NINTH

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ABSTRACT

This article draws from Book II of my dissertation and examines the Ninth Amendment to the United States Constitution. By applying principles of constitutional pluralism (which I contend is the only method that exists), this article contends that the Ninth Amendment is a substantive protector of unwritten rights. In making this argument, this article also sets forth a method by which courts can examine whether that provision protects an alleged right. Ultimately, this article concludes that (1) the proponent of an unwritten right must put forward that right; (2) they must show that the principles, text, or doctrines associated with the various clauses of the constitution reflect the alleged right; and (3) they must also show that the American people have popularly ratified the right—either in our history or traditions or in widespread current practice and values. Lastly, this article examines how these rights are held against the States.

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I. HISTORICAL AND SCHOLARLY BACKGROUND

The United States Constitution is one of the most important documents in American history.[1] There is less consensus, however, on its interpretation. Indeed, there is even disagreement as to whether there is a distinction between "interpreting" it and "construing" it.[2] The many theories about the proper Constitutional interpretation often comes in one of two camps: originalism or living constitutionalism.[3] Neither of these camps is stable, with each having its own sub-theories that bitterly oppose each other. These sub-theories are so contentious that, at times, they cross over to the opposing side, to the chagrin of their own main camp. A good example of this enraging crossover is Professor Lund's "living originalism."[4]

This great confusion has its origins in the birth of the document itself. It was formed in a sequestered convention that was originally meant to cure the problems of the Articles of Confederation. But that quickly evolved to a new mission of writing a new constitution. The men who wrote the Constitution were not the ones who eventually ratified it. And they all had various political motivations for writing the document.[5] To make matters worse, there are parts of the Constitution that are tightly written and explicit in their meaning, while other parts are very open-ended. For example, provisions that set qualifications for elected office tend to be clear; but the First Amendment and the due process clauses are not.[6] To limit the First Amendment to either its text or original purpose would have devastating consequences. Indeed, the clause explicitly limits its reach to Congress.[7] As such, a strict textualist approach would allow the president or the judiciary to violate the First Amendment.

Neither living constitutionalism nor originalism offers a proper framework for understanding the Constitution. In my view, both are merely

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1. Jeffrey Rosen & David Rubenstein, *The Declaration, the Constitution, and the Bill of Rights*, THE NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/the-declaration-the-constitution-and-the-bill-of-rights (last visited Aug. 19, 2024).

2. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

3. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

4. Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31 (2015).

5. For an excellent discussion on the Articles of Confederation, see Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 403 (2017).

6. *Compare* U.S. CONST. art. I, § 2, *with* U.S. CONST. amends. I, V, & XIV, § 1.

7. U.S. CONST. amend. I, states "*Congress* shall make no law…" (emphasis added).

charades propagated upon the masses.[8] Neither theory can justify its own existence without reliance on multiple methodologies to sustain its illusion of legitimacy. If one wishes to defend originalism, they must say something beyond "it's what the framers or ratifiers thought."[9] To defend any school of living constitutionalism, the scholar must say something more than "it just changes," and must connect it in some way to the text or purpose of the Constitution itself. Indeed, if neither the text nor history played a role in constitutional interpretation, there would be no need for a written document in the first place. Furthermore, each theory faces a canon and anticanon problem. Living constitutionalists cannot claim that anticanonical cases were wrong the day they were adopted, and no originalist has been able to adequately defend *Brown v. Board of Education*, despite multiple attempts.[10] As a practical matter, any theory of constitutional interpretation that fails these tests should be rejected outright.[11]

In reality, no judicial opinion has ever relied on just one theory of constitutional interpretation and arguments that have approached such narrowness have jeopardized the rule of law itself.[12] Thus, it seems that pluralism (discussed below) is the only method that exists in practice; what distinguishes scholars and these judicial opinions is how much reliance one gives to each modality of interpretation.[13]

Because I believe that neither living constitutionalism nor originalism adequately reflect how constitutional interpretation happens in practice, I identify as a constitutional pluralist. This means that, depending on the context, different interpretative modalities exert varying levels of influence on the case at issue. Further, I do not believe that the modalities used are inherent in the nature of "law" itself. Indeed, I am a pluralistic juridical

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8. An article fully articulating my theory is planned for a future date.

