indeed, between the constitutions of each state's history.

which states adopted (or failed to adopt) Baby Ninths and when, and then focuses on state constitutional conventions where the delegates discussed the meaning and desirability of both Baby Ninths and Tenthths. Part III concludes with an overview of the (thin) jurisprudence of Baby Ninths, such as it was, before the Civil War.

With that historical understanding of Baby Ninths and Tenthths, Part IV moves to the question of what Baby Ninths mean (at least for those states that adopted them before 1860). Given their textual similarity with the Ninth Amendment itself, I subject them to the various schools of thought discussed in Part I. I conclude that due to their presence in state constitutions, as opposed to the U.S. Constitution, what was said in state constitutional conventions and in jurisprudence, and their close relationship with Baby Tenthths, the only Ninth Amendment interpretation that makes any sense when applied to *Baby Ninths* is that they protect unenumerated individual rights. While doing so, I address the objections that others have made to this interpretation of Baby Ninths.

I make this conclusion without taking sides on how to interpret the Ninth Amendment itself. Whatever the right way to interpret the Ninth Amendment may be, the history discussed in this Article demonstrates that the original meaning of Baby Ninths—at least those adopted before the Civil War—was to protect judicially enforceable unenumerated individual rights.

I do not claim that this is the first work to seriously examine the Baby Ninths. Many others have probed their implications before.²⁰ But, for the period involved, this is the most in-depth treatment of the history of Baby Ninths (and Baby Tenthths) given to date.

I. THE BIRTH OF THE NINTH AMENDMENT AND WHAT IT MEANS

Although unenumerated rights clauses predate the Ninth Amendment,²¹ the Baby Ninths—as their name heavily suggests—owe their existence to the Ninth Amendment itself. The Ninth Amendment was a very specific provision without a predecessor in a state constitution. Its own history—along with that of its sibling the Tenth Amendment—

20. See, e.g., Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747 (2001); AKHIL REED AMAR, *THE BILL OF RIGHTS* 280-81 (1998); Yoo, *supra* note 12, at 1008-22; Louis Karl Bonham, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321 (1985); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 203-04 n.87 (1980).

21. Perhaps the first unenumerated rights provision in an American constitution was the Lockean Natural Rights Guarantee of the Virginia Declaration of Rights of 1776. See Calabresi & Vickery, *supra* note 14, at 1313-14.

therefore deserves a brief retelling, as familiar as it may be to some readers. Following the retelling, this Article leads into an overview of how modern jurists and scholars think the Ninth Amendment should be interpreted.

A. *How the Ninth and Tenth Amendments Were Framed*

In 1787, the men who would become the framers of the U.S. Constitution met in Philadelphia to form a more perfect union. As the summer wore on, their tasks were primarily devoted to what the powers of the new federal government would be and how those powers would be divided among its branches. They gave little consideration to issues of individual rights²²— something very different from what happened when many of the same framers had drafted their state constitutions over the previous eleven years (the first state constitutions only going back to 1776, shortly before independence).²³ A couple of times during the convention, a call was made to add a bill of rights to the emerging constitution, but these motions failed amid the attendees' various pressures.²⁴ The delegates did insert a few rights clauses into the document's text, however, including guarantees against ex post facto laws and bills of attainder, and (applying to state governments only) provisions protecting the obligations of contracts. Then, in the last days of the convention, the subject of a bill of rights was raised again. Perhaps largely motivated by fatigue and a wish to present their almost-complete blueprint for a federal government to the people, the delegates voted the proposal down.²⁵

But the issue of a bill of rights only grew in importance when the draft constitution went to the states for ratification. One of the biggest objections from those who opposed the document, the Antifederalists, was that it lacked a bill of rights.²⁶ Emphasizing the seemingly expansive reach of

22. JACK RAKOVE, *ORIGINAL MEANINGS* 316 (1996).

23. For example, George Mason, a delegate at the 1787 Convention, was the architect of the Virginia Declaration of Rights in 1776, and John Adams was the drafter of most of the 1780 Massachusetts Constitution, including its opening Declaration of Rights. See Calabresi & Vickery, *supra* note 14, at 1314 (discussing Mason's work on Virginia Declaration of Rights); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE* 209-11 (1968) (recounting John Adams's work on the Massachusetts Constitution, particularly its Declaration of Rights).

24. RAKOVE, *supra* note 22, at 316.

25. *Id.* at 288.

26. See Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 510-11 (2011). The well-known history of the Bill of Rights' adoption is retold in many books and articles. See, e.g., FARBER, *supra* note 3, at 29-44; KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 13-38 (2009). The following gives just the necessary minimum of facts drawn from these and other sources.

the powers given to the new government, the Antifederalists argued these powers could infringe on basic liberties, such as the freedom of the press.²⁷ The Constitution's proponents, the Federalists, countered that no bill of rights was needed because the new federal government was one of limited, enumerated powers.²⁸ The government did not have the power, for example, to limit the freedom of the press because such a power was not enumerated.²⁹ This argument was sometimes examined through contrast with state governments, which were understood to have general powers.³⁰ A bill of rights made much more sense, went the argument, in a state constitution because there the government's powers are so broad that fundamental liberties might be infringed. Enumerated powers themselves, however, protected the people's rights from the new federal government.³¹ The people had delegated certain powers to the new federal government, but had only delegated a few well-defined ones, none of which endangered the people's rights. Further, if a bill of rights were added to the Constitution, it would only protect a handful of rights, and it might imply that the federal government *does* have the power to infringe on unnamed ones.³² After all, given the infinite number of actions people can take—the right to wear a hat was an example proposed—no bill of rights can name them all.³³

The Antifederalists did not buy these arguments for several reasons. Two stand out. First, the powers granted to the new government seemed rather broad. This was especially true in light of the Necessary and Proper Clause, which added flexibility to the enumerated powers of article I, section 8.³⁴ In light of the growth of federal power since the New

27. See Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 332 (2014).

28. See *id.* at 332-33.

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

30. For example, Hamilton argued that a bill of rights makes more sense when the government has broad unenumerated powers than when they are limited, as in the U.S. Constitution. See *id.* at 513 ("But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns."). See also Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1230-31 (1990) (demonstrating supporters of ratifying the Constitution argued reserving rights in state constitutions was proper due to the state's broad powers, and contrasting that with the proposed federal government's limited powers).

31. Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1266-67 (2015).

32. *Id.* at 1267.

33. 1 ANNALS OF CONG. 759 (1789) (statement of Rep. Sedgwick).

34. FARBER, *supra* note 3, at 39-40.

Deal, the Antifederalists seem to have won the argument on that point. Given how broadly the power to regulate interstate commerce has been interpreted,³⁵ it almost seems silly to think that under that same understanding Congress' power does not also reach any subject in the Bill of Rights. Second, the original Constitution itself actually did contain some rights, such as the prohibition on bills of attainder.³⁶ If there truly was a fear that the federal government's powers would be read to intrude upon rights not enumerated if other rights already were, then that fear already existed due to the handful of rights in the original text. Therefore, the Antifederalists retorted, an additional bill of rights could hardly make things worse.³⁷

In the states' ratifying conventions to which the Constitution went to receive the states' approval, many delegates voted to accept the Constitution, but only after recommending amendments for the new Congress to adopt. Several states submitted these suggested changes. They included protections such as freedom of the press, religion, and trial by jury—substantive and procedural rights that in some cases eventually made their way into the first eight amendments to the Constitution.³⁸ But there were other suggestions that sought to clarify the federal government's powers and to try to prevent the argument the Federalists feared of a limited set of rights nullifying other rights or expanding federal powers.³⁹

When the First Congress began its work, James Madison, by then a Virginia congressman, had come around to the necessity of adopting a bill of rights, and he submitted several proposed amendments to the House. Two of the proposed amendments later became the Ninth and Tenth Amendments. They were, respectively, as follows:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the

35. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding Congress has the power to prohibit possession of marijuana that has not been bought or sold).

36. See U.S. CONST. art. I, §§ 9-10 (including, *inter alia*, prohibitions on both Congress and states passing bills of attainder and ex post facto laws, and on states impairing the obligations of contracts).

37. See FARBER, *supra* note 3, at 34-35.

38. See, e.g., 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 338-39, 334-35 (Jonathan Elliot ed., 2d ed. 1901) (New York and Rhode Island proposals, respectively).

39. A number of these examples may be found in Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 355-58 (2004) (citing examples from ratifying conventions of New York, North Carolina, Pennsylvania, and Virginia).

powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.⁴⁰

These were referred to a select committee in the House, which left the draft of the eventual Tenth Amendment unchanged but edited quite a few words in the eventual Ninth Amendment. After the committee completed its edits, the now-Ninth Amendment read as it does today, but with a "this" instead of the first "the."⁴¹ Both draft amendments then changed in the Senate to their present versions, with the only substantive change being the addition of "or to the people" in the Tenth.⁴² They, and the rest of what came to be known as the Bill of Rights, were then ratified by the requisite number of state legislatures over the next two years.

B. The Models of Ninth Amendment Meaning

That is the story. Scholars agree that these things happened. What the Ninth Amendment actually "meant" at the time, however, is a very different matter. There are a number of different arguments for what the Ninth Amendment meant at the time it was adopted—that is, what its original meaning was. Professor Randy Barnett has helpfully organized them into five broad models.⁴³ I briefly outline them here.

The first is the state law rights model. Under this model, the Ninth Amendment simply says that rights enjoyed under state law "continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."⁴⁴ The Ninth Amendment does not protect these rights from the federal government; it simply says the rights "continue in force" until changed or overridden.

The second model for the original meaning of the Ninth Amendment is the "residual rights" model. Here, the Ninth Amendment prevents the specific argument that Congress has broader powers than it otherwise

40. James Madison, *Speech to the House Explaining His Proposed Amendments and His Notes for the Amendment Speech*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 51, 55-56 (Randy E. Barnett ed., 1989).

41. See Lash, *supra* note 39, at 368.

42. See *id.* at 369-70.

43. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 11-21 (2006).

44. Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 228 (1983), discussed in Barnett, *The Ninth Amendment*, *supra* note 43, at 11-12.

would because of enumerated rights.⁴⁵ Under this view, it could be supposed, for example, that because there is a prohibition on violating the freedom of the press, that Congress actually would have a power to do so if it were not for the First Amendment, thus implying that Congress has additional, unenumerated powers. However, the Ninth Amendment makes unavailable that particular argument.

The third model, the individual rights model, is that the Ninth Amendment tells us that just because there are enumerated rights in the Constitution does not mean that there are not other rights, and that those rights should not be “denied or disparaged” just because they are not enumerated.⁴⁶ Those rights receive constitutional protection and are judicially enforceable; if they were not—and those in the first eight amendments were—they would be “denied or disparaged” simply because they were unenumerated. What those rights *are* is a different question that scholars then subdivide themselves into. Libertarians, such as Randy Barnett, believe economic liberty is a protected unenumerated right, but that positive rights, such as the right to an education, are not.⁴⁷ Some left-of-center scholars, such as Dan Farber, believe some negative rights are protected (although not economic liberty) but that the right to an education is also.⁴⁸

The fourth model, the collective rights model, believes the Amendment is a rule of construction that protects rights, but only the collective rights of people in the states. A foremost example, put forward by Akil Amar, is the right of the people to alter or abolish their government.⁴⁹ Another is the right of a state’s body politic to choose the policies it wants to adopt free from federal government interference.⁵⁰

The fifth model is the federalism model. It is in some ways the flip-side of the residual rights model. Here, the Ninth Amendment works with the Tenth Amendment to limit the federal government to a narrow reading of its enumerated powers. Instead of fighting against a conclusion that the federal government has general, unenumerated powers, the federalism model has the Ninth Amendment fighting against a conclusion that the federal government has broad enumerated powers.⁵¹

45. *Id.* at 12-13 (discussing McAfee, *supra* note 30).

46. *Id.* at 13-15.

47. Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. Pa. J. CONST. L. 1, 21 (2006).

48. FARBER, *supra* note 3, at 96-97, 145-53.

49. AMAR, *supra* note 20, at 120.

50. See Lash, *supra* note 39, at 342 (“The retained rights of the Ninth Amendment also may have been understood as being subject to the collective action of the people on a state-by-state basis.”).

51. Barnett, *The Ninth Amendment*, *supra* note 43, at 17-21.

It should be noted that some of these models do not necessarily contradict each other. For example, someone could hold that the Ninth Amendment both protects unenumerated individual rights and prevents a broad reading of the federal government's enumerated powers.

I do not take a position on these various positions in this Article. However, I do argue below that whichever view of the Ninth Amendment itself is right, the *only* view that makes sense for Baby Ninth Amendments in state constitutions is the individual rights model.⁵²

II. THE BIRTH OF THE BABY NINTHS

After the federal Bill of Rights was adopted, the Ninth Amendment made its way to the states in the form of the Baby Ninths. But it took some time, and the journey does not begin when the first Baby Ninth came to be in Alabama in 1819, but when a Baby *Tenth* made its first appearance.

