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# The Ninth Amendment in Congress

Brian C. Kalt

*Michigan State University College of Law, kalt@law.msu.edu*

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# The Ninth Amendment in Congress

Brian C. Kalt\*

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## I. INTRODUCTION

The Ninth Amendment to the United States Constitution declares that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Despite decades of scholarship about judicial enforcement of these other rights, courts have disregarded the amendment with impressive consistency. Another stream of scholarship has promoted constitutional interpretation outside the courts. These ideas have had some real-world support, most

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\* Professor of Law and Harold Norris Faculty Scholar, Michigan State University College of Law. Special thanks to Reb Brownell, Rick Garnett, Michael Gerhardt, Mark Graber, Mae Kuykendall, Kurt Lash, Lumen Mulligan, Christopher Schmidt, Glen Staszewski, Maxwell Stearns, Mark Tushnet, Jen Verleger, Robin West, and the participants at workshops at the University of Maryland Carey School of Law and the Michigan State University College of Law, for their suggestions.

recently from the Tea Party,<sup>1</sup> but they have also been met with bafflement.<sup>2</sup>

In this article, I explore the intersection of these two undervalued lines of inquiry, and I find more there than just doubled disappointment. I contend that the Ninth Amendment has a lot to say to Congress, and that Congress in turn is well-suited to vindicate the Ninth Amendment's "other" rights.

Currently, if (as the "interpretation outside the courts" movement would have it) members of Congress consider the Constitution before passing a law, it is to make sure that something in the Constitution empowers them to pass the law, or that nothing in the Constitution forbids it.<sup>3</sup> But the Ninth Amendment tells them that they should be asking more.

The first eight amendments are a list of rights that Congress must respect, and the Ninth Amendment adds an "et cetera" to the end of that list.<sup>4</sup> The Ninth Amendment directs Congress not to use the Bill of Rights as a checklist, going through the rights specifically enumerated in the Constitution ("First Amendment? No problem. Second Amendment? No problem. . . .") and concluding once the list has been cleared that a proposed law is okay. Instead, Congress must consider other, unlisted rights too. Put another way, the Ninth Amendment tells us that Congress is wrong when it acts as though it is permitted to do everything that is not *specifically* forbidden.<sup>5</sup>

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1. See generally Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011) (discussing Tea Party's use of popular constitutionalism).

2. Consider this example of bafflement:

At a press conference held by House Speaker Nancy Pelosi, a reporter . . . asked the Speaker where in the Constitution she found the basis for the individual mandate provision of the health care bill. . . . "Are you serious? Are you serious?" she asked. When the reporter responded in the affirmative, [she] shook her head and moved on to another questioner.

Schmidt, *supra* note 1, at 233–34 (noting Pelosi's comment as an inspiration to the Tea Party initiative); see also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) (noting that despite seeming self-evident, "many legislators" reject the idea that members of Congress should consider the constitutionality of legislation before voting). Opposition to the Tea Party's initiative is partly just partisan, but this is somewhat ironic given that the leading scholars in the "interpretation outside the courts" movement are mostly quite far from conservative themselves. See Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons From the Tea Party*, 88 DENV. U. L. REV. 523, 545 (2011) (characterizing political leanings of popular constitutionalists in the academy).

3. Because courts generally ask those same two questions, members of Congress often ignore the Constitution and focus instead on policy. See *infra* note 33 and accompanying text.

4. DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 4 (2007) (describing the Ninth Amendment as adding "a crucial 'etc.' to the Bill [of Rights]").

5. This renders the Ninth Amendment somewhat redundant with the Tenth Amendment. Commentators differ on what that redundancy means for this interpretation of the Ninth Amendment. See Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239,

Of course, saying that Congress should consider other rights tells us nothing about what the other rights are. Rather, it suggests a process for finding and vindicating these other rights in Congress. This process can potentially clarify our concept of what “rights” are, and can enrich political debates accordingly. It can also explain, in a new way, things that Congress has been doing all along.

The central point, though, is simply this: There are important rights that are not in the Constitution, and the Ninth Amendment tells us to respect them. That “us” includes Congress. Congress should act to vindicate these valuable rights.

Part II of this article briefly discusses current thinking about the Ninth Amendment and about constitutional interpretation outside the courts. The current literature has focused on the Ninth Amendment in the courts, and on the rest of the Constitution in Congress. Others have thus danced around the subject of this article, and have occasionally touched upon it, but this article is the first to give full consideration to the Ninth Amendment in Congress.

Part III explores some of the possibilities that the Ninth Amendment opens up for Congress. The simplest is the expansion of traditional negative rights. However, it can also promote other forms of rights, including so-called positive rights. Indeed, Congress already creates such rights; the Ninth Amendment can make that process more conscious, in ways that better serve the rights in question.

Part IV answers three likely criticisms of Part III. The first and most important criticism is that these “rights” are really no more than politically popular ideas. Another is that Congress is not capable of performing this deliberative task. A third is that this theory offers inadequate protection for these rights.

## II. CONTEXT

In a 2000 book review, I wrote the following in a footnote to a discussion of the Ninth Amendment: “I am in the process of writing an account of the Ninth Amendment that emphasizes . . . political means of defining and enforcing rights, and promotes their revitalization today.”<sup>6</sup>

There was a lot of good scholarship about the Ninth Amendment and

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245–51 (1988) (discussing support for and criticism of this interpretation).

6. Brian C. Kalt, *The People’s Forest and Levy’s Trees: Popular Sovereignty and the Origins of the Bill of Rights*, 17 CONST. COMMENT. 119, 133 n.22 (2000) (book review). At that time, I was skeptical of courts interpreting the Ninth Amendment. In this article, I take no position on the question.

about constitutional interpretation outside the courts at that time, and much more has emerged since then. Insights from that scholarship will pepper Parts II and III and their footnotes. The focus in this part is on why, despite all of this scholarship, there is still plenty of room for an article considering the Ninth Amendment in Congress.

#### A. *The Ninth Amendment*

The literature on the Ninth Amendment and unenumerated rights, both from before 2000<sup>7</sup> and since then,<sup>8</sup> has focused primarily on whether and how courts should use the Ninth Amendment. The answers diverge. Some work promotes the use of the Ninth Amendment in court; other work decries the possibility. Scholars answer variously that the Ninth Amendment’s “other” rights are those derived from natural law or from federalism (that is, the amendment limits the federal government’s power to violate state-established rights).<sup>9</sup>

This article is different. It takes no position on what courts can or should do with the Ninth Amendment, and so it sidesteps almost all of the extant literature. Instead, this article focuses only on what *Congress* can do with the Ninth Amendment. As for the content of unenumerated rights in Congress, the whole point is that this is a matter for Congress to determine.

#### B. *Interpretation Outside the Courts*

The literature on interpretation outside the courts is more extensive than the literature on the Ninth Amendment. It represents a reaction to the

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7. See, e.g., MARSHALL DEROSA, *THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE* (1996); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* (1995); 1 *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989) (collecting scholarship by numerous authors); 2 *id.* (Randy E. Barnett ed., 1993) (same).

8. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) [hereinafter BARNETT, *LOST CONSTITUTION*]; FARBER, *supra* note 4; KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009); Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1 (2006) [hereinafter Barnett, *Unenumerated Rights*]; Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357 (2006); Ken I. Kersch, *Everything Is Enumerated: The Developmental Past and Future of an Interpretive Problem*, 8 U. PA. J. CONST. L. 957 (2006); Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121 (2006); Louis Michael Seidman, *Our Unsettled Ninth Amendment: An Essay on Unenumerated Rights and the Impossibility of Textualism*, 98 CAL L. REV. 2129 (2010); Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011). Williams includes a particularly useful summary of the history of the Ninth Amendment in court and in the academy. See *id.* at 504–08.

9. Among the numerous explanations of these two different approaches, a particularly helpful one is that in MASSEY, *supra* note 7, which finds both to be justified by original intent.

twentieth century trend toward judicial supremacy, and it reasserts the role of other participants in the enterprise of constitutional interpretation.<sup>10</sup>

Some of this scholarship focuses on constitutional interpretation by the public,<sup>11</sup> some focuses on interpretation by Congress or the President,<sup>12</sup> and some considers all of this.<sup>13</sup> Together, this work reinforces a notion that is very important here: that the American political system is capable of conducting high-minded discussions of abstract principles and higher law, not just down-and-dirty fights about policy and power.

For the most part, though, this literature does not engage the Ninth Amendment. These scholars focus on constitutional interpretation, after all, and by definition unenumerated rights are not listed in the Constitution. To be sure, the Ninth Amendment itself is part of the Constitution, but this article is not about interpreting the Ninth Amendment as such; it is about respecting and applying the Ninth Amendment in Congress.<sup>14</sup>

10. See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657–58 (2000) (describing academic consensus that non-judicial branches have a power/duty to interpret the Constitution, notwithstanding courts' notions of judicial supremacy).

11. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897 (2005).

12. See, e.g., CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds., 2005) [hereinafter DEVINS & WHITTINGTON] (collecting scholarship by numerous authors); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997) [hereinafter CURRIE, FEDERALIST PERIOD]; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861* (2005); NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* (1996); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* (1996); DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION* (1966); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (2004); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986); Brest, *supra* note 2; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983); Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted?*, 86 WASH. U. L. REV. 313 (2008); Schmidt, *supra* note 1; Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

13. See, e.g., JOHN J. DINAN, *KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* (1998); MOORE *supra* note 11; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

14. Some scholars have focused on the American constitution with a lowercase "c": the

### C. At the Intersection

Not much has been written in depth at the intersection of these two lines of inquiry. The most common items are passing references in which Congress is used as a foil for the courts. Those who want courts to enforce Ninth Amendment rights sometimes offer Congress as a bogeyman, essentially saying, “Some people reject the idea of judges protecting unenumerated rights. They would place these important rights at the mercy of those craven chuckleheads in Congress.”<sup>15</sup> On the other side, those who reject a judicial Ninth Amendment role agree that they would leave unenumerated rights at the mercy of Congress, and they are untroubled by that result, but they are not moved to actually promote it.<sup>16</sup> Both sides seem to concede that Congress *can* do something with unenumerated rights along the lines of what this article suggests—presumably something very different from what courts can do with them—but neither side really considers the details of *what* Congress can do with them.<sup>17</sup>

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structures and principles that govern how the nation is run. Not all of that constitution appears in the Constitution with a capital “C”: the 1787 document and its amendments. This scholarship is thus distinct from the larger body of work on constitutional interpretation as such, but it will be important here. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* 26 (2010) (noting lack of attention paid to small-c constitutional tasks being completed outside courts); see also Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 418 (2007).