9. Indeed, even one of the most ardent originalists has seemed to support pluralism in their academic writing. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013) ("One virtue of the weak presumption is that it promotes doctrinal stability while still accommodating pluralism on the Court.").

10. Brown v. Bd. of Educ., 347 U.S. 483 (1954). For a good discussion on this point, see Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995); Ronald Turner, *The Problematics of the* Brown*-is-Originalist Project*, 23 J.L. & POL'Y 591 (2015); Lawrence Rosenthal, *Litigating Original Meaning from* Heller *to* Rahimi*: The Role of Lawyering in the Confused Path of Second Amendment Jurisprudence*, 73 AM. U. L. REV. 1857, 1900-01 (2024).

11. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380-81 (2011) (noting all understanding of the Constitution must refute the anticanon and must account for *Brown*'s correctness).

12. Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362-63 (1988) (discussing Marsh v. Chambers, 463 U.S. 783 (1983)).

13. Professor Bobbitt noted this explicitly in PHILIP BOBBITT, CONSTITUTIONAL FATE 8 (1982). At least one state supreme court has ruled similarly as to its own constitution, noting that the same interpretative principles applicable to statutes and other written instruments are applicable to constitutional interpretation. *Succession of Lauga*, 624 So. 2d 1156, 1165 (La. 1993).

nihilist, who does not believe "law" has any inherent nature or identity outside the minds of those who use the term.[14] Rather, in regard to constitutional pluralism, I find that the modalities are simply those that our society accepts as legitimate means for judging law and facts. The modalities are essentially interpretive "rules of recognition and adjudication" to borrow from the parlance of a school of thought I also believe to be a fraud: analytical jurisprudence.[15]

Not only is constitutional pluralism internally consistent (meaning it uses multiple modalities to justify its use of multiple modalities), but it avoids the canon and anticanon problem described above. The anticanon either relied too much or too little on specific interpretive modalities depending on the case; whereas *Brown* successfully integrated just enough textualism and originalism to fulfill the overarching purposes and principles espoused by our constitution.

As noted by famed pluralist Phillip Bobbitt, our society has coalesced around several modalities of constitutional pluralism: the textual, the historical, the structural, the doctrinal, the American ethos, and the prudential.[16]

The purpose of this article is to borrow from the work of my dissertation and apply these modalities to the Ninth Amendment of the United States Constitution. While the Ninth Amendment was born of a compromise (i.e., to assuage fears that the listing of the Bill of Rights would be construed to limit other rights), it has seen little success in jurisprudence.[17] It had some success in the early right to privacy case law such as *Griswold v. Connecticut*,[18] but has otherwise maintained its status as "the forgotten Ninth Amendment,"[19] though most scholars have long since believed it does protect unwritten rights.[20] However, it seems that those same scholars have

14. Derek Warden, *Pluralistic Juridical Nihilism*, 16 WASH. U. JURIS. REV. 20 (2023).

15. *Id.* at 23 (citing H.L.A. HART, THE CONCEPT OF LAW 113 (1961).

16. While Professor Bobbitt began the pluralism trend, other scholars have followed suit. *See, e.g.*, BOBBITT, *supra* note 13; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994). Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

17. For more on this, see Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987 (1988).

18. *See generally* Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 780-81 (1994) (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)).

19. BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

20. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (discussing various academic theories). While Professor Barnett understands the Ninth Amendment as a rule of construction, he interprets that to mean unwritten rights are protected otherwise they would be denied or disparaged in violation of the amendment. *Id.* at 78.

yet to formulate a method for discovering these unwritten rights. This article, however, adds to that academic discussion and shows both that the Ninth Amendment protects unwritten rights *and* how courts should determine which rights are protected.