A. *The Baby Tenth*s

After a spring and summer of drafting what we now know as the Bill of Rights, Congress sent proposed amendments to the states on September 25, 1789. Meanwhile, the state of Pennsylvania was gearing up for a constitutional convention to redraft its own constitution. The convention appointed various committees to redraft different articles of the previous Pennsylvania Constitution, including the article constituting the state's declaration of rights. This committee was appointed on December 10, 1789⁵³ and reported a draft on December 23, 1789.⁵⁴ The last clause of the new declaration of rights that this committee proposed looked rather similar to the then-proposed Amendment we now know as the Tenth Amendment. It read:

To guard against transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.⁵⁵

52. See *infra* Part IV.

53. THE PROCEEDINGS RELATIVE TO THE CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, at 153 (Harrisburg, Pa., John Wiestling 1825) [hereinafter PENNSYLVANIA PROCEEDINGS].

54. *Id.* at 163.

55. *Id.* This language was preceded by language in an earlier motion to appoint the committee to draft the declaration of rights, which, in relevant part, said "That that part of the constitution . . . called A declaration of the rights of the inhabitants . . . of Pennsylvania,

From what I can tell, this collection of phrases was first put together in December 1789 at the Pennsylvania Convention. I have found no earlier examples in American constitutions of the “transgressions” or “excepted out” terminology. The language about delegation is, however, similar to the language in the then-proposed Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Both speak of how the government that the constitution concerns has been delegated certain powers. Indeed, the connection between the Tenth itself and this Baby Tenth becomes more apparent when considering the political circumstances at the convention. It appears the provision was meant to please Antifederalists as part of a series of compromises between Federalists and Antifederalists in reforming the prior Pennsylvania constitution: “If, as Federalists had argued, the states were the guarantors of individual rights, this statement [the Baby Tenth] would be a further protection against federal encroachments.”⁵⁶

But the provision is noticeably different in a couple of ways that demonstrate that its Pennsylvanian drafters understood the differences between the federal government and state governments. First, it refers to “high powers” and “general powers,” not enumerated powers.⁵⁷ Powers *are* delegated, but those powers are “general” and are also recognized as of a “high” variety. Perhaps the people *could* have delegated only certain enumerated powers to the state government, but instead they delegated “general powers.” Second, what are held back from that delegation are not simply undelegated powers—which is what the Tenth Amendment says—but just the powers that intrude upon the rights in Pennsylvania’s Declaration of Rights. This echoes the Federalists’ now-discarded argument that a federal bill of rights was not needed because the enumerated powers did not include the power to violate fundamental liberties. Here,

requires alterations and amendments, in such manner as that the rights of the people, reserved and excepted out of the general powers of government, may be more accurately defined and secured . . .” *Id.* at 152.

56. Carroll C. Arnold, *Early Constitutional Rhetoric in Pennsylvania* 184, in *AMERICAN RHETORIC: CONTEXT AND CRITICISM* (Thomas W. Benson ed., 1989).

57. I should note a major omission from this Article that a studied reader will notice. I do not use the term “police power.” This may seem odd, because today this term is nearly synonymous with the general powers of state governments. I do not do so because in the antebellum period “police power” did not catch on as a standard term of art until quite late, being infrequently used, at least in judicial opinions, until the 1850s. (This is demonstrated through a LEXIS search of “police power” in the state courts database.) Therefore, I fear I may import some later understandings of state government power into this earlier period by using that term. Instead, I use the terms state constitutions from the period actually used, “general powers” or “high powers.”

because the powers are "high" and "general," Pennsylvania's framers recognized there might be "transgressions" against those liberties. Thus, to protect against any power being used to violate the rights in the Declaration of Rights, that power is expressly not delegated as part of those "general powers." It is not just that the constitution affirmatively protects those rights; the power to violate them is not given to the state government in the first place.

The Baby Tenth is an example of popular sovereignty, a belief commonly held at the time of the U.S. Constitution's adoption, that sovereignty did not reside in the federal or state governments, but ultimately in the people themselves.⁵⁸ The people can delegate their sovereignty however they wish, either through enumerated powers (*a la* the federal government) or general powers (*a la* the states). They could also, presumably, delegate *no* powers and live in anarchy. Pennsylvania's Baby Tenth asserts that the people are delegating quite broad powers that are in keeping with how "sovereign governments" generally operate, but that they are safeguarding some of their rights out of those powers.⁵⁹

The Pennsylvania Convention voted to include the Baby Tenth language, and, as the convention continued, the language stayed in the various drafts. Meanwhile, the state legislature ratified what we now call the Bill of Rights on March 10, 1790.⁶⁰ A few months later, the state officially adopted its new constitution, including the Baby Tenth, on September 2, 1790.⁶¹ The federal Bill of Rights was not actually adopted until December 15, 1791 with the Virginia legislature's ratification.⁶²

After Pennsylvania's experience, Baby Tenths grew to be popular among constitution drafters. Conventions in Delaware (1792), Tennessee (1796), Kentucky (1799), Ohio (1802), Indiana (1816), and Mississippi (1817) included similar language in their revised or brand new constitutions.⁶³ Often they were a conclusion to a bill of rights, not in a numbered

58. See Lash, *supra* note 39, at 370.

59. Pennsylvania's declaration of rights both before and after the constitution of 1790 contained a Lockean Natural Rights Guarantee, so it could be argued that the Baby Tenth exempted out of the state's general powers the unenumerated rights that the Lockean provision protected. PENNSYLVANIA PROCEEDINGS, *supra* note 53, at 303 (PA. CONST. of 1790 art. IX, § 1). We will see how other states did the same thing with a Baby Ninth.

60. Kenneth R. Bowling, "A Tub to the Whale": *The Adoption of the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* 57 (Patrick T. Conley & John P. Kaminski eds., 1992).

61. ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES* 335 (2006).

62. Lash, *supra* note 39, at 393.

63. The language in those constitutions were as follows:

Delaware: We declare, that every thing in this article is reserved out of the general powers of government hereinafter mentioned.

clause, but set forth at the end to exempt the state's powers from the preceding rights.⁶⁴

B. Alabama's Baby Ninth

It was not until a full thirty years after Madison and his colleagues drafted the Ninth and Tenth Amendments that a state adopted language modeled after the Ninth Amendment. When it happened, it attracted little fanfare, but set a precedent for generations of American constitution drafting.

THE CONSTITUTIONS OF THE UNITED STATES; ACCORDING TO THE LATEST AMENDMENTS, TO WHICH ARE PREFIXED, THE DECLARATION OF INDEPENDENCE AND THE FEDERAL CONSTITUTION 134 (Philadelphia, William Duane, 1806) ([hereinafter DUANE CONSTITUTIONS]).

Indiana: To guard against any encroachments on the rights herein retained, we declare, that every thing in this article, is excepted out of the general powers of Government, and shall forever remain inviolable.

IND. CONST. of 1816, Indiana Historical Bureau, *available at* <http://www.in.gov/history/2882.htm>.

Kentucky: To guard against transgressions of the high powers which we have delegated, WE DECLARE, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.

DUANE CONSTITUTIONS, *supra*, at 253.

Mississippi: To guard against transgressions of the high powers herein delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.

4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2035 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS, with the respective preceding volume number].

Ohio: To guard against the transgressions of the high powers which we have delegated, we declare that all powers, not hereby delegated, remain with the people.

DUANE CONSTITUTIONS, *supra*, at 283.

Tennessee: The declaration of rights hereto annexed, is declared to be a part of the constitution of this state, and shall never be violated on any pretence whatever. And to guard against transgressions of the high powers which we have delegated; We declare, that every thing in the bill of rights contained, and every other right not hereby delegated, is excepted out of the general powers of government, and shall for ever remain inviolate.

Id. at 230.

64. Illinois also had a Baby Tenth in a draft of its 1818 constitution during its convention, which for an unknown reason was taken out before it was adopted. SOLON JUSTUS BUCK, ILLINOIS IN 1818, at 283-84 (1918).

Congress created the Alabama Territory in 1817.⁶⁵ The territory soon moved toward statehood, and in 1819 Congress authorized a constitutional convention for the expected new state of Alabama.⁶⁶ After the territory's counties elected delegates, they arrived in Huntsville, Alabama in July 1819 to draft their new foundational document.⁶⁷

One of the convention's first tasks was to appoint a committee to write a draft of the state constitution. It selected a group of fifteen men, chief among them the committee's chairman Clement Comer Clay, a future governor.⁶⁸ Of the fifteen, Clay and two others—plus a non-delegate, the territorial governor William Wyatt Bibb—were the resulting draft's "chief architects."⁶⁹ The committee was selected on July 6 and issued their draft constitution to the convention as a whole on July 13, after a mere week of constitution writing.⁷⁰ Somewhere in those seven days, the concept known today as a Baby Ninth Amendment was born.

The draft constitution was later changed in some ways by the convention as a whole. It was, after all, simply a starting point. But the draft declaration of rights, Article I of the draft constitution, met little resistance in the convention.⁷¹ Article I was largely modeled after next-door Mississippi's constitution of 1817. Setting the declaration of rights from both documents side-by-side, they are practically identical, with only eight of Alabama's thirty provisions differing in substance from Mississippi's.⁷²

So, we know the committee members were influenced by Mississippi's constitution, if only out of expediency, but we do not know much more than that.⁷³ A scant journal has survived with some clues on what was said in the convention as a whole, but on many topics the convention did

65. PAUL M. PRUITT, *TAMING ALABAMA* 11 (2010).

66. *Id.*

67. *Id.* at 11-12.

68. *Id.* at 124.

69. *Id.*

70. JOURNAL OF THE CONVENTION OF THE ALABAMA TERRITORY 5-6, 12-13 (Huntsville, Ala., John Boardman, 1819).

71. Compare Malcom Cook McMillan, *The Original Draft of the Alabama Constitution of 1819*, 20 ALA. LAW. 1 (Jan. 1959) (containing Clay's committee's draft), with 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 97-98 (ALA. CONST. of 1819, Decl. of Rts.).

72. Compare 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 97-98 (ALA. CONST. of 1819, Decl. of Rts.), with 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2033-35 (MISS. CONST. of 1817, Decl. of Rts.).

73. I have found no records of the committee's work other than the draft constitution itself.

not disagree with the committee's draft, and it had no comment on a constitutional provision.⁷⁴ When it came time for the Baby Ninth in the committee's draft, nary a word is recorded in the convention journal (as, indeed, was also true for most of the rights provisions).⁷⁵

What we do know is how the section differed from the section it seems to have been modeled on, the Baby Tenth of Article I of the Mississippi Constitution. That provision stated:

To guard against transgressions of the high powers, herein delegated, We Declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.⁷⁶

Alabama's has this language, but with a couple of additions. They are highlighted in the following:

This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and, to guard against any encroachments on the rights herein retained, or any transgression of any of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.⁷⁷

Notice there are two additions. First, there is the underlined language. This seems to come from the Indiana Constitution of 1816, which was the one state with a Baby Tenth that had used the underlined language instead of the "transgressions" language before stating "we declare."⁷⁸ Alabama's committee apparently liked both introductory clauses, and joined them together.

More importantly for present purposes, the committee also joined the bolded language. This can only have been taken from the Ninth Amendment itself, as no other constitutional document contained a provision with something like those words at that point.

74. See generally JOURNAL, *supra* note 70, at 21-36 (amending various provisions, but not all, of the original draft).

75. See *id.* at 21 (amending only seven provisions out of the thirty in the Declaration of Rights).

76. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2035.

77. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 98 (ALA CONST. of 1819, art. I, § 30) (emphasis added).

78. See *supra* note 63.

Why did the committee put the Ninth Amendment in there? Unless some paper buried deep in an archive can be found, we cannot know directly. The fact that the clause as a whole already contained language from Mississippi's and Indiana's otherwise materially identical clauses provides a clue. Perhaps its drafters liked a belt-and-suspenders approach to protecting the declaration of rights and threw in every clause they could find in prior constitutions to protect against state abuses. Perhaps someone on the committee also had the idea that they should "except out" of the general powers of government not just those rights in the declaration of rights, but other rights as well. Thus, stating that those "other rights" cannot be denied or disparaged, plus excepting them (as they were "in this article" via the Baby Ninth language) along with the enumerated rights from the "general powers of government," would be the most comprehensive rights protection.

Perhaps, however, a member of the committee liked the Ninth Amendment itself and simply wanted a parallel provision in the state constitution. Coupling it with a Baby Tenth Amendment might seem to make sense because they both are "all inclusive" provisions, covering rights and powers, respectively, that are not dealt with elsewhere.

In any case, as far as history knows, no one at the convention objected to this draft language. The constitution eventually ratified by the convention contained the same language. The state was then admitted to the Union later that year. A similar version of the provision—still with a Baby Ninth and a Baby Tenth—is in Alabama's Constitution today.⁷⁹

C. *Maine's Baby Ninth.*

Alabama can rightfully call itself the first "Baby Ninth State," but not by much. Just three months after Alabama's drafting committee invented its Baby Ninth, Maine acted similarly. However, in Maine there apparently was no hunger for a Baby Tenth as well. So Maine had—and still has—the first stand-alone Baby Ninth.