15. Among many others, see FARBER, *supra* note 4, at 4–5 (decrying conservatives who “contend that these unenumerated rights lack any legal weight and were *merely* entrusted to the political process”) (emphasis added); see also BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 255 (arguing that without judicial enforcement of unenumerated rights, Congress and the President could “violate [them] with impunity”); Sager, *supra* note 5, at 251–52 (discussing and rejecting “judicial unenforceability thesis,” but in a way that is less critical of Congress). Perhaps the most surprising example of such glancing blows appears in MASSEY, *supra* note 7. Massey offers a deep, nuanced, historical-philosophical investigation of the proper judicial interpretation of the Ninth Amendment. See *id.* at 190–93. He even discusses the ways that Congress can interact with the courts when the courts weigh in on the amendment. See *id.* at 203–06. As to Congress’s independent consideration of the amendment, though, he offers nothing much beyond what the others mentioned in this footnote do, even after hinting that there is some “there” there. For instance, he notes that members of Congress “are required to determine the scope of [Ninth Amendment] rights and to act to preserve and obey them,” and he concedes that “it cannot be assumed” that “unenumerated rights will wither and die” in Congress. *Id.* at 14. He nevertheless continues much as though he is making precisely that assumption. See, e.g., *id.* at 203–06. Massey also provides a wonderful account of James Madison’s invocation of the Ninth Amendment in a congressional debate over the Bank of the United States, but without taking this as a cue to engage the larger issue of the amendment’s use in Congress. See *id.* at 81–82.

16. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91–92 (Scalia, J., dissenting) (finding Ninth Amendment right to control the upbringing of one’s children, but limiting enforcement of this to arguments in “legislative chambers or in electoral campaigns”); cf. Raoul Berger, *The Ninth Amendment: The Beckoning Mirage*, 42 *RUTGERS L. REV.* 951, 962 (1990) (“I would not deny effect to the unenumerated rights of the ninth amendment, but only insist that it is for the people [as distinct from Congress], not the judiciary, to clothe them with actuality.”).

17. For explanations about why this may be, see MOORE, *supra* note 11, at 4 (“Excessive preoccupation with the roles of judges within the constitutional system has distorted analysis of actions taken and options available to other governmental officials and to citizens.”); Robin West,

Some scholars have done more to promote Congress's independent consideration of the Ninth Amendment, but they have done so mainly in passing. As an example, Andrzej Rapaczynski has written that Ninth Amendment rights might include "more amorphous traditions," such that "[s]ome of them, even though quite important, could have been conceived as less than unchangeable—perhaps the people themselves, acting through their representatives in the legislature, could renounce or revoke them."<sup>18</sup> Rapaczynski continues by noting that at the time it was written, the Bill of Rights was understood not just as a legal document but also as a statement of political norms, with the Ninth Amendment as an important open end to that statement.<sup>19</sup> That is pretty much all he has to say about it, though.

Robin West has gone further. She has written eloquently about what she calls "unenumerated duties": affirmative obligations of governments to act that are not specified in the Constitution, and which are not necessarily enforceable in court.<sup>20</sup> West contends that legislators are compelled to act not only by moral or political imperatives but also by the Constitution itself; the Constitution, she says, requires more from legislators than just those things that courts might order.<sup>21</sup> In all of this discussion, though, West never mentions the Ninth Amendment—perhaps because she is focusing on duties rather than rights.<sup>22</sup>

The venerable Charles Black mentioned the Ninth Amendment in Congress in an article about the positive right to livelihood.<sup>23</sup> As he put it, "The courts probably cannot do very much [with the Ninth Amendment right

*Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 228 (2006) (noting that scholars' discussion of affirmative legislative duties "are typically made within the context of an argument whose main point is to take the judiciary off the hook of constitutional or moral responsibility rather than put the legislature on it").

That courts and Congress would use different tools to handle the same constitutional provision should not be surprising. See Whittington, *Extrajudicial Interpretation*, *supra* note 12, at 813–14 (noting different competencies and techniques of courts compared to Congress).

18. Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 182 (1988); see also Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 86 (1988) (favoring a "multiplicity of interpreters" of the Ninth Amendment).

19. See Rapaczynski, *supra* note 18, at 182–88.

20. West, *supra* note 17.

21. See, e.g., *id.* at 235 ("My conclusion that the Constitution imposes no judicially enforceable legal duties on legislators does not imply that it imposes no political, constitutional, or moral duties on legislators that might be interpreted by representative bodies and enforced by the people through the ballot box.").

22. See *id.* at 225 (discussing distinction between rights and duties).

23. See Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986).



to livelihood] . . . . But Congress too is bound by the Constitution . . . .”<sup>24</sup> His conclusion was that “a constitutional justice of livelihood should be recognized, and should be felt by the President and Congress as laying upon them serious constitutional duty.”<sup>25</sup> But Black’s principal point was to argue just that the right to livelihood existed; he had no real detail to offer about how this Ninth Amendment right would actually work inside Congress.<sup>26</sup>

In a sense, then, the point of this article is to go back to my twelve year old footnote, combine it with thoughts like Rapaczynski’s, West’s, and Black’s, and run with them.

### III. THE NINTH AMENDMENT IN CONGRESS

Part I summarized the effects that the Ninth Amendment should have in Congress: reminding Congress that it should not act as though everything is permitted that is not specifically forbidden, and thus that Congress should consider unenumerated rights before it passes laws.

This part will explore what this would look like in practice, first as to traditional negative rights, then as to positive and other sorts of rights. It concludes by bringing a Ninth Amendment perspective to others’ research about how Congress already establishes rights that are not listed in the Constitution—to show, in other words, that Congress is already doing what this article suggests, just not consciously.

#### A. *Negative Rights*

Negative rights—rights to be free from particular government action or interference—are the most obvious sort of Ninth Amendment rights.<sup>27</sup> The Bill of Rights appears as a list of such negative rights, and the “et cetera” that the Ninth Amendment adds at the end suggests that the Ninth Amendment’s “other” rights are of the same ilk.<sup>28</sup> This article maintains that the Ninth Amendment can encompass other sorts of rights as well,<sup>29</sup> but negative rights are a logical place to start.

The fact that the negative-rights version of the Ninth Amendment is the most obvious might explain why we have not seen more use of the Ninth Amendment in Congress. We live in a post-New Deal, post-Great Society era of activist government. Libertarianism is a significant ideology, but it is

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24. *Id.* at 1107.

25. *Id.* at 1113.

26. *Id.*

27. *See* West, *supra* note 17, at 241–42 (discussing centrality of negative rights in American lawyers’ jurisprudential worldview).

28. *See* U.S. CONST. amends. I–IX.

29. *See infra* Part III.B.

far from a dominant one in the U.S.<sup>30</sup>

That said, the Ninth Amendment offers negative-rights fodder for both liberals and conservatives, and not just libertarians.<sup>31</sup> As Leif Wenar and Stephen Macedo have put it:

Americans reach for the language of rights to support political reforms at all points along the political spectrum, and they do so from a wide range of perspectives, from the religious to the militantly secular. The language of rights in America has never been the language of a single group or movement.<sup>32</sup>

So, for instance, Congress could act with an understanding that women have a right to choose abortion—thereby defeating proposed restrictions on abortions—or, alternatively, that the unborn have a right to life—thereby defeating proposed funding for abortions—and it would not matter whether or not these rights could be found anywhere in the Constitution. The Left can press for anti-discrimination rights for gays and lesbians, and the Right can press for the right to individual treatment as opposed to category-based affirmative action—again, without having to find these rights in the Constitution. The list is potentially endless.

To illustrate the Ninth Amendment's effect in Congress more directly, consider a hypothetical proposal for an internet-surveillance law. Assume that it is well-designed as a matter of policy (it would successfully address a real problem), that nobody doubts the law is within Congress's power to enact (under the Commerce Clause, let's say), and that the Supreme Court will have no problem affirming the statute if it passes, because the case law makes clear that the statute would not be held to violate Fourth Amendment rights against unreasonable searches.

Even before we get to the Ninth Amendment, Congress could have some constitutional debate here. Following the “interpretation outside the

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30. See David Boaz, *How Many Libertarian Voters Are There?*, CATO@LIBERTY (Jan. 22, 2010, 3:15 PM), <http://www.cato-at-liberty.org/how-many-libertarian-voters-are-there/> (estimating that 14% of registered voters are libertarians).

31. Cf. FARBER, *supra* note 4, at 3 (describing failure of liberals to make use of Ninth Amendment); SCHMIDT, *supra* note 1 (contending that popular constitutionalism naturally favors conservative or libertarian ideas).

32. Leif Wenar & Stephen Macedo, *The Diversity of Rights in Contemporary Thought*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* 280, 293 (Barry Alan Shain ed., 2007); cf. ALAN DERSHOWITZ, *RIGHTS FROM WRONGS* 166–68 (2004) (listing rights, each with an opposite, conflicting right); TUSHNET, *supra* note 8, at 211–12 (listing unenumerated rights recognized by courts and noting that they have been “used in the service of conservative as well as liberal goals”).

courts” line of thinking, a representative might object that the Supreme Court’s precedents give short shrift to the true meaning of the Fourth Amendment. As a result, the representative would call on Congress to reject the bill on Fourth Amendment grounds, regardless of the fact that the courts would uphold the law. This debate will be hard for our objector to win, though. Some members will agree with her assessment of the Fourth Amendment. Others will disagree. The vast majority, however, will huddle together under the “judicial overhang”—they will be content to avoid the entire constitutional discussion and just rely on the courts to interpret the Fourth Amendment.<sup>33</sup> The number of members who both think that the proposed law would be effective policy-wise, and are not worried about the Fourth Amendment, should be enough for the law to pass.

Now add in the Ninth Amendment. With it, Congress cannot be satisfied just to ask whether there is a Fourth Amendment problem, and, if there is not, assume that it has the power to act. Instead, Congress must ask whether there are any other rights threatened by the proposed law. Instead of a short list of barriers to federal action, there is now a potentially infinite one. Maybe the new law would violate an enhanced right to internet privacy that goes beyond anything arguably in the Constitution, but which is nevertheless compelling. If enough members of Congress turn against the bill when they are confronted with this internet-privacy rights argument, the bill will fail.