II. THE MODALITIES AND READING OF THE NINTH AMENDMENT

To reiterate, I am not alone in viewing the Ninth Amendment as a protector of unwritten rights. Many scholars now agree that it offers such protections. They simply disagree as to how these rights should be discovered.[21] Constitutional pluralism, through the modalities discussed below, not only shows that the Ninth Amendment protects unwritten rights but also explains how courts may discover those rights.

A. The Textual Modality

The textual modality, as its name suggests, involves looking at the text of the Constitution to discern what it would mean to the contemporary person on the street.[22]

Fortunately for those of us who study the Ninth Amendment, its plain meaning has remained largely unchanged in these last two centuries. While it is clear that the amendment acknowledges the existence of unwritten rights, the challenge lies in determining how to identify these rights. In all interpretations of the Constitution, it is best to first discuss the text of the document at issue. For, as the famous phrase notes, "it is a constitution we are expounding,"[23] and all interpretation must begin there. The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[24]

Plainly, the amendment means that rights' absences from the Bill of Rights or from the Constitution otherwise should not necessarily entail their lack of protection.[25] Applying the textual modality to this provision reveals several key insights about the communicative content of the Ninth Amendment. First, the amendment explicitly acknowledges the existence of

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21. *See* sources cited *supra* note 20.
22. BOBBITT, *supra* note 13, at 12.
23. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).
24. U.S. CONST. amend. IX.
25. Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruence in Current Civil Rights Litigation Law*, 64 WAYNE L. REV. 403, 426 (2018).

other "unwritten rights." Second, any interpretation of the listed rights must ensure that these unwritten rights are neither denied nor disparaged. It is easy to see how an ordinary person on the street could read this to mean that there are other rights, not listed, which the Constitution protects. Moreover, because all other rights listed in the Constitution are protected by the clauses that recognize them, and because the Ninth Amendment recognizes other unwritten rights, then the Ninth Amendment is also the protector of these other unwritten rights.[26] Thus, a textual reading of the Amendment illustrates that the Ninth Amendment protects unwritten rights.

Furthermore, the text of the Amendment shows something else. By use of the phrase "the people," the Ninth Amendment suggests that what the people say is a right (either customarily, in various statutes, or so forth) may well be such a protected right.[27] Further still, that the Amendment also mentions the other rights listed in the Constitution suggests that these other written rights have some role to play in the existence of these other unwritten rights.

B. Historical Modality

The historical modality involves looking at the intentions of the framers and ratifiers of the Constitution.[28] Thus, it focuses not so much on the words but rather how those words fit within a larger social situation.

The historical modality shows (1) that the framers wanted to protect unwritten rights through the Ninth Amendment and (2) how this protection ought to be carried out. At the time of the framing, natural rights theory was the flavor of the era. Natural law and natural rights can be found in countless founding era documents and even in the Declaration of Independence itself.[29] As noted above, the Ninth Amendment reflects this idea—the framers knew that it would be impossible to list every conceivable right in existence but did not want to exclude those rights from protection; thus, they adopted the Ninth Amendment.[30] This mirrors the idea behind Article 4 of the Louisiana Civil Code, which mandates how one is to find new rules of law even when the Code does not explicitly list them.[31] This comparison is

26. This could also be a structural modality argument, as it relies on the relationship between the various amendments and how those rights are set up. This illustrates the overlap between the modalities.

27. Warden, *supra* note 25, at 425-26.

28. BOBBITT, *supra* note 16, at 12.

29. For a good discussion on this history, see Hon. Diarmuid F. O'Sclannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513 (2011).

30. Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 603-04 (1991).