For years, the residents of the then-District of Maine debated whether they should leave the Commonwealth of Massachusetts and create their own state. After a number of referenda on the subject—all of which failed—Maine's voters finally voted to become their own member of the Union.⁸⁰ To do so, of course, the prospective state needed its own constitution, and, just like Alabama, they elected delegates to a constitutional

79. ALA. CONST. art. I, § 36.

80. Ronald F. Banks, *The Maine Constitutional Convention of 1819*, in *A HISTORY OF MAINE: A COLLECTION OF READINGS ON THE HISTORY OF MAINE, 1600-1976*, at 179 (Ronald F. Banks ed., 1976).

convention. The convention began in October 1819. One of Maine's political leaders, William King, had planned for this moment for years, and wanted to write a constitution anew and not copy from John Adams' Massachusetts' Constitution of 1780.⁸¹ However, given the time constraints when the convention was actually called, the convention did begin by using Massachusetts' version as a template, although many changes were made.⁸²

Maine's convention spun off the business of drafting various provisions of the constitution to different committees. The Declaration of Rights committee was composed of thirty-three members.⁸³ As in Alabama, no detailed record has been found of the committee's deliberations. There is a (non-exhaustive) journal of the convention's proceedings, but, also as in Alabama, no remarks are recorded that were made about the Baby Ninth Amendment.⁸⁴

The Baby Ninth was in the committee's draft declaration of rights, and remained unchanged throughout the convention (and, indeed, is unchanged today). Much of the Declaration of Rights was taken from Massachusetts' Constitution, but the Baby Ninth, at the end of the document, was new. It read:

The enumeration of certain rights shall not impair nor deny others retained by the people.⁸⁵

This was very similar, of course, to the actual Ninth Amendment, but different in a couple of interesting ways. First, instead of "deny or disparage" it says the enumeration of rights shall not "impair nor deny." Is "impair" a stronger word than "disparage"?⁸⁶ Furthermore, the phrase "shall not be construed" is completely absent. In Maine, the Baby Ninth does not forbid a reader from construing the bill of rights to mean other rights can be denied or impaired, but says the enumeration of certain rights *itself* shall not impair or deny other rights. Perhaps this difference is immaterial, but perhaps it is meant to be a stronger clause than a "mere" rule of construction.

81. *Id.* at 153.

82. *Id.* at 181.

83. *Id.*

84. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE DISTRICT OF MAINE (Augusta, Me., Fuller & Puller, 1856).

85. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 67 (2d ed. 2013).

86. The First Congress in fact briefly considered substituting "impair" for "disparage." Yoo, *supra* note 12, at 979-80. Professor Yoo argues that the common use of "impair" in Baby Ninths demonstrates the drafters' assumption that the provisions protect unenumerated, preexisting, rights. *Id.* at 1009-10.

Maine then adopted its constitution and entered the Union in 1820 as part of the later infamous Missouri Compromise.

D. A "Proto-Baby Ninth" in Tennessee?

Before we see where the examples of Alabama and Maine led, we must consider what happened in Tennessee. As noted above, along with other states that adopted constitutions in the years following Pennsylvania's 1790 constitution, Tennessee included a Baby Tenth in its first constitution, ratified in 1796.⁸⁷ However, Tennessee's included a phrase absent in the constitutions of other states that adopted Baby Tenth's before 1819. Its Baby Tenth stated, in relevant part,

And to guard against transgressions of the high powers which we have delegated, We declare, that every thing in the bill of rights contained, *and every other right not hereby delegated*, is excepted out of the general powers of government, and shall for ever remain inviolate."⁸⁸

For the most part, this is a Baby Tenth. It uses the transgression language going back to Pennsylvania's original drafting. Then, it reserves what is in the bill of rights to the people. This seems to be functionally the same thing as excepting those rights from the "general powers of government" in other Baby Tenth's.

However, stuck in the middle of the language is a reference to "every other right not hereby delegated." Delegating rights? The same sentence already speaks of *powers* that have been delegated, like the actual Tenth Amendment's reference to the delegation of powers. If that is true, then how are rights also delegated?

The answer is not entirely clear. It could be that "every other right" actually means powers of government. However, that doesn't seem to work because "powers" was already used to mean powers of government, and "every other right" comes directly after a reference to the bill of rights. A more plausible reading is that "every other right not hereby delegated" means there are *some* rights delegated over to the government, beyond those in the bill of rights, and the people therefore do not have those rights anymore. However, of those "other" rights that are *not* "hereby delegated," they are "reserved to the people" just as the rights enumerated in the bill of rights are. In other words, through the Tennessee Constitution, the people have alienated some rights, but not the rights that are reserved to the people in the bill of rights *plus some others*.

87. See *supra* note 63.

88. DUANE CONSTITUTIONS, *supra* note 63, at 230 (TENN. CONST. of 1796, art. X, § 4) (emphasis added).

This is not exactly the same as a Baby Ninth, because it does not talk about denying, disparaging, or impairing unenumerated rights. However, it does say that some unenumerated rights—that is, all unenumerated rights that aren't delegated to the State of Tennessee—are reserved to the people. Perhaps the best way to describe it is as a weak or “proto” Baby Ninth. Some “other rights” *are* denied or disparaged because they are not enumerated, but some “other rights” are protected in some way.

It appears this language was never litigated in a published case in Tennessee during the thirty-nine years of the constitution's existence. Then, for good or bad, in the Tennessee Constitution of 1835 the “every other right” language was removed, although the rest of the Baby Tenth stayed in.⁸⁹

III. HOW THE BABY NINTHS BECAME POPULAR AND WHAT THEIR FRAMERS THOUGHT OF THEM

The following first tells the story of how Baby Ninths became popular in the decades between 1819 and the Civil War. It then moves on to provide the details we have on what delegates themselves thought of Baby Ninths—and sometimes Baby Tenths—and closes with the scant case law on Baby Ninths from the antebellum period.

A. *Slow, but Accelerating, Adoption from 1820 to 1860*

After this start in Alabama and Maine, Baby Ninths were not used in American constitutions for a few years. Massachusetts, New York, and Virginia, for example, all held constitutional conventions within a decade of each other during which they either adopted wholesale new constitutions or made significant amendments,⁹⁰ but none of those states added Baby Ninths to their governing documents.⁹¹ Also, Missouri was added to the Union in 1821 and did not insert a Baby Ninth in its constitution.⁹² Delaware held a convention in 1831 for a new constitution, and no Baby

89. WALLACE MCCLURE, *STATE CONSTITUTION-MAKING: WITH ESPECIAL REFERENCE TO TENNESSEE* 452-53 (1916).

90. *See generally* DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S (Merrill D. Peterson, ed., Liberty Fund 2010).

91. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1911-13, 1922 (amendments of 1820 convention to Massachusetts Constitution); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2639-51 (N.Y. CONST. of 1821); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3819-29 (VA. CONST. of 1830).

92. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2150-67 (MO. CONST. of 1820).

Ninth was adopted, although the state did retain its Baby Tenth.⁹³ Mississippi did the same in 1832, and, as discussed above, its neighbor Tennessee adopted a new constitution in 1835. Neither state added a Baby Ninth, even though both already had Baby Tenths (which both retained).⁹⁴ In 1835, Michigan drafted what was to become its first constitution, but it too lacked a Baby Ninth.⁹⁵ Thus, in 1835 an observer might think it "cute" that Alabama and Maine had each experimented with making Madison's invention part of state constitutional law, because few other state constitutional framers had thought much about it. There is one partial exception to this "drought" in Baby Ninths after Alabama and Maine. In 1824, Rhode Island held a constitutional convention.⁹⁶ The state, in fact, had no constitution at the time, and it would not have one until the 1840s.⁹⁷ The constitution the convention drew up was submitted to the voters but was handily rejected.⁹⁸ The draft constitution, however, contained a Baby Ninth, stating at the end of its bill of rights: "The enumeration of the foregoing rights shall not be construed to impair nor deny others retained by the people."⁹⁹ The exact words of this proposed Baby Ninth are not precisely the language of Maine's, but the provision is more in keeping with Maine's than Alabama's, as it does not contain Baby Tenth language.

After 1835, things began to change. In 1836, Arkansas drafted a constitution and was admitted to the Union.¹⁰⁰ Arkansas' Declaration of Rights was similar to Alabama's in roughly half of its clauses, with the rest being quite different or changed in material ways.¹⁰¹ Its last clause was word-for-word exactly the same as Alabama's joint Baby Ninth/Baby

93. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 582-600 (DEL. CONST. of 1831).

94. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2049-68 (MISS. CONST. of 1832); *supra* note 63 and accompanying text (TENN. CONST. of 1835).

95. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1930-43 (MICH. CONST. of 1835).

96. PATRICK T. CONLEY & ROBERT G. FLANDERS, THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 22 (2d ed. 2011).

97. See *infra* notes 108-12 and accompanying text.

98. CONLEY & FLANDERS, *supra* note 96, at 22.

99. PROPOSED RHODE ISLAND CONST. of 1824 art. VI, § 18, in CONSTITUTION OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, AS ADOPTED BY THE CONVENTION, ASSEMBLED AT NEWPORT, June 21, 1824, at 15 (Providence, R.H., Jones & Maxcy 1824), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.35112105061842;view=1up;seq=27>.

100. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 268.

101. Compare 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 97-98 (ALA. CONST. of 1819, Decl. of Rts.), with 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 269-71 (ARK. CONST. of 1836, Decl. of Rts.).

Tenth clause quoted above.¹⁰² As in Alabama and Maine, there is no record of any debate on the provision in the limited journal of the convention, so why Arkansas chose to adopt the provision is not clear. However, it was not simply inertia in copying Alabama's because, again, the Arkansas conventioners chose not to copy many of Alabama's other provisions.

Arkansas was not the only example of a state adopting something like a Baby Ninth in 1836. Outside the then-United States, the new Republic of Texas adopted a constitution.¹⁰³ It was to be the country's fundamental law for nine years until the State of Texas adopted its constitution in 1845. At the opening of its Declaration of Rights, the constitution had a provision very similar to Tennessee's 1796 Baby Tenth, including the "proto-Baby Ninth" discussed above, and Texas' provision was obviously taken from Tennessee's, as no other similar provision existed.¹⁰⁴ It did this despite Tennessee having removed the phrase "and every other right not hereby delegated" in its 1835 revision. However, the clause did not last long, as it was removed in the 1845 constitution when Texas entered the Union (although a Baby Tenth remained).¹⁰⁵ It appears this language was never litigated in the Texas Supreme Court during the nine years of the constitution's existence.

After Arkansas' and Texas' ("proto") Baby Ninths, Florida¹⁰⁶ and Pennsylvania both held constitutional conventions in 1838, and neither included Baby Ninths in their resulting constitutions. Pennsylvania did retain its Baby Tenth, however, and Florida affirmatively chose to include

102. *Id.*

103. 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3541-42 (TEX. CONST. of 1836, pmbl. to Decl. of Rts.).

104. The provision stated "This declaration of rights is declared to be a part of this constitution, and shall never be violated on any pretence whatever. And in order to guard against the transgression of the high powers which we have delegated, we declare that everything in this bill of rights contained, *and every other right not hereby delegated*, is reserved to the people." *Id.* (emphasis added).

105. The new Baby Tenth stated: "To guard against transgressions of the high powers herein delegated, we declare that everything in this bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or to the following provisions, shall be void." 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3549 (TEXAS CONST. of 1845, art. I, § 21).

106. Although Florida drafted its first constitution in 1838, the constitution was not approved by Congress until 1845, when Florida was admitted to the Union. *See* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 662-64 (Enabling Act for Florida 1845 and Constitution of 1838).

a Baby Tenth.¹⁰⁷ Then, in the two decades before the Civil War, a number of states followed Arkansas' lead. With each passing year, it became more and more likely that, if a state were going to either join the Union and write its first constitution or simply redraft its present one, the state would end up with a Baby Ninth.

The next constitutional convention was in Rhode Island. Although the state's history as a colony goes back to the seventeenth century, and it (belatedly) ratified the U.S. Constitution in 1790, the state did not actually have a constitution until 1843. It instead relied on its 1663 royal charter.¹⁰⁸ Arguably, however, its first constitution was actually adopted a couple of years earlier as part of the "Dorr Rebellion," a complicated and almost-quite-bloody episode during which Rhode Island's old ruling elite came under attack from a group of middle class reformers and new immigrant laborers.¹⁰⁹ The two sides in the struggle held rival conventions in 1841, producing two proposed constitutions. The elite's constitution was defeated in a referendum, while the "People's Convention" proposed a constitution that was overwhelmingly adopted in an earlier state-wide referendum that allowed many more voters because it rejected the state's strict property ownership rule.¹¹⁰ However, this constitution was not recognized by the old elite who continued to control the state government. Then, after defeating the populist forces lead by Thomas Dorr in a near-battle, the government held another convention in September 1842 that led to the state's first accepted constitution, which went into effect in early 1843.¹¹¹ This then served the state until a new constitution was ratified in 1986.

What is striking is all three of the constitutions milling around Rhode Island from 1841-1843 included the same Baby Ninth: "The enumeration of the foregoing rights shall not be construed to impair or ["nor" in the People's Convention version] deny others retained by the people."¹¹² In

107. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 666 (FLA. CONST. of 1838, art. I, § 27); 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3115 (PENN. CONST. of 1838, art. IX, § 26).

108. ROY RAVEN, THE DORR WAR: REBELLION AND THE FIGHT FOR REFORM IN RHODE ISLAND 16 (2010).

109. *Id.* at 19-20.

110. *Id.* at 33-34, 42.

111. *Id.* at 120.

112. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3224 (R.I. CONST. of 1842 art. I, § 23) (official, adopted, constitution); CONSTITUTION OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS AS ADOPTED BY THE CONVENTION, ASSEMBLED AT PROVIDENCE, NOV. 1841 (Providence, R.I., Knowles & Vose 1842) (proposed R.I. CONST. of 1841, art. I, § 21) ("official" proposed constitution, voted down); PROPOSED CONSTITUTION OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, AS FINALLY ADOPTED BY

other respects, the constitutions are by no means identical, especially in voting rights, which was the primary basis for the Dorr Rebellion. But the Baby Ninth was agreeable enough to all sides that it made its way into all three constitutions. Lest there be any doubt where its inspiration came from, its text is identical—including the idiosyncratic word “foregoing” instead of “certain”—to the failed 1824 state constitution.¹¹³

In May and June of 1844, New Jersey held a convention to redraft its constitution.¹¹⁴ It was the state’s first constitutional convention since 1776. The previous constitution, signed on July 2, 1776, contained no bill of rights (although a handful of individual rights dotted its scant paragraphs), so the framers of the 1844 bill of rights were in large part writing a new document.¹¹⁵ They included a Baby Ninth: “This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.”¹¹⁶ The New Jersians followed the lead of Maine and Rhode Island by using “impair” instead of “disparage,” and New Jersey also added “privileges” in addition to “rights.”¹¹⁷

The then-territory of Iowa held a constitutional convention in October 1844 whose delegates settled on a draft that then went to the people for ratification.¹¹⁸ However, the people voted it down twice, leading to another convention in 1846.¹¹⁹ That version was accepted by the people, and Iowa was then admitted as the twenty-ninth state later that year.¹²⁰ The 1846 version did not differ from the earlier one in many ways, and its new bill of rights was almost identical.¹²¹ Both had the same Baby Ninth: “This enumeration of rights shall not be construed to impair or deny others retained by the people.”¹²²

THE PEOPLE’S CONVENTION, ASSEMBLED IN PROVIDENCE, ON THE 18TH DAY OF NOV. 1841, at 2 (Providence, R.I., New Age Office 1841) (“People’s Constitution,” art. I, § 25).

113. See *supra* note 96 and accompanying text.

114. JOURNAL OF THE PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE GOVERNMENT OF THE STATE OF NEW JERSEY 15, 234 (Trenton, N.J., Franklin S. Mills 1844).

115. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2594-98 (1909) (N.J. CONST. of 1776).

116. JOURNAL, *supra* note 114, at 236 (art. I, § 19).

117. See *supra* notes 85, 112, and accompanying text.

118. JACK STARK, THE IOWA STATE CONSTITUTION 5 (Oxford Univ. 2011) (1998).

119. *Id.*

120. *Id.* at 6.

121. *Id.*; compare PROPOSED CONSTITUTION OF THE STATE OF IOWA, ADOPTED IN CONVENTION, NOV. 1, 1844, available at <http://publications.iowa.gov/13339/1/1844ConstitutionIA.pdf> (art. I), with 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1123-25 (IOWA CONST. of 1846, art. I).

122. The only difference is that the 1846 version inserted a comma after the word “others.” Compare PROPOSED CONSTITUTION OF THE STATE OF IOWA, ADOPTED IN CONVENTION,

As we have seen, Texas declined to keep its proto-Baby Ninth in 1845.¹²³ Louisiana did not include a Baby Ninth in its new constitution of that year.¹²⁴ Two and three years later, respectively, both Illinois (to revise its constitution) and Wisconsin (to adopt its first) held conventions, and neither included Baby Ninths in their new constitutions.¹²⁵ Why these four states did not include Baby Ninths but the three states immediately prior that held conventions (Rhode Island, Iowa, and New Jersey) did is unclear.

However, Baby Ninths were not going away. In 1849, California adopted a constitution containing a Baby Ninth.¹²⁶ It is here, in the records of the Golden State's first convention, that we finally have insight into what a state's delegates thought about a Baby Ninth, which will be discussed below.¹²⁷

Over the next three years, 1849-1851, six states held constitutional conventions. None of them were new states. Even so, two chose to add a Baby Ninth where their former state constitution lacked one: Maryland¹²⁸ and Ohio.¹²⁹ Both of their convention debates are discussed below.¹³⁰ The other states that held conventions during this time period, Indiana,¹³¹ Kentucky,¹³² Michigan,¹³³ and Virginia,¹³⁴ for whatever rea-

NOV. 1, 1844, available at <http://publications.iowa.gov/13339/1/1844ConstitutionIA.pdf> (art. I, § 23), with 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1123-25 (IOWA CONST. of 1846 art. I, § 24).

123. See *supra* note 105 and accompanying text.

124. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1392-1411.

125. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 985 n.b. 985-1012 (ILL. CONST. of 1848; convention held in 1847); 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 4077-99 (WIS. CONST. of 1848).

126. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 392 (CAL. CONST. of 1849 art. I, § 21).

127. See *infra* Part III.B.1.

128. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1716 (MD. CONST. of 1851, Decl. of Rts., art. 42).

129. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2915 (OHIO. CONST. of 1851, art. I, § 20).

130. See *infra* Part III.B.2-3.

131. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1073-93 (IND. CONST. of 1851).

132. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1292-1315 (KY. CONST. of 1850).

133. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1944-74 (MICH. CONST. of 1850).

134. 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 3829-52 (VA. CONST. of 1850).

son did not add Baby Ninths to their state constitutions. Kentucky retained its Baby Tenth,¹³⁵ although Indiana, for unknown reasons, did not.¹³⁶

In 1852 Louisiana held a constitutional convention but did not adopt a Baby Ninth.¹³⁷ Delaware also held one in 1853, although its proposed constitution was not ratified by the voters. It did not contain a Baby Ninth, but did seek to retain the state's Baby Tenth.¹³⁸

The next appearance of a Baby Ninth in a proposed constitutional document is in the so-called "Topeka Constitution" drafted in Topeka, Kansas in 1855. This was the first of four constitutions the differing parties in "Bleeding Kansas" created in the violent run-up to Kansas' statehood.¹³⁹ It and the following three other constitutions tell an interesting story of Baby Ninths in the run-up to the Civil War.

The "Topeka Constitution," drafted by a convention committed to a free Kansas, was presented to Congress but never accepted.¹⁴⁰ The Baby Ninth (with a short Baby Tenth) it proposed in Article I, Section 22, declared "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated shall remain with the people."¹⁴¹ The language is identical to Ohio's Baby Ninth/Baby Tenth, discussed below.¹⁴²

The Topeka Constitution was followed by the also-unsuccessful "Lecompton Constitution," created in the convention held by a rival pro-

135. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 643, at 1314 (KY. CONST. of 1850, art. XIII, § 30).

136. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1073-93. I have reviewed the journal of the 1850-1851 convention, and the former provision does not appear to be mentioned. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (Indianapolis, A.H. Brown 1850). Indiana's 1851 bill of rights was substantially revised from the 1816 version, so apparently the Baby Tenth ended up on the cutting room floor in that revision. Compare 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1059 (IND. CONST. of 1816), with *id.* at 1073-76 (IND. CONST. of 1851).

137. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1411-29 (LA. CONST. of 1852).

138. DEBATES AND PROCEEDINGS OF THE CONSTITUTION OF DELAWARE 87 (Dover, Del., G.W.S. Nicholson 1853).

139. FRANCIS H. HELLER, THE KANSAS STATE CONSTITUTION 5-12 (Oxford Univ. 2011) (1992).

140. *Id.* at 6.

141. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1181 ("Topeka Constitution" of 1855, art. I, § 22).

142. See *infra* Part III.B.2. The Ohio Constitution of 1850 was a prototype for the eventual Kansas Constitution of 1859. HELLER, *supra* note 139, at 8.

slavery group in 1857.¹⁴³ It also contained a Baby Ninth and Baby Tenth, but its language was taken from the Alabama and Arkansas constitutions.¹⁴⁴

The third Kansas constitution created during the run-up to statehood was the "Leavenworth Constitution" of 1858, written by free soil partisans.¹⁴⁵ It contained exactly the same Baby Ninth/Baby Tenth language as the first Topeka Constitution.¹⁴⁶ It also never became law, but the fourth constitution, the "Wyandotte Constitution," did, when the state finally joined the Union in 1861.¹⁴⁷ It also had exactly the same Baby Ninth/Baby Tenth language as the previous two free soil versions.¹⁴⁸

What might be inferred from this back-and-forth of Baby Ninths is that both sides of the slavery debate believed in using Baby Ninths in protecting individual liberties but had different motivations for doing so. Whether either side thought the Baby Ninth itself—in addition to other, more explicitly pro- or anti-slavery language in the various constitutions—was a tool in aid of their cause on the slavery issue, we do not know. But the fact that one took its Baby Ninth/Baby Tenth from the free state of Ohio and the other from slave states of Arkansas and Alabama demonstrates that slavery must have influenced decision-makers in selecting the clause.

In 1857, Iowa held a constitutional convention, and it retained its Baby Ninth without change and without comment.¹⁴⁹ In the same year, Oregon held its convention to draft its first constitution and included the following Baby Ninth: "This enumeration of rights and privileges shall not be

143. HELLER, *supra* note 139, at 6.

144. It read, "This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher power herein delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate, and that all laws contrary thereto, or to the other provisions herein contained, shall be void." 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1217 ("Lecompton Constitution" of 1857, Bill of Rts. § 24). For the Alabama and Arkansas constitutions see *supra* notes 65-80, 100-102, and accompanying text.

145. HELLER, *supra* note 139, at 6.

146. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1224 ("Leavenworth Constitution" of 1858, art. I, § 21).

147. HELLER, *supra* note 139, at 12.

148. 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 1224 (KAN. CONST. of 1859, Bill of Rts. § 20).

149. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA ASSEMBLED AT IOWA CITY, MONDAY, JAN. 19, 1857 140 (Davenport, Iowa, Luse, Lane & Co. 1857).

construed to impair or deny others retained by the people."¹⁵⁰ Its wording is identical to New Jersey's, the first to include the word "privileges."¹⁵¹

Minnesota also held a constitutional convention in 1857.¹⁵² In fact, it held two simultaneous conventions. Although delegates were elected for a single convention to draft a constitution for the territory's impending statehood, there was so much acrimony between the Republican and Democratic delegates that the two factions held their own rival "conventions" after the first day.¹⁵³ Each then produced a draft constitution, and the two sides hammered out a compromised version in a conference committee of sorts.¹⁵⁴ Interestingly for our purposes, each party proposed a Baby Ninth. The Republican convention appears to have adopted it but then rescinded it.¹⁵⁵ However, the Democratic convention adopted theirs without comment.¹⁵⁶ The Baby Ninth then survived the "conference committee" to make it into the final state constitution.¹⁵⁷

That its Baby Ninth ended up in the same section as one of its religious liberty provisions is evidence of the somewhat chaotic nature of how Minnesota's Constitution came to be. The language in the actual constitution was (and still is) the same as that adopted in the Democratic convention: "The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people."¹⁵⁸ In the actual constitution, but not in the draft from the Democratic convention, the paragraph continues with several sentences concerning religion.

*B. The Floor Debates on Adopting Baby Ninths and Baby Tenth*s

From 1776 on, the amount of detail recorded in state constitutional conventions gradually expanded. Whereas many early conventions have

150. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF OREGON 104 (Salem, Or., W.H. Byers 1858) (art. I, § 33).

151. See *supra* note 116 and accompanying text.

152. MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION 1 (2002).

153. *Id.*

154. *Id.*

155. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 112, 164 (T.F. Andrews ed., 1858) [hereinafter REPUBLICAN CONVENTION].

156. THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 204, 348-49 (Francis H. Smith ed., 1857) [hereinafter DEMOCRATIC CONVENTION] (demonstrating a Baby Ninth—section 20 of draft bill of rights—drafted in committee and approved without amendment or comment by the Committee of the Whole).

157. *Id.* at 20, 653 (drafted by the convention and then adopted as MINN. CONST. of 1857 art. I, § 16).

158. *Id.* (drafted by the convention and then adopted as MINN. CONST. OF 1857, art. I, § 16).

little or no (surviving, at least) records of speeches that were made,¹⁵⁹ this improved so that we begin to have transcripts of what delegates thought of various draft provisions in their state constitutions.¹⁶⁰ Just because a shorthand writer was present, however, does not mean that any delegates had anything to say about a specific constitutional clause. Many provisions in many state constitutions receive no comment in the most detailed transcripts. This is true for Baby Ninths. However, I have found four antebellum journals that recorded more than passing references to Baby Ninths: California, Maryland, Ohio, and Minnesota. I discuss them below. They give us more than a window into how framers of antebellum constitutions thought about Baby Ninths.

1. California

The first state convention's journal that contains material comments on a Baby Ninth is California's from 1849. The discussion proceeded in a rather confusing manner. However, it is well worth investigating and parsing because it sheds some light on views of the time on state constitutions, state powers, and unenumerated rights.

As in other state conventions, a committee performed the initial drafting of the bill of rights in California's 1849 constitution. The committee proposed a bill of rights with twenty clauses, eight of which it reproduced from New York's constitution and the rest from Iowa's.¹⁶¹ This included Iowa's Baby Ninth.¹⁶² The convention adopted the provision, and a slightly different version is still in the state's (since-readopted) constitution today.¹⁶³

After reviewing and voting on the other nineteen provisions, the convention came to the proposed Baby Ninth. Immediately, however, a delegate named W. M. Gwin moved to replace the proposed "Iowan" provision with language identical to Alabama's and Arkansas' provisions, discussed above, which include a Baby Ninth and Baby Tenth.¹⁶⁴ This led another delegate, C. T. Botts, to move to amend Mr. Gwin's amendment with a still-yet-different provision. That provision—which Mr. Botts said he had drafted himself—read: "As constitutions are the instruments by

159. See, e.g., JOURNAL, *supra* note 70, at 21-36 (record of motions with no transcript).

160. See, e.g., OHIO REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO (Columbus, Ohio, S. Medary 1850) (extensive transcript of convention floor debates).