Even if most members reject the internet-privacy rights argument, there would at least be a debate as members moved out from underneath the judicial overhang. It would be a non sequitur for anyone to claim that the internet-privacy argument should just be left to the courts to sort out, or that Congress should consider the argument but only in line with judicial precedents. By definition, the rights at issue here are unenumerated, so the courts will not have weighed in on them.<sup>34</sup> Moreover, because this is about negative rights—what Congress *cannot* do—the successful assertion of a right would manifest itself with a law *not* being passed. Unless Congress’s inaction results in some unconstitutional inequality or lack of due process,

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33. TUSHNET, *supra* note 13, at 57–58 (discussing judicial overhang); *see also* MORGAN, *supra* note 12, at 248–49 (offering example from 1940s wiretap debate); PICKERILL, *supra* note 12, at 7–8 (discussing congressional deference to judicial decisions); *id.* at 70–82 (describing how Congress stopped deliberating about the commerce clause after a generation of courts’ broad interpretation and consistent deference to Congress); Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 820–23 (2010) (discussing effect of judicial overhang on congressional consideration of Civil Rights Act of 1964).

34. If the courts had recognized the right being debated, they would not have treated it as unenumerated, but rather as included in substantive due process, enumerated in the Fifth and Fourteenth Amendments. *See* Tushnet, *supra* note 8, at 212–13 (noting that courts always enumerate newly recognized unenumerated rights by tying them to something in the Constitution).

there generally will be nothing on the books for the courts to overrule here.<sup>35</sup> Again, it would make no sense for members of Congress to try to sidestep the internet-privacy rights debate by deferring to the courts.

A broader, Ninth Amendment-inspired debate would help in other ways. It would be good, for instance, for individual representatives and senators to have to state on the record where they stand about a particular right. This would enrich the public debate and provide valuable information to voters and interest groups, who could add further fuel to the fire and add more public democratic accountability to the process—if they weren't the ones who pushed Congress to debate this new right in the first place.<sup>36</sup> Something much like this happened in the recent robust public debate over the Stop Internet Piracy Act (SOPA). The opponents' argument was not just that the proposed law was bad policy, it was that it crossed a line.<sup>37</sup> Opponents did not speak in terms of the Ninth Amendment directly, but they could have; many asserted rights beyond that which the Constitution might require or the courts might enforce.<sup>38</sup>

Such negative-rights offensives have a venerable pedigree. In the early decades of the Republic—when not only the Ninth Amendment but the intellectual foundations on which it rested were more widely acknowledged—this sort of congressional consideration and self-restraint were important mechanisms for protecting rights.<sup>39</sup> The Bill of Rights made

35. Courts could find that, in certain circumstances, the Constitution requires Congress to take certain actions, but this is exceedingly rare. *See* West, *supra* note 17, at 230–31 (recognizing but criticizing this fact).

36. *See* MOORE, *supra* note 11, at 41 (discussing how popular movements can “create[] unofficial legal meanings” that go on to influence Congress and the courts); PICKERILL, *supra* note 12, at 139, 143 (citing examples, from natural-resources and gun-control contexts, of interest groups spurring deeper and less court-centered discussions of rights in Congress); Schmidt, *supra* note 1 (discussing Tea Party's methods of popular constitutional mobilization). *But see* Gewirtzman, *supra* note 11 (expressing pessimism about general public's capacity to participate meaningfully in constitutional debates). *See generally* KRAMER, *supra* note 11 (promoting “popular control over the course of constitutional law”).

37. *See, e.g.*, SOPA STRIKE, <http://sopastrike.com> (last visited Oct. 2, 2012) (“We need to kill the bill—PIPA in the Senate and SOPA in the House—to protect our rights to free speech, *privacy*, and *prosperity*.”) (emphasis added).

38. *Id.*

39. *See* DINAN, *supra* note 13, at xi (arguing that up through the nineteenth century, “rights were secured primarily through representative institutions and the political process, particularly through the passage of legislative statutes”); Graber, *supra* note 8, at 363–79 (giving full account of original intent and early practice of securing rights through proper congressional structure rather than through enumeration); *cf.* Daniel J. Elazar, *How Present Conceptions of Human Rights Shape the Protection of Rights in the United States*, in *OLD RIGHTS AND NEW* 38, 43 (Robert A. Licht ed., 1993) (discussing how in the early Republic, “[l]egislatures did more for the protection of rights than courts”).

precious few appearances in the Supreme Court in the Republic's first century, but the Bill's principles loomed large in the political sphere.<sup>40</sup>

An early, powerful example is the Sedition Act.<sup>41</sup> The Jeffersonian opposition objected in Congress and in court to the Act's suppression of free speech, but to no avail.<sup>42</sup> Federalist legislators and judges did not interpret freedom of speech that way.<sup>43</sup> When the Jeffersonians took over the government in 1801, they implemented their constitutional vision: President Jefferson pardoned the Sedition Act convicts, and Jefferson's partisans in Congress let the law expire.<sup>44</sup> It would be over 160 years before the courts would actually disavow the constitutionality of the Sedition Act in a First Amendment case.<sup>45</sup> In the meantime, though, members of Congress were free to take a different constitutional view—whether by interpreting the First Amendment right to free speech more broadly, or by taking a Ninth (and Tenth) Amendment approach to read federal power more restrictively than anything in the Bill of Rights explicitly required.<sup>46</sup> It was not controversial for Congress to feel compelled to stop short of doing anything and everything that the courts allowed it to do; neither should it be controversial today.

For another example (among others) that implicates the Ninth Amendment more directly, consider an early debate over a bill that would have limited electioneering by federal revenue officers.<sup>47</sup> One representative said that the proposed law was “unconstitutional, as it [would] deprive [the officers] of speaking and writing their minds; a right of which no law can divest them.”<sup>48</sup> Another representative agreed, saying that the proposed law was “nugatory in itself, because it [would go] to deprive the citizens of an unalienable right, which you cannot take from them, nor can they divest themselves of it.”<sup>49</sup> The bill's proponent retorted that these officers' freedoms were not as important as safeguarding the sanctity of elections, because “the violation of the freedom of elections was the greatest

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40. See DINAN, *supra* note 13, at 32; Graber, *supra* note 8 (describing this history).

41. 1 Stat. 596 (1798).

42. See CURRIE, FEDERALIST PERIOD, *supra* note 12, at 260–62.

43. *Id.*

44. *Id.* at 273.

45. See *New York Times v. Sullivan*, 376 U.S. 254, 273–76 (1964) (disavowing Sedition Act).

46. See Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 856–59 (2008) (relating contemporaneous Ninth Amendment arguments—previously forgotten by historians—made against Alien and Sedition Acts, and explaining how Ninth and Tenth Amendment arguments dovetailed). The Tenth Amendment loomed larger than the Ninth in the arguments against the Sedition Act, marking in some sense the beginning of the decline of the Ninth Amendment in the public consciousness. See Kurt T. Lash, *James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165 (2006).

47. See 2 ANNALS OF CONG. 1924–27 (1791).

48. *Id.* at 1925 (comments of Rep. John Vining).

49. *Id.* at 1927 (comments of Rep. Fisher Ames).

infringement on that Constitution.”<sup>50</sup> Following this rights-based debate, the bill was defeated, twenty-one to thirty-seven.<sup>51</sup>

This debate is a perfect example of a discussion of the Ninth Amendment’s “other rights” in Congress, because it took place in early 1791, before the First Amendment and the rest of the Bill of Rights were ratified. At that point, pretty much *every* right was unenumerated.<sup>52</sup> Later that year, the Bill of Rights enumerated several rights and the Ninth Amendment declared that the remainder should not be denied or disparaged. In other words, unenumerated rights deserved at least the same consideration that they had always gotten—including congressional respect such as the revenue officers’ free expression rights had gotten earlier that year.<sup>53</sup>

More broadly, that 1791 debate is a fine example of rights talk at its best: lawmakers taking the time to consider transcendent principles that should guide and constrain their work, instead of leaving that task to the courts or to nobody at all.<sup>54</sup> Congress had fine debates about unenumerated rights in 1791,<sup>55</sup> it can, and should, and does have such debates today.

This raises obvious questions that deserve acknowledgement here, though they will not be addressed until later. First, how does Congress establish something as a right? Could the defeat of one bill, as in our internet-privacy example, suffice?<sup>56</sup> Second, what does it mean to say in Congress that there is an unenumerated right at issue? How do we know that the opponents of our hypothetical internet-surveillance bill were voting against it because they thought it violated a right to internet privacy, as opposed to voting against the bill because they thought its effects on internet privacy made it unforgivably bad policy?<sup>57</sup> Third, is Congress really capable of—or interested in—conducting such discussions?<sup>58</sup> Fourth, if a right is recognized in Congress, does that actually provide any protection for it?<sup>59</sup>

50. *Id.* (comments of Rep. James Jackson).

51. *See id.* (recording vote).

52. By saying “pretty much every,” I recognize that in the unamended Constitution, Article I, Section 9 contained restrictions on congressional action that technically count as enumerated rights.

53. This leaves to one side the question of what sort of judicial enforcement unenumerated rights were entitled to, either before or after the Bill of Rights and the Ninth Amendment were ratified. *See* BARNETT, LOST CONSTITUTION, *supra* note 8, at 236 (discussing judicial enforcement of unenumerated rights before and after 1791).

54. *See* 2 ANNALS OF CONG. 1924–27 (1791).

55. *See id.*

56. *See infra* Part III.C.

57. *See infra* Part IV.A.

58. *See infra* Part IV.B.

59. *See infra* Part IV.C.

Before turning to these issues, though, we need to expand our consideration beyond negative rights.

### *B. Positive Rights and Other Sorts*

As suggested at the outset of the last section, some people might think that Ninth Amendment rights are negative because they read the rights enumerated in the rest of the Bill of Rights as negative.<sup>60</sup> But the enumerated rights in the Bill need not be read solely that way. For instance, the Sixth Amendment right of a criminal defendant to counsel has been interpreted as requiring the government to provide an attorney when the defendant is indigent.<sup>61</sup> This makes it partly a positive right: something that the government has an affirmative duty to provide to the right-holder.

Others would argue more generally that American constitutional rights were not all frozen in amber in 1791 or 1868 (when the Fourteenth Amendment was ratified).<sup>62</sup> It is not just theorists who take a broader view; courts have found all manner of rights in the Constitution that would have scandalized America's pre-constitutional forebears.<sup>63</sup> Despite the fact that the Ninth Amendment speaks of "retained" rights—i.e., rights that already existed in 1791—it would seem that Ninth Amendment rights should be susceptible to modernization at least as much as their enumerated brethren.<sup>64</sup> This could include not just negative rights but positive rights or any other sorts of rights "which we don't now think of."<sup>65</sup>

To be sure, the judicial recognition of rights that did not exist in 1791 or

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60. See *supra* Part III.A.

61. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also Wenar & Macedo, *supra* note 32, at 293 ("America's politics of rights has never been about securing negative rights only.")