31. For a comparison between the two, see Derek Warden, *Secundum Civilis: The Constitution as an Enlightenment Code*, 8 J. CIV. L. STUD. 586, 617 (2015).

warranted because the framers drew on civil law sources; and, at the time of the framing, hatred of English society was so strong that there was a large movement to adopt the civil law, with some framers even decrying adoption of the English Common law entirely by stating it would bring anti-republican ideas.[32] Because of this complex history, most scholars now believe that the Ninth Amendment was intended by both the drafters and ratifiers to protect unwritten rights.[33]

History reveals more than the framers' intention that the Ninth Amendment protect unwritten rights. It also offers some guidance as to how this might be done. This comes from two concepts of law at the time of the framing: common law and civil law. Despite some early American misgivings about the common law, it became the backbone of American law. From the very nature of the common law at the time of the framing, it appears that the generation which began our nation believed that courts could find unwritten rights: When common law judges made decisions, they were not "creating law," but "discovering law."[34] If the law were to be discovered, it must have already existed.

To determine what the law already was, judges would look to custom and reason, as well as to the text of various other laws.[35] The same can be said of civil law sources. Civil law recognizes that, in the absence of contrary legislation, custom can be a source of law—when the practice is repeated for so long that it is generally accepted as being law.[36] Applying these general ideas to the Ninth Amendment, that would mean where a practice is repeated for so long or widely that it is generally viewed as a constitutional right, it may become a constitutional right. For similar reasons, widespread legislation against that alleged custom or practice would mitigate against the finding of an unwritten right. Moreover, the civil law offers another method by which a court, looking at the Ninth Amendment, could protect unwritten rights—beyond the Constitution, but through the Constitution.[37] Here, like the civil law jurists, the courts would

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32. *Id.* at 594-96.

33. See e.g., Sherry, *supra* note 20; Barnett, *supra* note 20 (discussing various academic theories).

34. Sherry, *supra* note 20, at 1014.

35. Fairly detailed accounts of this complex discovery of the law were done in two articles regarding the Roman Civil law influence in the early republic. M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723 (1992); R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649 (1992).

36. This can be seen most clearly in articles one and two of the Louisiana Civil Code. *See* LA. CIV. CODE ANN. arts. 1-3.

37. Another scholar noted this same issue and argued that tying the Ninth Amendment to other doctrines and clauses was a good thing. He also noted that this process reflected how civilian scholars read their civil codes to discover unwritten rules. *See* Mitchell Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government:* Griswold v. Connecticut*;* South

deduce the existence (to some extent) of the other "unwritten rights" by reference to the rights already listed in the Constitution. This type of interpretive approach—reasoning from the text, backed up with custom—can be seen in many early and modern opinions in our country.[38]

C. The Structural Modality

The structural modality involves inferring rules from the structural relationship between different parts of the Constitution.[39]

Like the previous modalities, this method of analysis (1) tells us that the Ninth Amendment protects unwritten rights and (2) suggests some methods by which those rights might well be protected or identified.

The Constitution sets forth a Bill of Rights and other rights provisions. As noted above, these clauses protect the rights that they recognize. Thus, it would follow that, insofar as the Ninth Amendment identifies the existence of unwritten rights, it must be that the amendment itself protects those rights.

The structural modality also offers guidance on why the discovery of unwritten rights cannot be either entirely open ended or divorced from the text of the Constitution itself. For example, the Constitution establishes an Amendment process[40] and a democratic republican form of government, which it guarantees to the various states.[41] Thus, under the structural modality, one should be skeptical of any interpretation that would supplant the need for Article V and its amending process. Constitutional amendment by mere judicial fiat would then render Article V superfluous in the rights context. Moreover, the people of our nation, and not the courts, are the ones who vote on laws, constitutional amendments, and policies. Therefore, whatever method of analysis is ultimately used to protect unwritten rights from the Ninth Amendment (1) must not completely undermine Article V and (2) must have some republican-democratic legitimacy behind it. The discovery of these unwritten rights should be limited in some way to the

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Carolina v. Katzenbach, 40 TUL. L. REV. 487, 487-88 (1966).