161. J. ROSS BROWN, REPORT OF THE DEBATES OF THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 31 (Washington, D.C., John T. Towers 1850).

162. *Id.* at 50-51.

163. The current provision states "This declaration of rights may not be construed to impair or deny others retained by the people." CAL. CONST. art. I, § 24.

164. BROWN, *supra* note 161, at 50.

which the powers of the people are delegated to their representatives, they ought to be construed strictly, and all powers, not expressly granted, should be taken to be reserved.”¹⁶⁵ Mr. Botts claimed this would do the same work as Mr. Gwin’s “Alabama version,” but prided himself on the fact that it was not simply copied from another constitution.¹⁶⁶

But although Mr. Botts may have intended his version to do the same work as the Alabama version, his “amendment to the amendment” in fact contained much stronger language. It seems to say that if the government of California does not have a power expressly authorized then the state cannot exercise it. This would be much more restrictive than earlier Baby Tenths (other than Ohio’s, discussed below¹⁶⁷), because in those versions the only powers “reserved” are those that would violate enumerated rights and other rights. Baby Tenths, after all, recognize that state governments have “general powers of government” not enumerated powers, in contrast to the federal government. Mr. Botts’ version was much more like the Tenth Amendment itself—in fact, even stronger—as it used the words “expressly granted.”

Another delegate took great exception to Mr. Botts’ “amendment to the amendment.” Delegate Robert Semple argued that such a provision is all well and good for the federal government, but that in a state constitution “[y]ou can only say what it [the government] shall not do”¹⁶⁸ Mr. Botts then retorted that, no, the state government only derives power from the state constitution, arguing, “All the power committed to their hands is delegated to them through the Constitution. If it does not come through the Constitution, it does not come [sic] all.”¹⁶⁹ Mr. Semple then responded with a very interesting distinction:

[Semple] was willing, in forming this Constitution, that the powers not herein expressly delegated should be withheld. But by whom? By the State, or by the people in their individual capacity. It must be by the people in some capacity—either individual or legislative.¹⁷⁰

Mr. Semple then strongly implied that it should be in their legislative capacity: “Wherever [the people] have not thus restricted their own power, they have a right to enact such laws as they please.”¹⁷¹ In other

165. *Id.* at 51.

166. *Id.*

167. *See infra* Part III.B.2.

168. BROWN, *supra* note 161, at 51.

169. *Id.* at 52.

170. *Id.* at 53.

171. *Id.*

words, if powers aren't delegated to the government in the state constitution they still can be exercised by the government. This, of course, makes any "delegation" a misnomer.

Mr. Gwin, the author of the original amendment using Alabama-style language then spoke up and declared that, indeed, the proposed amendment states that "all power not specially delegated to the legislature is reserved to the people."¹⁷² (It is difficult to ascertain, however, whether he was referring to the original proposed Baby Ninth from Iowa, his language from Alabama, or the amendment to the amendment of Mr. Botts.) Mr. Gwin then claimed that all constitutions in the country had such a provision. A representative of the committee then spoke up and said the proposed Baby Ninth from Iowa actually "was selected on account of its brevity. It was to be found in four other Constitutions of the States, nearly in the same words."¹⁷³

Then another delegate, L. W. Hastings, stepped forward with a statement that would be familiar to those in the First Congress. His language suggests he was speaking to the original proposed "Iowan" Baby Ninth. He argued,

[T]here appeared to be no necessity for the article at all. Why declare that all rights not herein enumerated are reserved to the people? Would it not be true without such a declaration? Does the mere assertion make it any more true? Gentlemen seem to be afraid that if they omit one right the people will loose [sic] it altogether.¹⁷⁴

At that point the "amendment to the amendment" was voted on and rejected, and then the original amendment of substituting Alabama's language was also rejected.¹⁷⁵ However, the original proposal itself, taken from Iowa's Baby Ninth, was then adopted. Further, just before the vote on the "Alabama amendment," Mr. Semple stated that "upon a more careful examination of the amendment" there was not "any difference of opinion after all between himself and the gentleman from San Francisco [meaning Mr. Gwin],"¹⁷⁶ and he would vote for it after all.

We should not make too much of this often confusing, and relatively short, exchange, but we can glean a few things.

172. *Id.*

173. *Id.* This was correct, when counting Baby Ninths that didn't also include a Baby Tenth: Maine, Rhode Island, New Jersey, and Iowa.

174. *Id.*

175. *Id.* at 53-54.

176. *Id.* at 54.

First, delegates were by no means of like mind on what powers state governments had. Some adamantly asserted the traditional view, discussed above, that state governments have general powers. However, Mr. Botts believed that the coming State of California would only have the powers granted to it in the state constitution.

Second, there is a hint of a “collective rights” reading of Baby Ninth. Mr. Semple seemed to be forwarding a view that when powers are not delegated to the government, they are withheld by the people in their *legislative* capacity. Now, there are logical problems with that view; there is no difference between delegating the government power and the people legislatively retaining power. The “government” and “the people” in their legislative capacity are, of course, the same thing (in a democratic republic at least). Even so, this may have been Mr. Semple’s understanding of the Baby Ninth or Baby Tenth language. Given the confusing nature of the amendments offered, and given that Mr. Semple is referring to powers, not rights, however, it could be that his reasoning only applied to Mr. Bott’s amendment to the amendment and not the “Iowan” Baby Ninth itself. Since Mr. Semple later agreed with Mr. Gwin “after all” and voted for Mr. Gwin’s “Alabaman” Baby Ninth, it may be that Mr. Semple simply was referring to the idiosyncratic version of Mr. Botts.

Third, the fact that Mr. Hastings’ objection to the Baby Ninth—that it was not needed to protect unenumerated rights—was rejected suggests that at least a majority of the delegates¹⁷⁷ viewed the Baby Ninth as at least helpful, if not necessary, in protecting rights that are not listed in the bill of rights itself. This, of course, supports the individual rights reading of California’s Baby Ninth. However, the fact that Mr. Hastings believed that rights were protected, *even if* they were not in the constitution via an unenumerated rights clause, demonstrates there was some quarter for the view that state government power could not violate certain rights no matter what a bill of rights says, namely, no matter what rights it enumerates or whether it has unenumerated rights clause(s). Include a Baby Ninth or not, those rights are still protected.

2. Ohio

In Ohio’s 1850 convention records, there are some hints of how the delegates viewed the new combined Baby Ninth/Baby Tenth. After the initial draft bill of rights came out of its committee, the proposed provision was laid before the full convention. Placed at the end of the bill of rights, it said: “This enumeration of powers shall not be construed to im-

177. No roll call votes are given for these specific actions in the journal of the convention, so we do not know who voted for or against. *Id.* at 50-54.

pair or deny others retained by the people, and all powers not herein delegated, remain with the people.”¹⁷⁸ A delegate then made a motion, which passed without discussion, to replace the first “powers” with “rights,” presumably to make the first clause read more like other Baby Ninths and the Ninth Amendment itself.¹⁷⁹ This amended version is what came to be Ohio’s Baby Ninth and Baby Tenth, still in force today.

The most interesting thing about the initial draft is not that “powers” was, perhaps inadvertently, used instead of “rights” in the first clause. It is the form of the second clause. It reads like Mr. Botts’ failed amendment in California, discussed above.¹⁸⁰ It summarily states that if powers are not delegated through the constitution then they “remain with the people.” This, again, is much stronger than other Baby Tenth, which recognized the people were not delegating enumerated powers but general powers of government.¹⁸¹ Ohio’s first Baby Tenth, in its 1802 constitution, was a bit different. It stated: “To guard against the transgressions of the high powers, which we have delegated, we declare, that all powers, not hereby delegated, remain with the people.”¹⁸² This old version did seem to imply Ohio’s government rested on a principle of enumerated powers. But it was somewhat ambiguous because it at least implied that “high powers,” which is a rather open-ended term, were being delegated.¹⁸³ The drafters of the 1851 version added a Baby Ninth to the front of the old Baby Tenth and then simplified it, deleting the “transgressions” clause. But the resulting text is not ambiguous like the 1802 version. It simply says that if powers aren’t delegated—whatever they are—then they remain with the people.

That this scheme of enumerated powers would turn traditional state government on its head was actually recognized later in the convention.

178. 2 OHIO REPORT, *supra* 160, at 337.

179. *Id.*

180. *See supra* Part III.B.1.

181. *See, e.g., supra* note 63.

182. DUANE CONSTITUTIONS, *supra* note 63, at 283 (OHIO CONST. of 1802, art. VIII, § 28).

183. A reading that this implication of “high powers” meant “general powers” of government—as other Baby Tenth had used the phrase—is almost compelled by a review of the rest of the 1802 constitution. The state government is not actually given many powers, at least not explicitly. Apart from the power to control the internal functions of government, such as electing legislators or running the courts, the power to provide for public education is the only power explicitly provided to the State of Ohio in the text of the constitution. There is no power, however general, that would cover, for example, making killing or stealing a crime, the type of “general power” at the core of the traditional functions of government. The delegates obviously thought it unnecessary to spell out such a power. This flies in the face of the notion that a state government only possesses the powers specifically delegated to it by its constitution.

During a debate about how the constitution should address the state's regulation of liquor, a delegate stated the following, which is worth quoting at length:

The other day, upon another subject, I ventured to express the opinion, that there was an unlimited power exercised by the General Assembly, except in cases where they were so restrained, their power was unlimited.

But, I was then reminded—and forcibly, too—that the closing section of the bill of rights, upon which we have passed, is in these words: “This enumeration of powers¹⁸⁴ shall not be construed to impair or deny others retained by the people, and all powers not herein delegated, remain with the people.”

Sir, I wish that were the practical construction of the instrument we are forming. It is a beautiful theory of the general government, “that all power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and to the people.” Here we have almost the same language applied to the general Assembly: but I hold that they have hitherto been treated as void and meaningless words. But gentlemen say all power not expressly delegated is reserved: and I yield on account of the importance of the principle. It becomes, at once, a fundamental, a seminal principle—a clear touch-stone, by which to bring the action of the Legislature to the test. I am willing to yield, if I am to understand this to be the construction. I apply it in this way. Here is a grant of power.¹⁸⁵

The delegate, Mr. Taylor, then went on to explain that there actually was a grant of power to regulate liquor in the separate provision they were considering.¹⁸⁶ It appears no other delegate challenged him on his construction of what I call Ohio's “Baby Tenth.”

Mr. Taylor's remarks are impressive, because he pointed out the revolutionary nature of Ohio's new Baby Tenth (if taken literally). Other than the control of the internal operations of government, the only powers actually delegated to the State of Ohio in the original 1851 constitution are to promote education (article VI), to support care for “the insane, blind, and deaf and dumb” (article VII, section 1), to provide for jails (article VII, section 2), to repel invasions and suppress insurrections through a militia (article VIII, section 2; article IX), to provide for public works (ar-

184. The delegate was apparently working from a prior draft of the language, before the amendment discussed above.

185. OHIO REPORT, *supra* note 160, at 337.

186. *Id.* at 444.

ticle VIII, section 12), to tax (article XII), and to allow incorporations (article XIII).¹⁸⁷ Although covering a large amount of the actions state governments took in the mid-nineteenth century, this list lacks central functions, such as protecting Ohio citizens from crime and prosecuting criminals. No one, obviously, believed the state lacked these powers, even though they were not delegated to the state in the text of the constitution.

It thus appears that Mr. Taylor's remarks on enumerating powers were not taken too seriously, either by other drafters of the 1851 constitution, or by Ohio's subsequent courts and lawmakers.

3. Maryland

Maryland's Baby Ninth apparently came to be through the concerted effort of one delegate. During the floor debate on the new convention's declaration of rights, Delegate Parke rose to offer a Baby Ninth for inclusion in the constitution. His exchange is worth quoting in full:

The next question was on the amendment of which Mr. PARKE had heretofore given notice, and which he now offered in the words following:

"Article 43. This enumeration of rights shall not be construed to impair or deny others retained by the people."

The amendment having being read.

Mr. PARKE said that it was a mere assertion that there were rights not enumerated in the declaration of rights, and that they were retained by the people. There could not, he thought, be any impropriety in its adoption.

Mr. SCHLEY invited the gentleman, (Mr. Parke) to specify what the non-enumerated rights were.

Mr. PARKE said it was impossible for him to do so. He presumed that they were very numerous—so much so as to render it impossible to include them in the bill of rights. A bill of rights, probably, might not be absolutely necessary, yet it was customary to have such a declaration. We all know that all the rights could not be set forth, and he

187. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 2913-37 (OHIO. CONST. of 1851). Curiously, there is also a provision stating that there shall be a Board of Public Works, and that the Board's powers "shall be such as are now, or may be, prescribed by law." *Id.* at 2927 (OHIO CONST. of 1851, art. VIII, § 13). This, therefore, allows the legislature to give the Board whatever powers it sees fit, allowing quite a workaround of the Baby Tenth's requirement that powers be delegated in the Constitution.

thought it would be best to make a declaration that there were other rights which were not enumerated.