62. See MASSEY, *supra* note 7, at 129.

63. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy law as violating Due Process Clause).

64. See MASSEY, *supra* note 7, at 129–31 (arguing that, despite "retained" language, Ninth Amendment rights "are a dynamic, evolving list"). There are other theories as to what the amendment means by "retained." See, e.g., BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 54–55 (equating retained rights with natural rights).

65. Letter from Edmund Pendleton to Richard Henry Lee (June 14, 1788) [hereinafter *Pendleton Letter*], in 2 *THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803*, at 530, 533 (David John Mays ed., 1967); see Black, *supra* note 23, at 1107, 1113 (arguing for Ninth Amendment positive right to livelihood); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 131, 160 (1988) (arguing in favor of positive Ninth Amendment rights).

Pendleton's full phrase in defense of the Ninth Amendment is: "Again is there not danger in the Enumeration of Rights? May we not in the progress of things, discover some great and Important [right], which we don't now think of?" *Pendleton Letter*, *supra*, at 532–33. This certainly seems to suggest that at least one member of the Founding generation saw the point of the Ninth Amendment as protecting new rights. To be fair, though, this is one stray comment in the context of an argument making a different point. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215, 1276 n.232 (1990) (discussing context of Pendleton's statement).

1868 has scandalized some contemporary thinkers as well; it is not as though *everyone* would accept new, positive Ninth Amendment rights coming out of Congress as valid.<sup>66</sup> But plenty of people would not limit themselves to an eighteenth-century catalog of negative rights. Indeed, Congress has legislated positive rights into existence already.<sup>67</sup> To that extent, this article is not calling on Congress to pass unprecedented sorts of legislation so much as it is calling on Congress to think differently about what it is already doing.

More pragmatically, if the point of the Ninth Amendment in Congress is that Congress should think about rights other than those listed in the Constitution, then every sort of right is on the table—whether negative, positive, or otherwise—so long as Congress can muster a sufficient consensus for it.<sup>68</sup> The Ninth Amendment might not refer directly to new, modern rights, but it also does not foreclose Congress from conceiving of them.

Moreover, the current constitutional landscape clearly gives Congress the power to establish positive rights. Think of the 1787 Constitution as defining a space within which Congress can legislate. Each specific grant of power to Congress expands that space. Each enumerated negative right serves as an exception to those powers, and thus shrinks the space accordingly.<sup>69</sup> As the last section suggested, the Ninth Amendment recognizes that there are other negative rights, such that Congress can shrink or close off other parts of the space that would have otherwise been available

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66. Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 183–85 (1990) (rejecting, in the context of judicially-created rights, the Ninth Amendment as “a warrant for [the creation of] rights not mentioned in the Constitution,” and asserting that it is best understood as a preservation of those rights “already held by the people under their state charters” at the time of the Founding).

67. See, e.g., 20 U.S.C. §§ 1400, 1408(a)(2)(C)(i) (referring to certain children’s right to “free appropriate public education”); OPEN Government Act of 2007, Pub. L. No. 110-175, § 2(6), 121 Stat. 2524, 2524–25 (2007) (referring, in amendments to the Freedom of Information Act, to Congress’s duty to vindicate the public’s “fundamental ‘right to know’”).

68. See ESKRIDGE & FEREJOHN, *supra* note 14, at 5 (“The republic of statutes we describe transcends the libertarian bias in Large ‘C’ Constitutional rights. . . . [S]tatutes commonly provide positive rights to people, providing them with legal means to combat oppression and discrimination.”); *infra* Part III.C (describing necessary consensus).

69. But see Berger, *supra* note 16, at 960–62 (decrying those who consider rights to be the converse of powers). I am comfortable with my own informal usage here, insofar as the government lacks the ability to act when doing so would violate a right, because that act would be void. See MASSEY, *supra* note 7, at 67, 89–91 (describing the Framers’ sense of rights and powers as complementary, but explaining how this view has faded in favor of the modern view of rights as trumps, and how that shift has led to modern views of the Ninth Amendment as being about individual rights instead of federalism).



to it.<sup>70</sup> It is not 1791, though. Subsequent constitutional amendments have given Congress new powers.<sup>71</sup> More significantly, broad constructions of the Commerce Clause and the Spending Clause have greatly expanded Congress's constitutional space.<sup>72</sup> If the original space was a small neighborhood, the current space is a big city.<sup>73</sup>

Even if the Ninth Amendment was only referring to rights Americans had in 1791, it was referring to those rights vis-à-vis the powers Congress had in 1791. When there is not as much that the government can do, there are not as many rights that the government can violate. New or enlarged powers thus tee up new or enlarged rights; it is no coincidence that the Supreme Court's modern era of civil rights and civil liberties—putting some oomph behind the Bill of Rights beyond anything seen before—began in earnest almost immediately after the Supreme Court began allowing expansive federal power in the 1930s.<sup>74</sup> Space-wise, it follows that the more new streets the government can go down, the more buildings there will be to consider declaring off-limits.

But that is negative-rights talk. Positive rights function differently in this extended metaphor. With the great expansion of federal power, Congress has plenty of room in which to introduce positive rights. Instead of powers (space the federal government is permitted to occupy) and negative rights (space it is forbidden to occupy), positive rights are spaces that the federal government is *required* to occupy.<sup>75</sup> So if congressional deliberations are infused with the spirit of the Ninth Amendment, and if there is an adequate consensus that a particular unenumerated positive right exists (e.g., a right to old-age pensions), and there is certainty that Congress has sufficient power to implement that right (e.g., the spending and commerce powers), then Congress would feel compelled to act (e.g., to

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70. This is part one of why I disagree with John Hart Ely's contention that "the Ninth Amendment was not designed to grant Congress authority to create additional rights, to amend Article I, Section 8 by adding a general power to protect rights." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 37 (1980). When we are dealing with negative rights, it is not an exercise of authority for Congress to recognize or respect a new right through the exercise of self-restraint. *See also infra* note 76 (continuing Ely discussion).

71. *See* U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

72. *See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578–79 (2012) (noting Congress's "expansive" power to regulate via the Commerce Clause and "considerable influence" via the Spending Clause, made "broader still" by the Necessary and Proper Clause).

73. *Cf.* BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 1 ("The Constitution that was originally enacted and formally amended creates islands of government powers in a sea of liberty. The judicially redacted constitution creates islands of liberty rights in a sea of governmental powers.").

74. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

75. Congress can also act affirmatively to vindicate negative rights; consider the Civil Rights Act of 1964, in which Congress used its commerce power to grant Americans new rights against private discrimination. *Cf.* BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 57 (arguing that some natural rights are affirmative, making them difficult to enumerate as limits on government).

develop, maintain, or protect a social-security system).<sup>76</sup>

As with negative rights, the list of possible positive rights is infinite, as befits the open-ended nature of the Ninth Amendment. Indeed, there are ample examples to be drawn from actual political debates; liberal politicians say that there is a right to affordable housing, or access to health care, or education—rights that are left to Congress either because they are not in the Constitution or because courts under-enforce them.<sup>77</sup> The conservative reply is to decry this notion. Conservatives might think that the federal government does not have the power to act in these areas, in these ways. Other conservatives might accept Congress's power but not agree that Congress should treat these "wants" as rights. The list of possible rights may be infinite, but the congressional advocates of a particular right still need to win over enough of their colleagues before a right can go from possible to actual.

The same goes for so-called collective rights (like the right to a healthy environment, or intergenerational equity), or animal rights, or really any sort. One important category is state-based rights, which are also not completely enumerated in the Constitution. Kurt Lash has made a strong case that the original understanding of the Ninth Amendment was that it would constrain federal action, in the service of maintaining a proper

76. See Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 194 (2007) (discussing Congress's use of commerce power to enhance rights); Young, *supra* note 14, at 445–46 (discussing how "this sort of extracanonical supplementation is a primary means by which a Constitution that is very old and hard to amend manages to serve the needs of a modern and highly complex society"). This is part two of why I disagree with John Hart Ely's contention that "the Ninth Amendment was not designed to grant Congress authority to create additional rights, to amend Article I, Section 8 by adding a general power to protect rights." ELY, *supra* note 70, at 37. Congress does not need some sort of general power to protect rights in order to establish positive rights. It can rely instead on enumerated powers, like commerce or spending. See *supra* note 70 (beginning Ely discussion).

77. See President Franklin D. Roosevelt, *Message to the Congress on the State of the Union* (Jan. 11, 1944), reprinted in CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 235, 242–43 (2004) (proclaiming "second Bill of Rights" including rights to economic security, housing, health, and education). For three random examples from the countless ones extant, see 158 CONG. REC. E427 (daily ed. Mar. 22, 2012) (statement of Rep. Sheila Jackson-Lee) ("While the U.S. Constitution and Supreme Court interpretations do not identify a constitutional right to health care for those who cannot afford it, Congress has enacted numerous statutes . . . that establish and define specific statutory rights of individuals to receive health care services from the government."); 149 CONG. REC. 28,443 (2003) (statement of Rep. Steve Israel) (referring to children's "inalienable right to an education"); 143 CONG. REC. 7519 (1997) (statement of Rep. Bobby Rush) (referring to "the people's right to affordable housing").

On under-enforcement—the idea that courts should not try to do everything themselves, and that by under-enforcing some constitutional provisions they create space for Congress to vindicate those provisions—see SAGER, *supra* note 12, at 101–02.

federalist balance and allowing states to protect rights.<sup>78</sup> Since the New Deal, the primary focus has shifted away from federalism and toward individual rights,<sup>79</sup> but there are still plenty of people interested in federalism.

Again, whatever particular rights the Framers of the Ninth Amendment might have had in mind, if Congress shows enough support over enough time for the notion that any particular right exists, in any particular form, then it exists. The Ninth Amendment serves to remind Congress of this possibility.

### C. *A Republic of Statutes*

An important recent book by William Eskridge and John Ferejohn, *A Republic of Statutes*, has implications for the Ninth Amendment in Congress.<sup>80</sup> The book describes the ways in which certain “superstatutes” are part of the American constitution in the lowercase-c sense of the word.<sup>81</sup> That is, these statutes form part of the bedrock of the structure of American government, despite not being part of the document that we call the (uppercase-C) Constitution. Many of these constitutive statutes deal with structure rather than rights, but there are plenty of the latter, making Eskridge and Ferejohn’s arguments highly relevant to this article.<sup>82</sup>

The past ninety years have seen a vast increase in the rights of Americans, and very little of it has come through the constitutional amendment process.<sup>83</sup> Some of this increase has come from court decisions finding things in the Constitution, but a fair amount has come through federal legislation that does not purport to derive the rights from the Constitution at all.<sup>84</sup>

Eskridge and Ferejohn note several places where statutes are “the exclusive mechanism by which public norms have formed around the protection of individual or minority rights.”<sup>85</sup> Their examples include anti-discrimination rights for pregnant women, certain aspects of the right to an education, the “right[] to compete in a free and fair market, to decent

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78. See LASH, *supra* note 8, at 31–34.