38. In an early case, the Court expressly noted it was relying on public opinion in part. United States v. Hudson & Goodwin, 11 U.S. 32, 32 (1812) ("Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition") and in the Twentieth Century, in *Griswold*, as noted above, the Court combined various clauses and traditions to discover a right to privacy. *See supra* Part I; *see also* Griswold v. Connecticut, 381 U.S. 479 (1965).

39. BOBBITT, *supra* note 13, at 12-13.

40. U.S. CONST. art. V.

41. U.S. CONST. art. IV, § 4.

other provisions of the Constitution and, at the same time, reflected in the customs and mores of the people.

D. The Doctrinal Modality

The doctrinal modality is simply the application of rules built up by precedent.[42] In the realm of constitutional jurisprudence, this modality has often taken a very broad form. Lawyers make arguments based on prior cases even when the precedent they are citing and their present case rely on different constitutional clauses.

There is undoubtably precedent that the Constitution protects unwritten rights. There is also some case law which suggests that the Ninth Amendment does so. As noted above, in *Griswold*, the Court used the Ninth Amendment to support the discovery of an unwritten right to privacy after discussing various principles derived from cross-textual readings of the Constitution. Further, the Court itself has recognized that either Substantive Due Process or the Ninth Amendment can protect at least some rights.[43]

But, again, precedent does not only show that the Constitution protects unwritten rights but also highlights some principles as to how such protection should occur. In *Griswold*, the Court examined the text of the Constitution to derive the unwritten right to privacy, because such a right protected other listed rights and was reflected in those listed rights.[44] Of course, *Griswold* also struck down a law that American society at large had regarded as outdated (and potentially unconstitutional).[45] As such, the doctrinal modality suggests that the discovery of Ninth Amendment rights should be tied to general American custom and other constitutional provisions.

In this way, the Ninth Amendment is a sort of constitutional rights prophylaxis, in that it helps protect the other rights listed. Thus, the doctrinal modality suggests one more thing about the nature of the Ninth Amendment

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42. BOBBITT, *supra* note 13, at 13.

43. This was most famously done in *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

44. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (stating "Without those peripheral rights, the specific rights would be less secure"); *Id.* at 482-86 (discussing the interplay between various listed rights); *Id.* at 484 (specifically mentioning the Ninth Amendment as a basis for finding unwritten rights); *Id.* at 486-87 (Goldberg, J., concurring) (stating the right to privacy "is supported by numerous decisions of this Court…and by the language of the Ninth Amendment.").

45. Indeed, two Justices dissented in *Griswold* but maintained that the law was "uncommonly silly." *Id.* at 527 (Stewart, J., dissenting).

and its use of custom or constitutional text, by reference to another "prophylaxis" clause—the Ninth Amendment's textual cousin, Section 1 of the Fourteenth Amendment.[46] In Fourteenth Amendment jurisprudence, Congress can "enforce" the guarantees of Section 1 of the Fourteenth Amendment through prophylactic legislation, if that enforcement is congruent and proportional to the constitutional rights thereby protected.[47] In making this inquiry, courts are to consider the nature of the right at issue and the history of constitutional violations adduced by Congress.[48] The more fundamental the right is deemed to be, the more leeway Congress has been allowed in its enforcement.[49] Moreover, the more widespread the record of Constitutional violations, the less specific the right at issue needs to be.[50] Therefore, that both the Ninth and Fourteenth Amendments contain prophylactic characteristics suggests that the more widespread and accepted the unwritten right is, the less specific it needs to be. Further, the more closely linked the alleged right is to more fundamental rights, the more likely it is protected by the Ninth Amendment

E. The American Ethos Modality

The American ethos modality or "ethical modality" derives rules from the moral commitments of the United States that the Constitution expresses.[51] This type of argument occurs in some substantive due process cases and often reflects the constitutional principles of promoting liberty and limiting government overreach.[52] This modality walks in tandem with the historical and structural approaches discussed above. For example, some of the ethos is derived from history, and some can be derived from the structures of the Constitution.