Mr. JENIFER thought that such a declaration would be entirely out of keeping in this place. If, as was conceded, the bill of rights took away no rights, of course every thing which was not taken away, remained.

The PRESIDENT, pro tem., stated the question.

Mr. KILGOUR asked the yeas and nays.

Mr. MERRICK said he hoped the gentleman, (Mr. Parke), would withdraw his amendment. It certainly was unnecessary. It could effect no great good, nor, indeed, could it do any harm.

Mr. PARKE said if it was the wish of the Convention that the amendment should be withdrawn, he, (Mr. Parke) would withdraw it. He did not see that it could make any great difference, whether the amendment was incorporated in the Constitution or not. He had seen it in other Constitutions—he had seen it in the Constitution of California. He was willing, however, to withdraw the amendment.

But, after a moment's reflection,

Mr. PARKE stated that he preferred to adhere to his amendment.

* * *

The question was then again taken on the amendment of Mr. PARKE, and was decided in the affirmative: ayes 30, noes 25.

So the amendment was adopted.¹⁸⁸

This exchange demonstrates both Delegate Parke's reason for proposing the Baby Ninth—to assert that there were more rights retained by the people than just those explicitly granted by the state constitution—and also that in his view—and the objecting delegates' view—the Baby Ninth was not strictly necessary. This was because the people possessed the unenumerated rights the Baby Ninth referred to, as well as the actual enumerated rights, whether or not the Baby Ninth—or indeed the declaration of rights itself—was in the constitution.

This seems to run contrary to the solemn deliberation required in writing a constitution. If rights are protected whether or not they are placed

188. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONSTITUTIONAL CONVENTION 225-26 (Annapolis, Md., William M'Neir 1851).

in the text—either by enumeration or indirectly through a Baby Ninth or another unenumerated rights clause—then why include a declaration of rights at all? The answer might lie in a limited view of what state powers existed in the first place, perhaps parallel to how the Federalists viewed the proposed federal government's powers in 1787. In any case, Mr. Parke's opposition did not win, and the people of Maryland to this day enjoy the protections of a Baby Ninth in their constitution.¹⁸⁹

4. Minnesota

At the Minnesota Republican convention, there were two separate colloquies on whether to include a suggested Baby Ninth and a Baby Tenth (the latter of which was never adopted). Both exchanges are worth examining.

First, in the Committee of the Whole—not in the delegates' capacity as the Convention itself—a delegate, Mr. Billings, moved to add a Baby Tenth. It was virtually identical, with just the difference of a word and some punctuation, to Mississippi's.¹⁹⁰ It did not have any Baby Ninth language in it. He was then challenged, and the debate went as follows:

Mr. MORGAN. It seems to me that such a section would not work very well, as some of our propositions in this Bill of Rights are affirmative and some are negative. It is a very unusual provision, and I must confess I do not see how it can operate.

Mr. PERKINS. I do not see the need of a section of this kind. It does not add any particular sanctity or obligation to the Constitution. That all enactments of the Legislature, in contravention to this Constitution, shall be void, is certainly a principle which cannot be gainsayed, and it need not be affirmed and reaffirmed. The acts of the Legislature which conflict with the Constitution must be void, and it seems to me folly to add a section of that kind.

Mr. WILSON. I certainly am opposed to that amendment, because, as has just been stated, the facts asserted in that section lie at the very foundation of all government. And the idea that the Constitution is above all law is something which needs no affirmation.

189. MARYLAND CONST. Decl. of Rts. § 45.

190. For Mississippi's language see *supra* note 63. Minnesota's proposed Baby Tenth read: "To guard against transgressions of the high powers which we have delegated, we declare everything in this article is excepted out of the general powers of government, and shall forever remain inviolate, and that all laws contrary thereto, or contrary to this Constitution shall be void." REPUBLICAN CONVENTION, *supra* note 155, at 112.

Mr. BILLINGS. My idea of the necessity of this section arose from the fact that we have in this preamble enumerated certain rights as belonging to the people. But there are still remaining with the people a large number of rights which we cannot enumerate, and to guard those unenumerated rights, I proposed that section.

Mr. WILSON. I think the section has just a contrary effect from what the gentleman intends.

The amendment was withdrawn.¹⁹¹

Then, on the next line of the convention's transcript, is the following, shorter exchange:

Mr. ALDRICH. I offer the following as an additional section:

"Sec. - The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people."

Mr. MORGAN. That is almost in the very language of the Constitution of the United States, which is in these words:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The amendment was agreed to.¹⁹²

Remember, the "amendment was agreed to" by the Committee of the Whole. To be adopted by the Convention would take another vote, which is discussed below.

In the above exchange, the pushback against the proposed Baby Tenth seems to have been an "anti-clutter" argument. It announced a completely accepted proposition—that the government has no power to exercise laws that violate the Bill of Rights, and that laws contrary to them and the Constitution generally, are void—which many felt was pointless to include. Further, the conversation between the sponsor, Delegate Billings, and Delegate Wilson indicates that the clause could be read to limit unenumerated rights, and therefore have the "contrary effect" to Billings' stated purpose of protecting unenumerated rights. It therefore seems unsurprising that the very next proposal was a Baby Ninth, to which there was no opposition. The transcript does not say whether the Baby Ninth was offered to answer Delegate Billings' statement about the

191. REPUBLICAN CONVENTION, *supra* note 155, at 112.

192. *Id.*

need to "guard those unenumerated rights," but given the timing it seems to be the case.

The very next day, the proposed bill of rights again came up for discussion, this time before the Convention itself.¹⁹³ This exchange then followed, concerning the very Baby Ninth which the same delegates had just agreed to the day before:

Mr. Secombe. I think the language of that section should be slightly altered. I do not understand that the people are giving up any rights by declaring this Bill of Rights. The word "retain" was the word used in the Constitution of the United States where the States did give up to the general government certain rights, and that word would be proper in case the people were giving up, by this bill, certain of their rights. I move to amend by striking out the word "retain" and insert the word "possessed."

Mr. Morgan. I hope the amendment recommended by the committee will not be concurred in. It seems to me mere surplusage, having no force whatever. The section was taken from the Constitution of the United States, which was adopted under different circumstances from ours. There the people did give up certain rights to the general government. But the section has no application to our case, and it has never been inserted in the Constitution of any State.¹⁹⁴ We retain all the rights we had before, and the Bill of Rights is merely a guarantee to us of those rights.

Mr. Aldrich. It seems to me that the section is all right as it now stands. The object is to give a portion of the people's rights to the officers of the government, and to retain a portion. It strikes me that the word "retain" is a better word than "possess," and we certainly have some rights which we have not delegated to anybody, and which we will not delegate.

Mr. Secombe. I do not understand that in this bill we delegate any of our rights to any person or body. We merely enunciate certain of the principal rights that we possess and we do not wish to have it understood by that enunciation, because we do not happen to mention certain others, that we have not got them.

193. Again, the prior day's debate was technically by the Committee of the Whole, while the second debate was by the Convention itself to adopt the Committee's recommendations. *Id.* at 152.

194. This is of course wildly wrong, as many states had a Baby Ninth of some kind by 1857. This may perhaps discount the usefulness of Delegate Morgan's remarks.

Mr. Aldrich. We do not delegate them in the Bill of Rights, but we do in the Constitution before we get through.

The amendment to the section was not agreed to. [Meaning the substitution of the word "possess."]

Mr. North. I now hope the additional section will not be agreed to. It seems to me to be entirely unnecessary, to be meaningless, and that it can have no real force. In fact it amounts to nothing. In the Bill of Rights we simply set forth certain rights, but we do not propose to take any rights from anybody, and to say that the setting forth any rights we do not impair any rights we retain, is surplusage and can have no effect in any manner. I do not think we should encumber our Bill of Rights with anything which does not have a direct, plain, and tangible meaning.

The amendment was not concurred in [meaning, the Baby Ninth failed].¹⁹⁵

Much could be unpacked from this exchange, but perhaps the most interesting is Delegate North's statement that "we do not propose to take any rights from anybody." From this statement, he seems to be arguing that the Minnesota Constitution does not take away anyone's rights.¹⁹⁶ Instead, the Bill of Rights "simply set[s] forth certain rights," but that does not mean other rights are not retained—that is, protected. Further, he argues that it would be surplusage to say the rights are retained. Again, therefore, as we saw in previous debates, such as in Maryland, some delegates opposed a Baby Ninth *not* because it would be a "fountain" of judicially created rights of a dubious distinction, but because it was *not even needed* to protect unenumerated rights. This is the opposite of Justice Scalia's famous statement that there are rights the Ninth Amendment recognizes, but that judges are powerless to enforce them.¹⁹⁷

C. Jurisprudence

There were very few cases in the antebellum period that discussed Baby Ninths. Overall, they reflect the understanding of the delegates discussed above—including the delegates' differing interpretations of state powers. However, to the limited extent they provide a window into the antebellum understanding of Baby Ninths, they do reflect a consensus that Baby Ninths protected unenumerated individual rights.

195. *Id.* at 154.

196. That, of course, is directly contradictory to the sentiments behind the Baby Tenth, which explicitly state "high powers" are being delegated that could transgress upon rights.

197. *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

By far the deepest treatment of a Baby Ninth in a judicial opinion before the Civil War is Alabama's *In re Dorsey*, decided in 1838.¹⁹⁸ There, an applicant to the Alabama bar challenged a requirement that he swear an oath that he had not previously engaged in a duel, and would not do so in the future, before being licensed. Three different judges rendered opinions, and all three interpreted Alabama's Baby Ninth to protect individual rights.

First, Judge Goldthwaite stated that the enumerated rights in the state's Declaration of Rights are exceptions out of the general powers of state government. However, "as it was impossible, in the nature of things, to provide for every case of exception, a general declaration was added, that the particular enumeration should not be construed to disparage or deny others retained by the people."¹⁹⁹ In other words, the Baby Ninth was an "etcetera clause" protecting rights that "it was impossible" to enumerate in full. And, in keeping with the recognition that the Alabama legislature had general, not enumerated powers, Judge Goldthwaite went on to state that it was not "expressly prohibited" from enacting the oath requirement at issue in the case, but that, because the retroactive portion of the oath violated the state constitution's right to trial by jury, the oath requirement was unconstitutional.²⁰⁰ Thus, Judge Goldthwaite did not invalidate the requirement via the Baby Ninth, but he did state that the Baby Ninth protected rights of individuals (that is, rights like those actually enumerated in the state constitution).

Second, Judge Ormond began with a discussion of well-known natural rights opinions, including Lord Coke's *Doctor Bonham's Case*²⁰¹ and Justice Chase's opinion in *Calder v. Bull*.²⁰² He recognized the important question that these cases raise—whether courts have the power to declare laws invalid on the basis of natural principles of justice alone—but concluded that that question was academic in Alabama "because the people who formed the Constitution of Alabama, have provided by the organic law of the State, for the examination by the judiciary, of all laws having this tendency, whether expressly forbidden by the bill of rights or not."²⁰³ By the last clause he meant the state's Baby Ninth, which he then went on to quote and examine—including the Baby Tenth portion. The

198. 7 Port. 293 (Ala. 1838).

199. *Id.* at 359-60.

200. *Id.* at 360. Justice Goldthwaite also discussed other sections of the state bill of rights, as Calabresi and Vickery discuss. See Calabresi & Vickery, *supra* note 14, at 1412-13.

201. 8 Co. Rep. 107a, 77 Eng. Rep. 638 (1610).

202. *In re Dorsey*, 7 Port. at 375-77.

203. *Id.* at 377.

clause, he argued, protected “any” rights, enumerated or not, and should be given a “large and liberal interpretation.”²⁰⁴ He then went on to examine various other portions of the Alabama Constitution and concluded, without singling out one clause in particular, that the oath requirement was unconstitutional.²⁰⁵

Third, in his dissenting opinion, Chief Judge Collier concluded that the oath requirement was constitutional. In addressing the Baby Ninth claim, the Chief Judge argued that the Baby Tenth language indicated the state government had general powers not needing “express constitutional recognition.”²⁰⁶ It appears he thought this was Mr. Dorsey’s argument—a powers, not rights, argument—and so did not address whether the provision protected Dorsey’s right to practice law. Collier did, however, also state, echoing Madison, that the clause “was doubtless inserted *ex majore cautela* [for greater caution]—lest it should be supposed that an article intended to embody certain fundamental rights of the citizen, should be construed as yielding up others, and throwing them into the general mass of governmental powers”²⁰⁷ Thus, although not in the context of what he thought Dorsey’s actual claim was, Collier did state that he thought the Baby Ninth was intended to protect unenumerated individual rights.

Therefore, all three judges, in addressing Alabama’s Baby Ninth, concluded that it protected unenumerated individual rights. They also believed that the state had general powers, not limited to enumerated powers, but that the rights in the bill of rights—including unenumerated rights—were exempted out of those general powers.

As helpful a case as *Dorsey* is to understanding the judiciary’s views of Baby Ninths in the antebellum era, it unfortunately is by far the most helpful case. A handful of other cases cite Baby Ninths, but they do so along with a number of other constitutional provisions and without any great elaboration on the Baby Ninth’s meaning.