79. See MASSEY, *supra* note 7, at 97–98 (describing this shift).

80. ESKRIDGE & FEREJOHN, *supra* note 14; see also William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

81. For more on the notion of statute-based rights forming part of the U.S. small-c constitution, see Young, *supra* note 14.

82. See, e.g., ESKRIDGE & FEREJOHN, *supra* note 14, at 73.

83. *Id.*

84. *Id.* at 6. Some has come from both—consider that *Brown v. Board of Education* did not amount to much in practical effect until Congress (eventually) passed legislation to make it so. See *id.*

85. *Id.* at 11–12.

housing and adequate medical care, [and] to security against old age, sickness, accident, and unemployment.”<sup>86</sup> Congress has thus brought plenty of unenumerated rights to life, even if it has not cited the Ninth Amendment in doing so.

Congress can back up these rights by providing or implying causes of action to enforce them in court.<sup>87</sup> But this is different—less—than what I, or Eskridge and Ferejohn, mean by a right here. Being a right entails being entrenched: protected more than an ordinary statute is from repeal or change. These distinctions will be explored in greater depth in Part IV.A, but for now the point is that some so-called rights coming out of Congress do not rise to the level of Ninth Amendment rights that actually *constrain* Congress.

Eskridge and Ferejohn describe a pattern of processes by which superstatutes entrench some rights.<sup>88</sup> These rights start merely as goals.<sup>89</sup> The goals are generally contested, and legislation to advance them may be controversial at first.<sup>90</sup> An initial statute passes and is implemented in ways that not only prove the opponents’ worries to be misplaced, but actually convince most of the opponents that the norm is a good one (even though there may still be disagreements at the margins).<sup>91</sup> From that point, the statute acquires an “enthusiastic and dynamic and growing base of popular support,” which leads to the statute being entrenched, and perhaps expanded.<sup>92</sup> Social Security, which began rather modestly and is now part of the American (small-c) constitutional fabric, is a perfect example.<sup>93</sup>

Rather than coming out of “constitutional moments,” these statute-based rights get entrenched incrementally, without “dramatic showdowns and conflict.”<sup>94</sup> (Social Security is deeply entrenched, for instance, but it did not get that way overnight.<sup>95</sup>) As Eskridge and Ferejohn have written elsewhere, the key is “neither how much public attention and enthusiasm accompanies a law’s adoption nor how long the law lasts.”<sup>96</sup> Rather, to become entrenched, the statute must substantially alter the status quo, and “‘stick[]’ in the public

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86. *Id.* at 12.

87. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (declaring congressional intent to be the key element required to find implied causes of action).

88. ESKRIDGE & FEREJOHN, *supra* note 14, at 17.

89. *Id.*

90. *See id.* at 7–8.

91. *Id.* at 7.

92. *Id.* at 17.

93. *Id.* at 166.

94. *Id.* at 165.

95. *Id.* at 166.

96. Eskridge & Ferejohn, *supra* note 80, at 1230.

culture in a deep way, becoming foundational or axiomatic to our thinking.”<sup>97</sup>

All of this provides some perspective on what Ninth Amendment discussions would look like in Congress. A member of Congress typically would not establish a right simply by striding into the Capitol and arguing that some previously unrecognized interest is not only suddenly essential as a matter of policy, but is actually a full-fledged right. Instead, one would expect to see other sorts of arguments: A member pointing to a long series of enactments (federal or state<sup>98</sup>) and arguing that they represent a right, such that it would take more than a mere policy argument to repeal them. Or a member noting that the series of enactments must be extended to cover more people and so fully respect the right, or that it must be funded and thereby vindicate the right for people who cannot afford it themselves. Regardless, the development of these rights would be a lengthy process, not a singular event.<sup>99</sup>

*A Republic of Statutes* demonstrates that Congress has, in fact, established a lot of these real, entrenched rights. The facts on the ground are such that this article’s approach—calling for Congress to consider and respect unenumerated rights—has substantial actual practice on its side. But while *A Republic of Statutes* describes how Congress has created superstatutes, it does not claim that Congress has used Eskridge and Ferejohn’s process knowingly, nor that Congress has characterized its actions with the terms that Eskridge and Ferejohn do. This article calls not only for Congress to deliberate about entrenching unenumerated rights, but to do so self-consciously. The Ninth Amendment says that Congress should remember to consider unenumerated rights; it only makes sense that when Congress entrenches such rights, it should do so mindfully.

If Congress were to conduct its debates over unenumerated rights more consciously and mindfully, this would potentially supplement the process that Eskridge and Ferejohn describe. Their main insight—that entrenchment requires a deep consensus that emerges only from a lengthy process—remains.<sup>100</sup> It would seem, however, that making the process more conscious would add both focus and legitimacy to it.

Although Eskridge and Ferejohn concentrate on positive rights, we can return to our negative-rights example about the internet-surveillance bill and

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97. *Id.* at 1231.

98. *See* ESKRIDGE & FERREJOHN, *supra* note 14, at 16 (introducing the notion of convergence of state statutes acquiring superstatute status). This is as good a place as any to mention that some people might be convinced that a particular right exists, but deny that it should be considered a federal right, as opposed to a state right. *See id.* at 172 (noting people making this distinction as to social security).

99. *Cf. id.* at 6–9.

100. *See supra* notes 95–97 and accompanying text.

the right to internet privacy to make this point.<sup>101</sup> A member of Congress objects that the bill would violate a right to internet privacy. This argument would not be out of the blue; the member would point to precedents (“the government has never attempted such a gross intrusion” and “previous attempts to intrude to this degree have all been defeated/discredited”) and suggest that they are not only persuasive but binding. This would afford an opportunity for Congress to debate the member’s reckoning of the precedents; whether it would like to continue down that path or veer from it; and the notion of congressional precedent more generally.<sup>102</sup> It might also increase the stakes—if proponents say not just that something is a good idea but that it is a right, they are raising the bar for themselves and they risk losing everything.<sup>103</sup> They also risk cheapening the category of rights through promiscuous use of the label.<sup>104</sup> In any case, though, the discussion would be open, and the results correspondingly more legitimate.

For positive rights, the argument would be similar. The positive government action would have to begin at some point, perhaps with a declaration that it was in the furtherance of a newly recognized right, but more likely not, given political realities.<sup>105</sup> Further efforts to strengthen or broaden that action would draw upon prior precedents; efforts to weaken or repeal the action would face resistance because of those precedents. With enough successful efforts, reflecting enough of a consensus, the positive right would be entrenched along the lines that Eskridge and Ferejohn sketch out—but again, the debate would be conscious and richer, and the results more legitimate.

#### *D. A Parting Thought*

This puts a new spin on the age-old clash between (1) those who call for a right and (2) those who retort that people don’t acquire a constitutional

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101. See *supra* pp. 83–84.

102. See Gerhardt, *supra* note 12 (discussing nature and functions of congressional precedent, a category that extends well beyond rights).

103. See TUSHNET, *supra* note 13, at 141–42 (noting that sometimes, losing an argument about something being a constitutional right hurts one’s political argument that, constitutional right or not, Congress should still provide it).

104. Cf. Conor Gearty, *Reflections on Human Rights and Civil Liberties in Light of the United Kingdom’s Human Rights Act 1998*, 35 U. RICH. L. REV. 1, 3 (2001) (noting, with human rights, “the risk that the term will become useless through overuse. (How can you play the game of politics when all the cards are trumps?)”).

105. See ESKRIDGE & FEREJOHN, *supra* note 14, at 171–75 (describing the modest rhetoric accompanying creation of Social Security, in terms of its character as a right).

right to something just because they really, really want to have it. The second group is correct, but the Ninth Amendment tells us that their argument does not refute the first group.<sup>106</sup> Rights need not be in the Constitution to carry weight.<sup>107</sup>

That said, the Ninth Amendment's admonitions are part of the Constitution. The unenumerated rights that Congress entrenches in the ways described above can be considered rights *by* the Constitution, even if they are not rights *in* the Constitution.<sup>108</sup>

#### IV. SOME QUESTIONS

This part of the article is devoted to answering obvious criticisms of the notion that the Ninth Amendment has a role to play in Congress. The first and most important criticism is that “right” is a misnomer for what is actually just a strong policy preference. The second is that Congress has no aptitude for debating rights. The third is that congressional respect for the Ninth Amendment would not actually protect rights.

##### A. *Are These Rights or Just Good Ideas?*

For the Ninth Amendment to matter in Congress, calling something a right there must actually mean something. It is not immediately apparent, however, what the real difference is between saying “we cannot/must pass this law because it violates/vindicates the right to *X*” and saying “we cannot/must pass this law because it is a very bad/good idea in light of our national interest in *X*.”<sup>109</sup>

##### 1. *Entrenchment*

Adrian Vermeule is a trenchant critic of *A Republic of Statutes*.<sup>110</sup> He asks questions similar to that in the previous paragraph, and he rejects the

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106. See MASSEY, *supra* note 7, at 3.

107. Ninth Amendment rights are not in the Constitution, and as such, any deprivation of them is not directly unconstitutional. To be sure, these rights might be constitutional in the lower-case sense of being foundational, as opposed to being mandated by the Constitution. See *supra* note 14.

108. Cf. Sager, *supra* note 5, at 239 (noting how the Ninth Amendment is “*about* rather than *of* the Constitution”).

109. See Adrian Vermeule, *Superstatutes*, THE NEW REPUBLIC (Oct. 26, 2010, 12:00 AM), <http://www.tnr.com/book/review/superstatutes> (reviewing ESKRIDGE & FEREJOHN, *supra* note 14) (citing Daryl Levinson for notion that “the move to a de facto interpretation of entrenchment makes it precious hard to distinguish a statute that survives because it is somehow resistant to change from a statute that survives just because people today like it and have no desire to change it”). Laws against murder, for instance, are extremely well-entrenched, but they may not have constitutional status. *Id.*

110. See *id.*

notion that the superstatutes Eskridge and Ferejohn describe are necessarily constitutional in the lowercase-c sense of the word<sup>111</sup> (for the sake of simplicity, I will assume here that what I call rights are what Vermeule, Eskridge, and Ferejohn would call lowercase-c constitutional):

Eskridge and Ferejohn basically describe the give-and-take struggle of lawmaking and regulation on more or less humdrum subjects—family and medical leave, antitrust, clean water laws—and then attach the label “constitutional” to the results. But if everything is constitutional, nothing is. The nagging merit of the book is that there is, clearly, some category of superstatutes with more than ordinary force and stature; but after reading the book, the nature and boundaries of that category are all the more opaque.<sup>112</sup>

This section humbly suggests that the Ninth Amendment approach can address Vermeule’s objection about clarifying the “nature and boundaries” of special statutes.