The American ethos not only acknowledges the existence of constitutional rights outside those expressly mentioned but also suggests how those rights ought to be identified. We, as Americans, love the idea of finding unwritten rights—even if doing so may kill us.[53] We treat our

46. U.S. CONST. amend. XIV, § 1.
47. Tennessee v. Lane, 541 U.S. 509, 520 (2004).
48. U.S. CONST. amend. XIV, § 5; *Lane*, 541 U.S. 509.
49. *Lane*, 541 U.S. at 522-25 (noting, in part, Title II of the Americans with Disabilities Act protects more fundamental rights than Title I. Thus, Title II is constitutional prophylactic legislation, while Title I was not).
50. *Id.* at 523-24 (discussing how more pervasive issues call for wider prophylactic legislation and what is inappropriate in one context may be appropriate in the other).
51. BOBBITT, *supra* note 13, at 13.
52. Obergefell v. Hodges, 576 U.S. 644, 663-65 (2015).
53. A perfect example of this can be seen in the "mask" controversy. *See* Jamal Greene, *Op-Ed: Americans Are Obsessed With 'Rights.' In the Pandemic, That's Killing Us*, L.A. TIMES,

Constitution as if it were the sole expression of the natural or divine law.[54] We frame ideals in terms of "constitutional rights" rather than human rights.[55] We acquiesce to the judicial decisions that protect unwritten rights—though to some opinions more than others.[56] Popular opinion pieces have argued that the Ninth Amendment protects unwritten rights.[57] And, at times, we will say some things are constitutional rights even if the Supreme Court has never held them to be constitutional rights. Indeed, by strong popular opinion, the American people have made a "constitutional canon" that includes items not explicitly mandated by the Constitution itself but are widely regarded as ratified similar to the Constitution.[58] This love of unwritten rights reflects a national ethos of limited government—we like these extra unwritten rights, in part, *because* they limit the power of government.[59]

In contrast, part of the American limited government ethos is this: we like democracy. We like being able to decide governmental issues without those in government merely dictating rules to us. For this reason, when the courts go too far, we claim that they are usurping democracy or acting as super legislators.[60] In short, our ethos of limited government must also limit what courts can do. For example, some say that ignoring the Supreme Court could undermine the rule of law, but how can we have a rule of law when those who interpret it act lawlessly? The need to limit the power of judicial discretion in discovering unwritten rights is especially pronounced because

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https://www.latimes.com/opinion/story/2020-07-02/coronavirus-masks-rights-refusals-law (last visited Nov. 27, 2020). Even though growing science was showing that masks reduced Covid transmission, people were asserting that mask mandates violated people's rights.

54. Warden, *supra* note 31, at 653 ("…and instead of merely adopting the natural law, it has become the natural law.").

55. One need only drive in many American cities to view bumper stickers declaring "save our constitution." It is "apparently revered" and is thought to be part of "American history and a timeless ideal, seemingly outside the flow of political events and social change." Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2122 (1996).

56. A detailed discussion of this subject can be found in Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948 (2009).

57. *See e.g.*, David John Marotta, *The Ninth Amendment: The Value of Our Unenumerated Rights*, FORBES (Dec. 16, 2012, 10:19 AM) https://www.forbes.com/sites/davidmarotta/2012/12/16/the-ninth-amendment-the-value-of-our-unenumerated-rights/; James Knight, *Americans Should Remember the Ninth Amendment*, CATO INST. (Nov. 20, 2019), https://www.cato.org/publications/commentary/americans-should-remember-ninth-amendment.

58. I have elsewhere argued that such is the case for one of Justice Ginsburg's disability rights opinions. *See generally* Derek Warden, *Canonizing Justice Ginsburg's* Olmstead *Decision: A Disability Rights Tribute*, 2020 U. ILL. L. REV. ONLINE 293 (2020); Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011) (discussing The Gettysburg Address, The "I Have a Dream Speech," The Declaration of Independence, and more).

59. Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 740 (1980).

60. Scholars have expressly held this point with the identification of unwritten rights. Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classification,* 80 GEO. L.J. 1787, 1799 n.55 (1992) (collecting authorities).

constitutional decisions are so difficult to overrule and simply ignoring them is met with the aforementioned charges of undermining the rule of law. Therefore, whatever method one uses to discover unwritten rights must respect what the people of the United States do, while also respecting the text of the Constitution. This theory is, of course, not controversial—virtually no one wants a government by judiciary.[61]

F. The Prudential Modality

The "Prudential modality" aims to balance the costs and benefits of a particular rule.[62] This type of reasoning is common in the standard statutory interpretation rule that clear language is to be applied as written, unless doing so would lead to absurd results.[63] In other words, clear text should be ignored if its result would be very imprudent. If concerns over prudence govern clear statutory text, it follows that such a principle should also help with the application of unclear constitutional rights and provisions.

The benefits of Ninth Amendment protection of unwritten rights are clear: it would allow the Constitution to expand to protect rights unknown at the time of the framing and help increase American enthusiasm and reverence for the Constitution. For example, expanding constitutional rights to fit modern problems makes the Constitution more relevant to the people. If the Constitution is to remain a functional document, it must maintain its relevance to the people's lives. The costs are that such a rule does not in and of itself tell courts how they should discover these rights. This alone could lead to a feeling that the courts are arbitrarily creating legal rules to impose their own policy preferences; and, thereby, would undermine the rule of law, democratic legitimacy, and the American populace's faith in the judiciary as an independent decision maker.[64]

Thus, the prudential modality shows there must be another aspect to the proposed rule that could mitigate these concerns. That limiting aspect would be as follows: though the Ninth Amendment does protect unwritten rights, the courts should look to the custom and practices of the people, as well as to the text of the Constitution, to examine whether a proposed right reflects

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61. I say virtually, because there are those who wish for the Supreme Court to act as a continually sitting constitutional convention. *See generally* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

62. BOBBITT, *supra* note 13, at 13.

63. *See e.g.*, LA. CIV. CODE ANN. art. 9. Even originalists seek to avoid absurdity, though such a rule conflicts with their professed ideology. *See* Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91, 114 (2019); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

64. Famously, this is the type of attack common on cases such as *Lochner v. New York*, 198 U.S. 45 (1905).

both written clauses and the customs of the people. Such a practice could constrain the judiciary, keep the Constitution relevant to the people it serves and guides, and help to maintain some republican-democratic legitimacy. It could also mean the creation of a guide for lower courts in the decision-making process without the need for the Supreme Court to continuously make *ad hoc* decisions regarding the existence of unwritten constitutional rights.

G. The Test for the Ninth Amendment

The above discussion made numerous references to the text of the other rights in the Constitution, the need for popular support, and the potential reference to statutes and customs. I identified concerns that a dead Constitution could undermine the rule of law, just as much as a method of interpretation too far removed from the text of the Constitution itself. I suggested that the more widely accepted a right is, and the more it relates to other fundamental rights, the less specific that right must be.

Therefore, based on the foregoing discussion, the modalities of constitutional interpretation show that, not only does the Ninth Amendment protect unwritten rights; but the modalities also demonstrate that such rights should be protected under the following rubric:

> ***First.*** A plaintiff must allege the existence of an unwritten constitutional right;
> ***Second.*** One analyzing whether the Ninth Amendment protects this right must determine whether it is reflected within principles, texts, or doctrines associated with the various other provisions of the Constitution. The more the proposed right can be said to enforce or relate to fundamental rights, the less specific it needs to be; and
> ***Third.*** The right must be popularly ratified by the American people—either in our history or traditions or in widespread current accepted practice, such that the proposed right can be said to have gained customary constitutional support. Such was the case in *Griswold*,[65]

65. Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing right to privacy by reference to other various provisions of the constitution, and the history in American law in respecting private choices). Further, so accepted is *Griswold* that the majority in *Dobbs*, which overturned a right to abortion, cited *Griswold* approvingly. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256 (2022).