For example, in *Ex parte Martin*,²⁰⁸ the Arkansas Supreme Court considered whether the state’s constitution mandated that just compensation be paid for the temporary flooding of land as part of a levee project.²⁰⁹ Although the court considered the project a proper public use, the problem was that the legislature had not provided for compensation for af-

204. *Id.* at 378.

205. *Id.* at 387.

206. *Id.* at 407.

207. *Id.*

208. 13 Ark. 198 (1853).

209. *Id.* at 205-06.

fected landowners. Further, the state's constitution, unlike the U.S. Constitution and the constitutions of many other states, did not explicitly provide for just compensation for takings.²¹⁰ Thus, in this pre-Fourteenth Amendment case, the issue was whether anything else in the state constitution could provide compensation.

The *Martin* court took together the state's Lockean Natural Rights Guarantee, Law of the Land Clause, and Baby Ninth, to "necessarily impl[y]" a just compensation requirement.²¹¹ The court then reviewed several cases from other jurisdictions, including *Fletcher v. Peck*,²¹² the famous Contracts Clause case, involving natural rights principles.²¹³ Unfortunately for our purposes, there was no further analysis of the Baby Ninth. In putting it together with the other clauses, however, the court clearly did invoke the Baby Ninth to demonstrate that the Arkansas Constitution protects individual rights other than those specifically enumerated in it.

In another case, *Billings v. Hall*,²¹⁴ the California Supreme Court found an adverse possession statute unconstitutional, relying on, among other authorities, the state's Lockean Natural Rights Guarantee.²¹⁵ A concurring justice also invoked the state's Baby Ninth, but only in conjunction with the Lockean Natural Rights Guarantee.²¹⁶ As Calabresi and Vickery have said, this indicates, at least for that justice, that the content of the state's Baby Ninth was linked to the Lockean provision.²¹⁷

And that is about all the case law on Baby Ninths there was for the antebellum period. From this very modest body of opinions we should hesitate to draw too much, but we definitely do see an understanding among these judges that Baby Ninths protected unenumerated individual rights. And, because two cases concerned property rights and one the right to work in an occupation, the case law indicates—again, to the extent it is useful—that Baby Ninths were understood to protect economic liberty.

210. *Id.* at 206.

211. *Id.* at 207.

212. 10 U.S. 87 (1810).

213. *Martin*, 13 Ark. at 207-11 (discussing *Fletcher*, 10 U.S. 87; *Gardiner v. Trs. of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816); *Crenshaw v. Slate River Co.*, 6 Rand 245 (Va. 1828); *Bristol v. New-Chester*, 3 N.H. 524 (1826)).

214. 7 Cal. 1 (1857).

215. *Id.* at 6-7.

216. *Id.* at 16 (Burnett, J., concurring).

217. Calabresi & Vickery, *supra* note 14, at 1418. Another case, *Miller v. State*, considered and rejected a challenge under Ohio's Baby Ninth, as well as other provisions in the state bill of rights, to a liquor law. 3 Ohio. St. 475, 485, 486 (1854). The law was upheld on the grounds that it merely regulated liquor sales and did not ban them. *Id.*

IV. WHY BABY NINTHS ONLY MAKE SENSE IF THEY PROTECT UNENUMERATED INDIVIDUAL RIGHTS

From the foregoing historical survey, we learn that on the eve of the Civil War eleven states had Baby Ninths, and eleven had Baby Tenth (with Alabama, Arkansas, Kansas, and Ohio making both lists), out of thirty-four states overall. Baby Ninths were geographically dispersed and gaining in popularity. Almost all of the Baby Ninths were less than twenty-five years old.

The history of the adoption of Baby Ninths before the Civil War demonstrates that they were intended to protect individual rights. Of the various models discussed in Part I.B, above, on how the Ninth Amendment itself should be interpreted, the only one that makes sense is the individual rights model. This is borne out by floor debates and jurisprudence, Baby Ninths' frequent juxtaposition with the Baby Tenth, and by the logic of including them in state constitutions.

A. What the Floor Debates and Case Law Tell Us

From the few transcripts of debates we learn two positions, both of which viewed the rights Baby Ninths refer to as individual rights. The minority view (at least in those states that adopted Baby Ninths) is that some delegates thought Baby Ninths were not needed because unenumerated rights *were already protected*. It appears these delegates thought there was a general understanding that state governments could not violate rights, whether or not they were specifically included in a constitution. The understanding seems to have been that governments did have certain powers, but those powers only extended to regulation that would not infringe the people's liberties. Bills of rights were accepted by those who objected to Baby Ninths, but they thought Baby Ninths were not, strictly speaking, necessary, because all rights—enumerated and unenumerated—were not within the government's power to violate.

The majority view (which we must call majority in light of the overwhelming number of conventions that adopted Baby Ninths after they were proposed²¹⁸) was that perhaps Baby Ninths were arguably unnecessary, but that they were adopted for greater caution.²¹⁹ The delegates

218. The Author has searched transcripts and journals of state constitutional conventions where no Baby Ninth was adopted and has not found any references to "failed" Baby Ninths, other than the Republican Convention in Minnesota (where the state eventually adopted a Baby Ninth anyway).

219. I am here channeling Madison's draft of what then became the Ninth Amendment: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the

wanted to make sure that their constitutions protected rights beyond those enumerated in their various bills of rights. So, they added in these "*et cetera*" provisions forbidding any inference that a right is not protected just because it is not enumerated.

But what is clear is *everybody* agreed that there were other rights that were protected vis-à-vis the state in addition to those in a state bill of rights. The controversy was whether they needed to be recognized with a Baby Ninth, or whether they were implicitly recognized even without one. And given that the context of the discussions concerned liberties not listed in the bills of rights but that could have been, the kinds of rights that were plainly at issue were individual rights. The only piece of evidence that could be interpreted the other way is in California with Delegate Semple's statement regarding the people's "legislative capacity."²²⁰ But that quite-confusing exchange seems to have concerned the proposed Baby Tenth, not Baby Ninth. And the fact that Mr. Semple later said he concurred on the Baby Ninth is further evidence that Mr. Semple did not think a Baby Ninth provided for a collective right to pass legislation.

As for the case law, as explained above, the limited amount available unanimously indicated that Baby Ninths protected individual rights.²²¹

B. What Baby Tenths Mean for Baby Ninths

Unlike the relative agreement among delegates on Baby Ninths, delegates' views on Baby Tenths were more opposed to each other. Basically, one side held that state powers were, as Madison said, "numerous and indefinite,"²²² while the other believed that just like the federal government, states only had powers delegated to them in their constitutions. And, although the latter approach does seem to be quite a minority view, some state Baby Tenths, such as Ohio's, seem to have explicitly said just that. Other Baby Tenths—a large majority—instead recognized the "general powers" that the people delegate to states, although at the same time implying that state governments did not *have* to be constituted that way. The people delegated "general powers" but perhaps could have delegated enumerated powers. Because they did not, and because delegating gen-

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." James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS 437, 443 (Jack N. Rakove ed., 1999).

220. See *supra* note 170 and accompanying text.

221. See *supra* Part III.C.

222. THE FEDERALIST NO. 45, *supra* note 29, at 292 (James Madison).

eral powers instead was a dangerous thing to do, the Baby Tenth's excepted bills of rights out of those general powers.²²³ The Baby Tenth's impact our understanding of Baby Ninth's in a couple of ways.

First, where the two were used together—as in Alabama, Arkansas, Kansas, and Ohio—the Baby Ninth appears to be protecting unenumerated rights alongside the exclusion of the bill of rights from the powers of the state government. If the Baby Ninth language in those constitutions did not protect unenumerated individual rights, it would be very odd, as the explicit protection of individual enumerated rights would stand alongside something referring to “rights” but not protecting individual rights. Instead, the straightforward interpretation is that these joint Baby Ninth's/Baby Tenth's protect both enumerated and unenumerated individual rights.²²⁴ They provided a belt *and* a pair of suspenders, by protecting unenumerated rights in addition to the enumerated rights, *and* by excepting all of these rights out of the powers of government in the first place.

Second, if joint Baby Ninth/Baby Tenth provisions protect individual rights, it makes sense that similar Baby Ninth clauses in other states that lack a Baby Tenth would also protect unenumerated individual rights. Those provisions just would not have anything to say about withholding power from government to transgress against rights, enumerated or not. That pair of suspenders simply is not present. But the belt in the Baby Ninth is.

One final thing should be said about Baby Tenth's. As we saw above, some legislative bodies—such as Minnesota's Republican Convention—rejected Baby Tenth's because they seem to say something entirely duplicative. Everybody knows that the government does not have the power to violate the constitution, so why bother saying so? However, another possibility exists. Although that is a generally accepted truism of American law, by enacting Baby Tenth's, it could be that constitution drafters were expanding the effect of bills of rights provisions, enumerated or unenumerated. Thus, it could be that without a Baby Tenth a judge or legislator might err on the side of thinking a questionable law was constitutional. However, with a Baby Tenth, a thumb is placed on the scale in

223. There is also one other view, propounded in the failed attempt to adopt a Baby Tenth in Minnesota, that the Baby Tenth itself protected unenumerated rights. *See supra* notes 191-92 and accompanying text. This seems to have been rejected because the delegates believed the Baby Tenth did not in fact do this and was immediately followed by a more successful attempt to adopt a Baby Ninth instead.

224. As Randy Barnett has said, it is not necessarily contradictory to believe the Ninth Amendment protects *both* individual rights and some other kinds of rights, such as collective rights. Barnett, *The Ninth Amendment*, *supra* note 43, at 3. As I discuss below, however, the same cannot be said for Baby Ninth's. *See infra* Part IV.C.

favor of protecting rights—as the constitution’s text recognizes the dangerous nature of the powers the people have delegated to the state—and the provision is asking judges and legislators to err on the side of finding or considering the law unconstitutional if it impacts provisions in the bill of rights. This would in turn include unenumerated rights if the bill contains a Baby Ninth, or another unenumerated rights clause, such as a Lockean Natural Rights Guarantee.

C. Applying Ninth Amendment Interpretations to Baby Ninths: Why Have a Baby Ninth in the First Place?

More fundamentally, in understanding what Baby Ninths mean we should ask why include Ninth Amendment language in a state constitution in the first place? To answer that, let’s apply the various originalist models discussed earlier regarding the Ninth Amendment itself to Baby Ninths and see how they fit. Instead of starting with the individual rights model, as we did in Part I, we will end with it, as part of its justification depends on contrasting it with the others. Again, these models are the state law rights model, the residual rights model, the collective rights model, and the federalism model.²²⁵

First, the state law rights model makes no sense in a state constitution. Even assuming that the Ninth Amendment protected state constitutional and common law rights, state constitutions themselves do not, of course, need a clause protecting their own rights, or state common law rights.

Second, the residual rights model also does not work for interpreting Baby Ninths. Under this model, the Ninth Amendment is meant to nullify the argument that the federal government has powers in addition to those the Constitution enumerates in light of the fact that some—but not all—rights are enumerated. For states, if the government is understood to already have these feared unenumerated powers (“general powers”), then it makes no sense that the framers of a state constitution would add a Baby Ninth so that the government would not have them.

Third, the collective rights model also fails. Again, “collective rights” here means the right of the people as a body politic to govern itself, including its right to abolish its government. This includes the people’s collective right to set policy, and the right to hold a constitutional convention to amend or replace its constitution.

It should be obvious why it does not make sense for a Baby Ninth Amendment to protect collective rights. One reason Baby Ninths are incompatible with collective rights is that any “collective right” of the

225. See *supra* Part I.B.

state's body politic to choose its own policies is already furthered through the constitution itself. By setting up a legislature, a governor, etc., the people of the state are giving themselves general powers to adopt laws. And, through whatever amendment or convention mechanism is in the document, the people are allowing for future alteration or abandonment of the constitution. "Protecting" the power to enact laws by essentially saying (as a "collective Baby Ninth" would) that the bill of rights does not impair or deny the power to enact laws would truly be an absurd use of constitutional text. It would be even more absurd in a state like Alabama that had a Baby Tenth excepting, among other rights, the rights in the Baby Ninth itself out of the general power of government.

Another reason the collective rights model does not make any sense for Baby Ninths is there is no relevant "collective" to protect other than the state as a whole. The collective right view of the Ninth Amendment itself depends on the states retaining sovereignty that many were afraid the new federal government would threaten. However, below the level of a state itself there can be no collective rights to protect. If Baby Ninths, for example, protected the right of cities to adopt their own polices, that would mean that a bill of rights applied to the state government, but that it does not apply (at least as much) to municipal governments because their collective right to enact policies cannot be impaired or denied just because there are explicit protections of individuals in the bill of rights. Again, this truly would be bizarre.

Unfortunately, this has not prevented a handful of courts ruling exactly that, finding that Baby Ninths protect local governments and even state governments from judicial review of their actions.²²⁶ These opinions all come after 1860, and therefore are not part of this Article, but for the reasons provided here none should have force in interpreting Baby Ninths, either as an originalist matter, or even under any other method of interpretation. The only thing that can be said for these cases is that the courts did not think through the logic of their opinions.