As discussed in the last section, Eskridge and Ferejohn have laid out a process by which statutes can win over opponents and become entrenched to the point of being axiomatic.<sup>113</sup> This entrenchment means that it is harder than usual—not just hard, but *harder*—to repeal or weaken these statutes.<sup>114</sup> Vermeule’s point remains, though: is it not the case that statute-law becomes harder to change simply by virtue of being popular?<sup>115</sup> Popularity can lead to a sort of political or practical entrenchment,<sup>116</sup> but that is different from the sort of legal entrenchment that a designation of “right” suggests. Eskridge and Ferejohn offer some answers to this that relate to the treatment of superstatutes in court, a topic covered in Part III.C above. For now, though, the discussion must stay with entrenchment.

Eskridge and Ferejohn failed to convince Vermeule of their theory that a combination of deliberation and consensus elevate their superstatutes to an extra-entrenched status.<sup>117</sup> Vermeule says that the “acid test of entrenchment

111. *Id.*

112. *Id.*; *see supra* note 14 (distinguishing lowercase-c constitution from uppercase-C Constitution).

113. *See supra* Part III.C. *But see* Young, *supra* note 14, at 448–49, 454–59 (rejecting notion that statutes must be entrenched in order to obtain small-c constitutional status).

114. *See* ESKRIDGE & FEREJOHN, *supra* note 14, at 102–18 (describing process and nature of statutory entrenchment).

115. *See* Vermeule, *supra* note 109.

116. *Id.*

117. *Id.* To be fair to Eskridge and Ferejohn, they talk not just about entrenchment but also about



occurs when a statute survives despite the opposition of a current majority or supermajority,” but he also notes that this essentially describes every statute extant because of the Constitution’s “elaborate lawmaking process.”<sup>118</sup> Still, as the quotation above shows, he believes that there are some extraordinary statutes. The question remains, then: what entrenches these statutes distinctly?

The Ninth Amendment approach offers one answer. If, as the modern view has it, rights are “trumps taking precedence over the principles of democracy and the public good,”<sup>119</sup> then their essence in a representative legislature is to make legislators vote against what would otherwise be the right result. This, in turn, presumes that there are legislators who are capable of distinguishing consciously between mere preferences and real restraints—between “should not” and “cannot.” To amend Vermeule’s acid test, a statute is entrenched when it survives because of legislators who support the statute *only because* it is entrenched, other arguments of policy and politics notwithstanding. Returning to our space metaphor, there is a difference between policy (saying that it is a good idea for Congress to decline to occupy a particular legislative space) and right (saying that that space is actually sealed off).

Assuming again that members of Congress are capable of making such distinctions,<sup>120</sup> it certainly seems that it would help immensely for them to be having actual discussions about unenumerated rights qua rights. By making the discussion conscious,<sup>121</sup> the Ninth Amendment approach adds a vital self-awareness to the process. With a conscious process, an entrenched right is entrenched because enough of Congress directly and explicitly says that it is—a boundary that should satisfy Vermeule. This need not rule out further debate. Members could agree that the right is a right, disagree that it is a right, or even disagree that Congress should be trafficking in such distinctions. The point is that the right must be able to win the debate.

That addresses the boundaries of the category, but what about its nature? We still need to know how a right would actually function differently in Congress than other, ordinary principles do. To some extent this has been

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a sort of social engraving process. See ESKRIDGE & FEREJOHN, *supra* note 14, at 28 (discussing how superstatutes “are supported not just by the normal obligation to obey the law but also by a broader social network”).

118. Vermeule, *supra* note 109.

119. WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS 73 (2009) (discussing Ronald Dworkin’s definition of a right). The notion of rights as trumps is a more modern approach; the older view was of rights as limits to powers. See *supra* note 69 and accompanying text.

120. See *infra* Part IV.B. Keith Whittington has defended Congress’s ability to reject good policy for being unconstitutional. See Whittington, *supra* note 12, at 841. But see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1368 & n.41 (1997) (arguing to the contrary).

121. See *supra* Part III.C.

covered above: A right would serve as a trump, with members feeling constrained to vote differently than immediate policy or political considerations would otherwise lead them to do.<sup>122</sup> A right would thus be entrenched more than it would be as an ordinary statutory provision.

Another key is enforcement. One enforcement mechanism is political. Something that is labeled a right will carry more weight and be harder to defeat in a political debate. This does not lead us back to our original problem; the point is that being a right is a *cause* of the heightened political potency, not merely a reflection of it. Classifying something as a right, and doing so consciously and openly, “would have a distinct and durable impact on political perceptions.”<sup>123</sup>

Such boundaries are still somewhat nebulous, though. By definition, when a right is unenumerated, it lacks the certainty and precision of a right that has been expressed in a fixed text. But this flexibility is at least as much a benefit of the Ninth Amendment approach as it is a drawback. Unlike enumerated-rights arguments that can get bogged down in the enterprise of shoehorning new concepts into old categories (such as whether burning a flag is speech), unenumerated rights are supple and better able to evolve with the changing times.<sup>124</sup> Being flexible in this way is not inconsistent with being entrenched; an ability to move and evolve is not the same as a susceptibility to evaporation.

Procedure could provide a more objective effect. The House and Senate could, for instance, pass internal rules that require certain types of debate or certain kinds of votes to overcome a rights-based objection.<sup>125</sup> Having these sorts of debates or votes would yield a result and produce a record, both of which could then be brought to bear in subsequent debates and votes. The designation of something as a right, in other words, could have a precedential effect inside Congress.

Records of debates and votes would be especially important for negative rights, because such rights would manifest themselves primarily in laws that are *not* passed, leaving debates and votes as the only sort of hard evidence of

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122. See *supra* note 119 and accompanying text.

123. SAGER, *supra* note 12, at 127. Sager uses this phrase in the service of a slightly different point: the effect it would have on political perceptions for Congress (and the President and courts) to accept a “constitutional right to minimum welfare and a constitutional obligation to repair the entrenched residue of structural injustice,” which Sager considers mandated by the Constitution and thus not unenumerated as such. *Id.* at 126–27.

124. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 221 (1999).

125. Cf. TUSHNET, *supra* note 13, at 16, 196 n.35 (describing the existing Senate process for considering constitutional issues).

their existence.<sup>126</sup> Positive rights, by contrast, would be embodied in laws, which could include congressional declarations of the rights in their text or legislative history. To be sure, there is already unenumerated-rights talk in legislation,<sup>127</sup> but these are rights in the sense of being judicially enforceable rather than being entrenched in Congress itself. Similar sorts of formal declarations could be part of a more robust and systematic understanding of—and use of—Ninth Amendment rights in Congress.

Declarations like these could also appear in the text or legislative history of laws that constitute a rejection of a negative right. Such a declaration might sound odd: “For the following reasons, the committee does not consider this law to violate the right to internet privacy declared in the Senate’s vote of May 4, 2019 on S. 2345” or “For the following reasons, the committee does not consider that there exists a right to internet privacy with which this bill would conflict.” But presumably this strangeness would fade with repetition.

Finally, the House and Senate could impose supermajority requirements on themselves.<sup>128</sup> They could, for instance, require the support of a three-fifths majority to pass a law that establishes a right or, once established, to alter or abolish a right. This would provide entrenchment in its most direct and undeniable sense, and would clearly mark the rights in question as more than just good ideas. Why is this not, therefore, the principal argument in this section? Because a supermajority requirement for votes on rights is not necessary; Congress could do all of the other things mentioned in this section even without a supermajority requirement. Moreover, not everybody agrees that such a self-imposed supermajority requirement would be constitutional.<sup>129</sup> Nevertheless, a supermajority requirement would certainly clarify things, and would make these rights much more meaningful.

Entrenchment is relative, of course. Members of Congress could always

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126. See Gerhardt, *supra* note 12, at 719 (contending that discoverability is necessary before something can be precedential); *id.* at 738 (noting possibility of precedential effect of congressional inaction).

127. See *supra* note 67 (citing two examples). The House of Representatives recently amended its Rule XII, requiring members to specify the specific constitutional powers under which their bills are allowed. See H.R. Res. 5, 112th Cong. (2011) (enacted). Some of these “constitutional authority statements” reference the Ninth Amendment, albeit perfunctorily. See, e.g., 157 CONG. REC. H5373–74 (daily ed. July 21, 2011) (statement of Rep. Ron Paul regarding H.R. 2613) (asserting authority for repeal of Gun-Free School Zones Act of 1990 under the Second, Ninth, and Tenth Amendments).

128. See, e.g., S. DOC. NO. 112-1, at 8–9 (2011); H.R. DOC. NO. 111-157, at 668, 889–90 (2011).

129. See, e.g., Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1 (1997) (arguing against constitutionality of self-imposed congressional supermajority requirements). The argument that self-imposed supermajority requirements are constitutional is essentially that either House can bind itself however it pleases, so long as it passes the rules doing so by simple majority votes. See generally John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (expounding this position).

reject, distinguish, or ignore their own precedents, just like their associates across the street at the Supreme Court can do. Nevertheless, if one is looking for meaning in Congress's designation of something as a right, the conscious creation of precedential weight, perhaps along with a supermajority requirement, is a good place to start.

## 2. *Congressional Rights Outside Congress*

If Congress takes the Ninth Amendment to heart, it would have an impact in courts and in the executive branch.

First, the courts. The issue is not whether a right gives people the ability to sue; Congress's power to create causes of action is not in dispute. Congressionally recognized Ninth Amendment rights would do more in court. As an example, Eskridge and Ferejohn describe how their analogous superstatutes exert a gravitational pull that influences courts' interpretation of other statutes and sometimes even of constitutional provisions.<sup>130</sup> In the latter case, Congress actually can help unenumerated rights become enumerated ones.<sup>131</sup>

Relatedly, by cementing something as a right Congress might also establish it as a liberty interest, or as a "traditional practice,"<sup>132</sup> or other things of the mushy sort that courts sometimes latch onto to provide constitutional due-process protections. Once again, Congress's action could lead the courts to find the unenumerated right in the Due Process Clauses of the Constitution, and thereby enumerate it.

As a general matter, it seems that the more seriously and explicitly Congress discusses rights, the more seriously the product of those discussions would be taken in court.<sup>133</sup> This is true even though the rights

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130. See ESKRIDGE & FEREJOHN, *supra* note 14, at 6, 27 (discussing how superstatutes "transform Constitutional baselines"); William N. Eskridge Jr. & John Ferejohn, *Quasi Constitutional Law: The Rise of Super-Statutes*, in DEVINS & WHITTINGTON, *supra* note 12, at 198, 199 (describing how such statutes "tend to trump ordinary legislation when there are clashes or inconsistencies," and thereby "bend and reshape the surrounding landscape" with their "normative gravity").

131. See ESKRIDGE & FEREJOHN, *supra* note 14, at 27 (arguing that superstatutes like the Voting Rights Act "sometimes rival Constitutional rules, bending an ambiguous or even hostile Constitutional tradition to acquiesce in superstatutory innovations"); see also TUSHNET, *supra* note 13, at 18–19 (offering a similar point).

132. See TUSHNET, *supra* note 13, at 18–19 (discussing how courts might look to legislation to gauge constitutional concepts like "evolving standards of decency").

133. See BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 260 (arguing that courts' presumption that Congress acts constitutionally was more justifiable when Congress had more serious constitutional discussions); Eskridge & Ferejohn, *supra* note 80, at 1253 (arguing that courts should

that Congress would be recognizing would not be directly enforceable in court, let alone constitutionally mandated.

On the administrative-law side, if Congress posits that a right exists, it could affect the courts' review of an agency's implementation of a statute. There might be less room for deference to the agency, for instance, because Congress has limited the agency's discretion regarding the right, and thereby reduced the range of acceptable interpretations of the statute that the agency might come up with.<sup>134</sup>

Relatedly, the Senate could make Ninth Amendment rights part of the executive confirmation process.<sup>135</sup> Imagine senators grilling presidential nominees about such rights. Senators who felt that there was an important right to internet privacy, say, or to affordable housing, could seek assurances that the President's nominees would interpret and execute the statutes within their bailiwick accordingly. This would draw the President (who already would have participated in the legislative process that gave rise to the right in the first place) further into the rights debate, adding more weight and legitimacy to rights that the President supports. This would also help to draw administrative agencies into the rights-making process. Their actual implementation of statutes—acting broadly to vindicate positive rights (or not), or shrinking back from violating negative rights (or not)—would make a big difference in how rights would fare.<sup>136</sup>

In sum, congressional consideration of Ninth Amendment rights would affect Congress, the courts, the President, and administrative agencies. Being a right would thus elevate these principles in too many ways to write them off as mere popular policy.

### *B. Is Congress Up to the Task?*

Another critique, which emerges indirectly from the existing literature, is that Congress is not capable of deliberating effectively about unenumerated rights. As discussed above in Part II, proponents of judicial enforcement of Ninth Amendment rights hold up the possibility of leaving the Ninth Amendment solely to Congress as almost a *reductio ad absurdum*, and even those who reject judicial enforcement in favor of political enforcement do not typically express any confidence in Congress's

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more readily use purposive interpretations when dealing with superstatutes as opposed to regular statutes).

134. Eskridge and Ferejohn also discuss how superstatute status should (and does) lead courts that are interpreting such statutes to try harder to vindicate the broad legislative purpose than they otherwise would. Eskridge & Ferejohn, *supra* note 80, at 1253.

135. *Cf.* TUSHNET, *supra* note 13, at 65 (observing that the right to privacy was set on a “firmer basis” by discussion of it in Senate confirmation hearings on judicial nominees).

136. *See* ESKRIDGE & FEREJOHN, *supra* note 14, at 266–69 (discussing agency contribution to the process of norms becoming superstatutes).

capabilities, leaving the impression that they have little regard for these rights qua rights.<sup>137</sup>

This is unfair to Congress. A large part of the “interpretation outside the courts” movement is dedicated to promoting Congress’s ability to have constitutional debates. This was clearly the intent of the Constitution’s designers, and the great constitutional debates of the nation’s first century were conducted mainly in Congress.<sup>138</sup> Even more recently, Congress has proven perfectly capable of having robust debates about religious freedom, the right to bear arms, and the rights implicated on both sides of the abortion debate, among many others.<sup>139</sup> These debates are not limited to just trying to understand what the courts have said or to predict what the courts will say; members of Congress have expressed strong, independent views about the meaning of constitutional rights provisions.<sup>140</sup>

If Congress can do this—and assuming that the robustness of these debates is a good thing—it can engage Ninth Amendment rights as well. Unenumerated rights are a different matter, to be sure, but they are arguably even better suited to congressional treatment than enumerated rights are. Courts deal with litigation, which is necessarily concrete, discrete, and retrospective;<sup>141</sup> Congress deals with legislation, which is more abstract, general, and prospective. Interpreting a fixed text like the Constitution, in the context of a live dispute, is thus more of a judicial task.<sup>142</sup> By contrast,

137. See *supra* notes 15–17 and accompanying text.

138. See Fisher, *supra* note 12, at 708–10 (describing early debates).

139. See KRAMER, *supra* note 11, at 238 (listing instances of serious constitutional debate in Congress); PICKERILL, *supra* note 12, at 113 (noting Second Amendment arguments made in Congress against Brady Bill); Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in DEVINS & WHITTINGTON, *supra* note 12, at 64 (describing Congress’s capabilities in, and techniques for, constitutional interpretation); see also DEVINS, *supra* note 12, at 29–30 (describing process of congressional constitutional consideration, such as it is); Fisher, *supra* note 12 (defending congressional constitutional aptitude).

140. In MORGAN, *supra* note 12, Donald Morgan surveyed the treatment of the Constitution in Congress and found both blitheness and a sense of responsibility. As to the latter, most members Morgan surveyed at the time (the 1960s) agreed that members of Congress were supposed to make independent assessments of the constitutionality of proposed legislation, and believed that congressional constitutional arguments were at least partly bona fide, as opposed to being just pretexts and proxies for political arguments. *Id.* at 8–9. For a fine recent example of this sentiment, see Schmidt, *supra* note 1, at 230 (quoting Tea Party stalwart Senator Mike Lee as saying that his oath “means more than doing that which you can get away with in court”).

141. See U.S. CONST. art. III, § 2, cl. 1 (limiting the federal judiciary to the resolution of cases and controversies).

142. There is a complicated relationship between constitutions and written-ness. After the Founding, judicial review slowly emerged as a supplement to political consideration/enforcement of constitutional norms. When John Marshall began interpreting the Constitution like a statute, it strengthened the notion that interpreting the Constitution is a fundamentally textual enterprise, and

having a more philosophical debate about which unwritten, abstract principles should guide legislative actions seems like a better fit for a deliberative, representative legislative body like Congress.<sup>143</sup>

Skepticism about Congress's abilities here often focuses on Congress's policy orientation. Congress may regard constitutional arguments as distractions, intended only to frustrate the achievement of urgent policy goals.<sup>144</sup> President Franklin Roosevelt's paradigmatic words to a congressional committee ("I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation") might sound brazen, but the sentiment they express does not sound at all dated.<sup>145</sup> This seems largely to be a function of Congress's abdication of

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thus something judges should do. See KRAMER, *supra* note 11, at 149–50; Graber, *supra* note 8, at 393–96. But this still leaves the old ways—including congressional and popular interpretation—available for non-textual tasks like considering Ninth Amendment rights.

143. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 140 (1977) (relating Learned Hand's notion that "It is wrong to suppose . . . that claims about moral rights express anything more than the speakers' preferences. If the Supreme Court justifies its decisions by making such claims, rather than by relying on positive law, it is usurping the place of the legislature. . . ."); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 *CHI.-KENT L. REV.* 211, 223 (1988) ("[I]t is the Constitution's status as a legal writing that is often said to make it subject to authoritative construction by judges, government officials whose primary training and experience is not in statesmanship, prophecy or political philosophy, but in the application of legal language to the resolution of disputes."); Whittington, *supra* note 12, at 813 (questioning "the special competence of the courts to provide principled deliberation on constitutional values"); cf. U.S. CONST. art. V (assigning Congress a preeminent role in drafting new constitutional provisions); BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 76 (conceding that one might "maintain that unenumerated natural rights are best protected by mechanisms other than direct judicial enforcement"). But see MASSEY, *supra* note 7, at 203 (distrusting Congress to police its own limits); Brest, *supra* note 12, at 82 (arguing that courts are best suited to constitutional interpretation because "adjudication as such is the paradigm of a disinterested decision procedure"); Sager, *supra* note 5, at 252 (arguing that judges are better placed than Congress to deal with unenumerated rights).

Maxwell Stearns has made a strong case to me that the very structure of a large legislative body like Congress makes it difficult to attribute its actions to any single, coherent rationale such as an understanding of a right. Unlike judges, who are required to justify their decisions with written opinions, a single legislative decision can rest on hundreds of individual reasons or on no reasons at all. In rejecting his conclusion, I am relying on both the history of serious, coherent deliberations in Congress and on the potential for improved future deliberations (especially at the committee level, where coherent written explanations are more common and where members of Congress can rely on their colleagues' specialized expertise and focus).

144. See MORGAN, *supra* note 12, at 24 (noting how constitutional objections can spur charges in Congress "of mere obstructionism, of reaction, even of subversion"); PICKERILL, *supra* note 12, at 7–8, 27–28 ("Put simply, members of Congress do not have the time or institutional motivation to routinely raise and debate constitutional issues that arise in the context of popular legislation."); Barbara Sinclair, *Can Congress Be Trusted with the Constitution?*, in DEVINS & WHITTINGTON, *supra* note 12, at 293, 293 ("The worst argument to use with a member when you're trying to persuade him to vote against a proposal is that 'It's unconstitutional,'" explained a senior Democratic leader . . ."). For a striking critique of Congress's ability and performance in constitutional interpretation, see Mikva, *supra* note 12.

145. 79 *CONG. REC.* 13,449 (1935) (reproducing Roosevelt's letter, which also said that "the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of

constitutional interpretive power to the courts. In such a setting, the Constitution can appear to be just another tool for keeping Congress from passing a law, such that there is no reason for anyone but obstructionists to use it.