Fourth, the federalism model also does not make sense for an obvious reason. Again, under this model, the Ninth Amendment is meant to nullify the argument that the federal government's enumerated powers should be read expansively where they do not intrude upon rights enumerated in the Constitution. However, unlike the federal government, states (generally) do not have enumerated powers. Now, we have seen that this was not a completely unanimous view in antebellum America. For those few who believed that states could only legislate according to powers enumerated in their state constitutions, then the force—such as

226. See, e.g., *Thomas v. Reid*, 285 P. 92, 97 (Okla. 1930) (Baby Ninth Amendment protects the right of local self-government by majority rule).

it is—of the enumerated powers model could apply to Baby Ninths. But for the overwhelming majority of constitution drafters, judges, and legal scholars who believed their states had broad powers to legislate beyond the exact powers in their state constitution, then an enumerated powers model of a Baby Ninth does not make any sense.

Thus, the above four models for interpreting the Ninth Amendment according to its original meaning do not fit Baby Ninths. What we are left with is the individual rights model. Of course, it might not fit either, in which case we would be left with nonsensical constitutional provisions in eleven states in 1861 and thirty-three states today. Thankfully, however, it does fit. Under this view, the “other rights” referred to in Baby Ninths are individual rights that the state cannot impair or deny simply because they are not contained in the state constitution’s bill of rights. And, as long as one takes the (virtually universal) position that the state cannot impair or deny enumerated rights, this means that states also cannot impair or deny unenumerated rights either—otherwise the government could impair or deny one but not the other, precisely what Baby Ninths say cannot be done.

What those individual rights are is a question I leave for another piece. However, given that this Article has surveyed virtually every (known) authority on Baby Ninths from before the Civil War, I will offer a passing reflection.

It certainly makes sense that the rights referred to in Baby Ninths, at least in the antebellum period, would be similar to those that preceded them in the same bill of rights for their respective states. If Baby Ninths are “*et cetera*” clauses, it would be odd if the “*et cetera*” were an entirely different *kind* of individual right than those inserted above them. For example, it would be odd if Baby Ninths guaranteed a positive right to a certain level of income if the preceding rights were entirely negative rights protecting individuals from state action.²²⁷ It would also be odd if they were rights against private actors, as state bills of rights, like the federal Bill of Rights, generally only contained protections against state action.

This then means that rights that are akin to, but not identical with, the other rights in a specific bill of rights, would be protected. Many of the bills of rights containing Baby Ninths in 1860 protected the freedom

227. This was generally true, as a scan of the various bills of rights containing Baby Ninths from the antebellum period would demonstrate. See, e.g., 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 97-98 (ALA. CONST. of 1819, Decl. of Rts.); ME. CONST. art. I. One potential exception concerning positive rights is a right to education that some state constitutions at the time contained, although these generally were not placed in a constitution’s bill of rights. See, e.g., 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 63, at 402 (CAL. CONST. of 1849, art. IX).

of the press and freedom to exercise one's religion. Rights akin to those perhaps would be freedom of association or freedom to reject religion entirely. Also, many bills of rights contained contracts clauses and takings clauses. Therefore, other kinds of economic liberties, such as a freedom to work in the occupation of one's calling, would be protected.²²⁸

This is in keeping with the limited constitutional convention discussions, and with the limited case law. Delegates spoke of not wanting to leave unprotected rights that they simply have not had time or space to cover.²²⁹ Again, the three relevant cases all concerned economic liberties of one kind or another.

An interesting issue arises when we look at bills of rights that have a Lockean Natural Rights Guarantee *and* a Baby Ninth. For example, the Iowa Constitution contained both. What does this mean? I think, if it means anything, it means that the Lockean Natural Rights Guarantee protects rights, including certain unenumerated individual rights, and that the Baby Ninth protects additional unenumerated individual rights if the first clause is interpreted to leave out some individual rights. It could be that the Lockean Guarantee is interpreted so expansively that the Baby Ninth is "not needed." In that case, it would have been adopted "for greater caution."

Whatever the other rights are that the various Baby Ninths protect, it is clear that as an originalist matter, there are many of them, and that *at least* some of them are individual rights. As the transcripts demonstrate, delegates legitimately wanted to protect more rights than they could devote their constitutional texts toward. This seemed like a logical way to do it. For courts to protect unenumerated rights was by no means unusual for the time period,²³⁰ and so inserting Ninth Amendment language into a constitution seemed like a perfectly sensible way to do so. And, it seems perfectly sensible today.

D. Addressing a Few Objections

A handful of scholars have examined the meaning of Baby Ninths before, particularly the original meaning of those adopted in the nineteenth

228. I leave open the possibility of properly interpreting a Baby Ninth to not protect against any specific rights but provide a "presumption of liberty" against all government action that implicates individual freedom. This is the argument Professor Randy Barnett has argued for in interpreting the Ninth Amendment itself. See BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 3.

229. See *supra* Part III.B.

230. See generally Calabresi & Vickery, *supra* note 14. See also Suzanna Sherry, *Forward: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935, 937-38 (1994) (discussing many instances of state courts invalidating laws through simple invocations of natural law, without referring to constitutional text at all).

century. As I do here, most have concluded that Baby Ninths were intended to protect unenumerated individual rights.²³¹ In particular, Professor Yoo has made a close examination of the text of the Baby Ninths prior to the Civil War, concluding that it does not make any sense for Baby Ninths to be read in any way other than protecting unenumerated individual rights.²³²

One exception, however, is Professor Thomas McAfee.²³³ He argues that the original meaning of state Ninth Amendment analogues was not to protect individual rights, nor to make them judicially enforceable.²³⁴ He makes two interconnected arguments for these propositions. They do not, however, stand up to scrutiny.

First, McAfee argues that drafters of Baby Ninths often did not think very critically about their meaning. When constitutional drafters work up new constitutions, he writes, "there has been a historical tendency to borrow, sometimes rather uncritically, provisions from earlier constitutions."²³⁵ This meant that provisions, including Baby Ninths, were placed in constitutions where, had the drafters actually thought critically about them, those drafters would have realized they did not make a lot of sense, or at least that they should not be judicially enforceable. Second, McAfee argues that early state constitutional declarations of rights, at least before the federal Bill of Rights, were not meant to be positive law but mere declarations of principles that courts were not meant to enforce.²³⁶

This understanding of judicial review is contested,²³⁷ but even assuming it is true, McAfee, of course, admits it later changed in the early years of the Republic.²³⁸ However, he claims that as judicial review developed "judges in the various states confronted difficult decisions about

231. See Amar, *supra* note 20, at 280-81; Ely, *supra* note 20, at 203 n.87; Yoo, *supra* note 12, at 1008-22.

232. Yoo, *supra* note 12, at 1008-22.

233. Another is Louis Bonham, who argues that, unless otherwise dictated by precedent, Baby Ninths should be interpreted along the lines of the federalism model discussed above. See Bonham, *supra* note 20, at 1333 ("Thus, the clauses can be considered to convert governments of plenary power to governments of delegated power."). I have argued above why this interpretation does not work. See *supra* Part IV.C. Bonham and I agree, however, that a collective rights interpretation of Baby Ninths does not make any sense. Bonham, *supra* note 20, at 1333-34.

234. McAfee, *supra* note 20, at 775-83.

235. *Id.* at 777.

236. *Id.* ("[E]arly state constitutions, from which a certain amount of this borrowing was done, were not drafted to create enforceable limits on government power").

237. See, e.g., Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933-34 (2003) (judicial review accepted in state courts before the U.S. Constitution).

238. McAfee, *supra* note 20, at 778.

how to treat constitutional provisions that were not designed for legal enforcement.”²³⁹ He includes Baby Ninths and Lockean Natural Rights Guarantees as examples of these provisions.²⁴⁰ And when confronted with them, judges, claims McAfee, chose not to enforce their language because otherwise it would have given judges too much power and undermined popular sovereignty. The alternative would be “a decision to be ruled by judges.”²⁴¹ He goes as far as to say that “[i]t is difficult to imagine [Baby Ninths] being treated in another way,” that is, difficult to imagine Baby Ninths being judicially enforceable, “given our constitutional order’s theory of popular sovereignty.”²⁴²

This argument proves too much and is factually inaccurate on a couple of its premises. If early state declarations of rights were not meant to be judicially enforceable, then that would be true for all of a state’s bill of rights, not just its Baby Ninth or Lockean Natural Rights Guarantee. But state constitutional guarantees *were* enforceable in court from a very early period, well before Alabama and Maine adopted the first Baby Ninths in 1819, including even some cases from before the federal Bill of Rights itself.²⁴³ Lockean Natural Rights Guarantees themselves were even enforced in court during this period.²⁴⁴ And, it certainly is true that later courts enforced both types of unenumerated rights clauses against the government.²⁴⁵

Further, regarding the lack of critical appraisal of Baby Ninths that were incorporated into later constitutions, this practice must be contrasted with other “uncritically adopted” constitutional language, such as protections on freedom of religion, of the press, against unreasonable

239. *Id.*

240. *Id.* at 779.

241. *Id.* at 782.

242. *Id.* at 779-80.

243. “In as many as eight cases across seven states, state courts deemed a state statute to violate a fundamental charter (or other species of higher law)” in the decade before 1787. Prakash & Yoo, *supra* note 237, at 933, 933 n169.

244. See Calabresi & Vickery, *supra* note 14, at 1331 (discussing 1783 Massachusetts case relying upon the state’s Lockean Natural Rights Guarantee in concluding slavery was outlawed in the state).

245. See Bonham, *supra* note 20, at 1328-31 (providing many examples of state courts enforcing unenumerated rights via a Baby Ninth); Calabresi & Vickery, *supra* note 14 (providing many examples of state courts enforcing Lockean Natural Rights Guarantees before the adoption of the Fourteenth Amendment). State courts have not universally applied Baby Ninths to protect unenumerated individual rights, but they certainly have not universally abstained from doing so.

searches, etc.²⁴⁶ Because these provisions may be similar, or even identical, to earlier state constitutions does not mean they must be interpreted in the same way, even from an originalist perspective. By that logic, the “law of the land” clauses found in many constitutions²⁴⁷ should be interpreted the same way as their lineal ancestor was when it was crafted in 1215, the Latin phrase *legem terrae* in Magna Carta.²⁴⁸ No originalist would argue this, and rightly so, given the differences in culture, history, etc., between thirteenth-century England and the eighteenth and nineteenth-century United States. Thus, denigrating Baby Ninths simply because they were supposedly not sufficiently analyzed by drafters also denigrates whole swaths of state constitutions and whole time periods. And, at least in a few states we know that Baby Ninths *were* carefully examined by convention drafters, something we do not know to be true for other parts of those same constitutions.²⁴⁹

Thus, McAfee’s fundamental argument against the judicial enforceability of Baby Ninths—and Lockean Natural Rights Guarantees—is not that their original intent or meaning does not allow for the judicial enforcement of unenumerated rights, but that it simply gives judges too much power, and that that is wrong as a normative matter.²⁵⁰ Indeed, he as much admits this when he claims, “I confess that the state constitutional equivalents of the Ninth Amendment might well have gotten my nomination for treatment in the already-classic *Constitutional Stupidities, Constitutional Tragedies*.”²⁵¹

This may be a position that a modern scholar who worries about “judicial activism” might take, but that does not mean that the framers of the thirty-three state constitutions with Baby Ninths never considered this possibility and decided to give judges that power anyway. Indeed, as we saw above, some framers of state constitutions did not think Baby Ninths

246. For example, see California’s example of adopting language from the Iowa and New York constitutions. See *supra* note 161 and accompanying text.

247. See, e.g., VA. CONST. art. I, § 8.

248. See generally HOWARD, *supra* note 23.

249. See *supra* Part III.B. Indeed, the evidence demonstrates that nineteenth-century constitution drafters had much broader access to prior constitutional materials than is commonly believed, and “were aware of and routinely debated the merits of a wide spectrum of constitutional possibilities.” Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 221 (2000).

250. See also Bonham, *supra* note 20, at 1333-37 (arguing against broad judicial enforcement of unenumerated rights through Baby Ninths because of fear of activist judges).

251. McAfee, *supra* note 20, at 777 n.115 (citing CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998)).

were necessary because unenumerated rights were protected *even without them*.²⁵² Further, McAfee's objection that constitutional drafters could not have meant Baby Ninths to make unenumerated rights judicially enforceable because it would undermine popular sovereignty does not take into account the Baby Tenth. These provisions demonstrate that framers of state constitutions carefully withheld power from state governments when it came to the power to violate rights, including unenumerated rights, as in the case of Alabama's combined Baby Ninth/Baby Tenth. In short, drafters of Baby Ninths knew what they were doing, and they wanted judicial protection of unenumerated rights even if later people might think that choice to be unwise.

V. CONCLUSION

Whatever the original meaning of the Ninth Amendment may be, the original meaning of Baby Ninth Amendments, at least those adopted before the Civil War, is that they protect unenumerated individual rights and are judicially enforceable. Baby Ninths only make sense if they are interpreted in this way. Further, their siblings, the Baby Tenth, demonstrate that state constitutions were drafted with the general powers of state government in mind, but that both Baby Tenth and Baby Ninth were innovations made to limit the scope of those powers. Baby Ninths survive in the constitutions of thirty-three states today. At least for those in existence before the Civil War, if interpreted in line with their original meaning, they would serve us in protecting many more of our individual rights beyond just those enumerated in state constitutions. Indeed, not interpreting them in this way in itself violates their plain text, their purpose, and their revolutionary spirit.

We may have a controversy in determining how we can protect our unenumerated rights against the federal government, but in protecting ourselves from state and local governments, most Americans have a clear answer lying in their own state constitutions.

252. See *supra* Part III.B.