Ninth Amendment rights do not suffer from this problem, though, because they do not have this posture. Take as an example a senator who, spurred to think about such things by the Ninth Amendment, concludes that a proposed law would violate an unenumerated right (say, our right to internet privacy).<sup>146</sup> That senator would not argue against the law by saying that the courts would find it unconstitutional; that would be a non sequitur because our hypothetical assumes that the right is not one that the courts have found in the Due Process Clause or elsewhere in the Constitution. Instead, the senator would be able to make a rights argument that is *united in purpose* with her policy argument: “This law doesn’t just entail ‘some costs’ in terms of internet privacy, it actually violates a right to internet privacy!”<sup>147</sup> There would be even less of a problem on the positive-rights side; there, the constitutional argument would support the legislation, not represent an attempt to squelch it.

A final reason to think that Congress is up to the task is rooted in the somewhat circular nature of the very question. Those who doubt Congress’s capacity to have a meaningful debate can talk about how Congress rarely attempts such debates and generally outsources the heavy lifting to the courts, but this is like a teenager who argues that he should not have to learn algebra because he’ll never use it. The teenager is correct only because he cannot use something he has not learned. Those who believe in Congress’s ability to debate rights can point out that Congress does a good job on those occasions when it does try;<sup>148</sup> the more Congress engages in real discussion about Ninth Amendment rights, the better it should get at it.<sup>149</sup> A keen interest in rights could spur more robust processes for the task, similar to the improvement in the quality of budgetary debates with the advent of the Congressional Budget Office<sup>150</sup> and similar to the positive recent experience

constitutionality”). In fairness to Roosevelt, his actions did reflect a particular constitutional vision, even if he was not interested in stopping to debate that vision in Congress. *See* Whittington, *supra* note 12, at 843–44.

146. *See supra* pp. 83–84.

147. *See supra* Parts IV.A (discussing distinctions between rights and mere policy) and III.C (discussing how such debates might play out in Congress).

148. *See* Fisher, *supra* note 12 (offering such a defense); Whittington, *supra* note 12.

149. *Cf.* TUSHNET, *supra* note 13, at 57–62, 129 (discussing possibilities for Congress to do more, and improve skill at, constitutional interpretation).

150. *See* PHILIP G. JOYCE, *THE CONGRESSIONAL BUDGET OFFICE* (2011) (describing history,



of the U.K. in considering human rights.<sup>151</sup>

Congress is capable of much more than it has delivered to date. It just has to want to do it. By providing a mechanism for deep principles to be treated as something more than mere political points, the Ninth Amendment approach could help Congress along toward this goal.

### C. *Does This Actually Protect Rights?*

The final major criticism of having Congress consider Ninth Amendment rights is that it would not provide any real protection. While Congress might establish a right, this argument goes, the durability of that right will be subject to the whims of shifting majorities in Congress.<sup>152</sup> Aside from the important points in Part III.A on how these rights would carry special weight, there are multiple responses to this argument.

First and foremost, whatever protection Congress can offer is better than nothing. If a particular right is not getting any protection from courts, then congressional action can only help. Even if the right *is* getting protection from courts, congressional action can only help. In short, unless congressional action to recognize a right would somehow actually undermine that right, there is really no problem here.

This connects well with the essence of the Ninth Amendment. Before the Bill of Rights was ratified, there was a pool of rights out in the ether. There were various ways to protect those rights—perhaps through judicial enforcement, but also through the constitutional structure making it difficult to pass legislation, through legislative self-restraint, and through popular sovereignty tossing disrespectful congressmen out of office.<sup>153</sup> Enumerating some rights in the Bill of Rights surely provided enhanced protection for those rights; as a practical matter, becoming visible has its advantages.<sup>154</sup>

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function, and success of CBO); TUSHNET, *supra* note 13, at 16, 197 n.35 (describing Senate process for considering constitutional issues); *id.* at 62 (suggesting benefits of specialized congressional staff for analyzing constitutional questions).

151. See David Feldman, *The Impact of Human Rights on the UK Legislative Process*, 25 STATUTE L. REV., no. 2, 2004 at 91 (highlighting success of formal rights-protection processes in U.K. legislative drafting); Lord Norton of Louth, *Parliament and the Courts*, in PARLIAMENT IN THE 21ST CENTURY 310, 316–18 (Nicholas D.J. Baldwin ed., 2005) (describing how, in wake of Human Rights Act, U.K. Parliament uses committee staff to analyze human-rights implications of proposed legislation).

152. This assumes that Congress does not create any sort of supermajority requirement, as discussed at the end of Part IV.A.1.

153. See *supra* text accompanying notes 39–54. Mark Graber has detailed numerous examples and statements of the original intention that “the democratic principle is the only means of securing the rights of the people.” Graber, *supra* note 8, at 364–66. In 1787, obviously, pretty much all of the rights of the people were unenumerated ones. See *supra* note 52.

154. See 1 ANNALS OF CONG. 452 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) (expressing understanding of enumeration of rights as providing “greater caution” toward their protection); see also Rapaczynski, *supra* note 18, at 182–83 & n.14; Williams, *supra* note 8, at

But, the Ninth Amendment tells us, the Bill of Rights did not eliminate all the ways that already existed for protecting unenumerated rights.<sup>155</sup> At the very least, Ninth Amendment rights are supposed to keep the significant legislative protection they enjoyed before the Bill of Rights was ratified.

Some countries without independent judicial review of legislation, such as the U.K., must rely on legislative self-restraint but still have managed to achieve a respectable climate of rights.<sup>156</sup> Then again, the U.K. has recently recognized its own shortfalls in this regard and now allows a sort of judicial review of legislation for human-rights violations.<sup>157</sup> But this article does not suggest that the U.S. rely entirely on Congress and its self-restraint here. It is not as though Congress could invoke the Ninth Amendment to take actions that violate other constitutional provisions. A law that vindicated a positive right to public safety could not survive in court, for instance, if it violated the Second or Fourth Amendment. Once again, in the American system of separated powers and checks and balances, congressional consideration of rights can only add to judicial protection—it cannot displace it.

Even to the extent that congressional protection of rights is limited by the way political majorities shift, this is far from fatal. For one thing, rights are vulnerable to such shifts in court too. One should compare the reality of Congress with the reality—not unrealistic ideals—of courts.<sup>158</sup> Courts are designed to be immune from political pressure, and they do protect rights,

525. This assertion certainly has raised some hackles, though. *See, e.g.*, BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 252 (“The Ninth Amendment mandates that unenumerated rights be treated the same as those that are listed.”); MASSEY, *supra* note 7, at 8, 13 (reaching a similar conclusion); Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW* 187, 188 (Myres S. McDougal & W. Michael Reisman eds., 1985) (“I submit that . . . the Ninth Amendment declares as a matter of law . . . that [unenumerated rights] shall be treated as *on an equal footing* with rights enumerated.”).

155. *See supra* text accompanying note 53.

156. The comparative experience of slavery in the U.S. versus the U.K. (which abolished slavery decades earlier) is a fitting historical example. *See* Slavery Abolition Act, 1833, 3 & 4 Will. 4, c. 73 (Eng.) (abolishing slavery in the British Empire in 1833); U.S. CONST. amend. XIII (abolishing slavery in the United States in 1865). This is an appropriate place to mention that Spain and Portugal have explicitly created two categories of enumerated rights in their constitutions: one group that is judicially enforceable, and another that is not, and instead is only “realized through political process.” OSIATYŃSKI, *supra* note 119, at 124.

157. *See* AILEEN KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 5* (2009) (describing origins and nature of U.K.’s Human Rights Act); *cf.* BARNETT, *LOST CONSTITUTION*, *supra* note 8, at 33 (noting failure of popular sovereignty as first practiced in U.S. because of unchecked legislative supremacy).

158. *See* Whittington, *supra* note 12, at 847; *see also* GRIFFIN, *supra* note 12, at 123 (making this point); KRAMER, *supra* note 11, at 239–40; Fisher, *supra* note 12, at 725.

but they can also be fickle. Which right is more secure in the U.S. at the moment: the (congressionally created) right to receive some sort of old-age pension, or the (judicially recognized) First Amendment right of corporations to spend unlimited amounts of money on political speech?<sup>159</sup> Courts may delay things, but eventually they almost always fall in line with public opinion.<sup>160</sup> Indeed, the consensus among political scientists is that the Supreme Court is not “eventually” political but is political in the moment.<sup>161</sup>

On the flip side, there is less to fear from shifting majorities than we might think. To the extent that narrow majorities do hold sway, “majoritarian” is not an antonym for “principled.”<sup>162</sup> Political debates are not inherently illegitimate just because the side with the most votes wins.<sup>163</sup>

More importantly, congressional action is not particularly majoritarian anyway. When it comes to changing the status quo, Congress is designed to flout the majority will.<sup>164</sup> Because new legislation must win the approval of the House, the filibuster-prone Senate, and either the President or a veto-proof majority, it is incorrect to say that a Ninth Amendment right could be established in Congress—or, once established, eliminated—simply by a narrow majority, even if it weren’t entitled to special weight.<sup>165</sup>

## V. CONCLUSION

The Ninth Amendment helps us remember that there is more to rights

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159. See Young, *supra* note 14, at 427 (“Even constitutional change through the Article V gauntlet may, in some circumstances, be politically easier than eliminating or revising a longstanding statutory scheme backed by powerful constituencies.”). Young uses flag-burning as his example instead of the controversial 5–4 decision in *Citizens United v. FEC*, 558 U.S. 50 (2010), but the point is the same.

160. See TUSHNET, *supra* note 13, at 134 (“[T]he Supreme Court rarely holds out for an extended period against a sustained national political majority.”); Whittington, *supra* note 12, at 831 (questioning the notion that Supreme Court is countermajoritarian). See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

161. See Whittington, *supra* note 12, at 816 (noting how political-science attitudinal model “call[s] into question the assumption that judges are uniquely principled or thoughtful in reaching their decisions”). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (providing comprehensive description and defense of the political-science model of Supreme Court decision making as driven by justices’ political preferences, and by extension, by their appointers’ political preferences).

162. See Whittington, *supra* note 12, at 845; see also *id.* at 818–26 (defending ability of political actors to be principled).

163. Conversely, courts have the ability to buck the majority, and they often do, but that does not mean that they necessarily reach the correct result every time. *Cf. id.* at 840 (“The success of the Constitution is best measured not by how many times political actors are prevented from acting on their policy views, but by how often their policy views are consistent with constitutional principles.”).

164. See Vermeule, *supra* note 109.

165. See *id.*

than what courts say about them, or even than what the Constitution says about them. The more that Congress elevates its discussion about the proper bounds of individual liberty and government duties, and the less that those things are left to the sole discretion of courts, the better off America is.

This article has tried to make those points modestly, in the hopes of spurring further discussion and research. There are many angles to pursue; each contestable point in this article—and surely there are many—represents an opportunity to develop or refine the great promise that the Ninth Amendment holds in Congress.

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