Miranda,[66] and *Dickerson*[67]—they were popularly supported by the body politic of the United States both before and after their "discovery," and they helped protect other unwritten rights. The more widespread acceptance the right has enjoyed, the less specific it must be. Here, it would be helpful if the right already exists in statutes, regulations, or policies.

III. INCORPORATION AGAINST THE STATES

A. Incorporation Against the States Generally

This part considers how rights are "incorporated" against the states, once they are discovered in the Ninth Amendment. "The Bill of Rights, including the [Ninth Amendment], originally applied only to the federal government."[68] However, after the Civil War and the adoption of the Fourteenth Amendment, these provisions were incorporated against the states via the Amendment's Due Process Clause.[69]

Once a controversial topic, incorporation has become mainstream.[70] At present, most provisions of the Bill of Rights are now applied to the states to the same extent as they are applied to the federal government. As discussed more fully below, there has been a great deal of controversy over the exact method of incorporation, however. Some justices wish to have the Privileges or Immunities Clause of the Fourteenth Amendment incorporate the whole Bill of Rights against the states. Others argue that the Due Process Clause should apply the whole Bill against the states. In some cases, where the Court has discovered a new unwritten right, there has been no discussion whatsoever of incorporation.

As such, there are, in my view, three possible means of incorporating these Ninth Amendment rights against the states. The first is automatic incorporation. The second is incorporation by the Fourteenth Amendment's Due Process Clause. The third is incorporation by the Privileges or Immunities Clause.

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66. Miranda v. Arizona, 384 U.S. 436 (1966) (in holding that police must read various rights to a suspect or suffer exclusion of evidence, and that questioning must stop if the suspect requests and attorney, the Court also noted that such a requirement protects the right against self-incrimination, and that it had a long-standing support in Anglo-American legal history).

67. Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting that *Miranda* warnings have become part of our national culture).

68. McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

69. *Id.* at 763.

70. *Id*. at 754-66 (discussing complex history and controversy surrounding incorporation).

B. Automatic Incorporation of Ninth Amendment Rights Under Griswold

The first method of incorporation involves automatic incorporation of the Ninth Amendment. It springs from the definitive Ninth Amendment case—*Griswold v. Connecticut*.[71] There, the Supreme Court recognized an unwritten privacy right of married couples to use contraceptives;[72] and that decision (majority and concurring) relied on the Ninth Amendment in doing so. Absent from the majority discussion is any mention of incorporation. Because there was no discussion of incorporation, it appears from *Griswold* that where an unwritten right is derived from the Ninth Amendment—or from reference to the other amendments—that right is automatically incorporated against the states. This would seem to follow logically from the simple fact that many of the other rights discussed by *Griswold*, from which the unwritten right was discovered, were already held against the states.[73]

C. Incorporation by the Fourteenth Amendment's Due Process Clause

The second method of analysis for incorporation is "selective incorporation" of the Bill of Rights against the states through the Fourteenth Amendment's Due Process Clause.[74] Though the phrase seemingly limits the rights incorporated against the states, the doctrine has now effectively incorporated the entire Bill of Rights against the states. Indeed, Justice Thomas suggested that it is time the doctrine fully incorporated the entire Bill against the states.[75] Nonetheless, as most scholars know, the Court has used various tests for determining whether a right is incorporated against the states, such as its being fundamental to our scheme of ordered liberty or deeply rooted in our history or traditions.[76] Whatever test is used, it seems almost necessary that the unwritten Ninth Amendment rights are held against the states. Those rights would be found by reference to rights already incorporated against the states and supported by widespread social understanding.

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71. Griswold v. Connecticut, 381 U.S. 479 (1965).
72. *Id.*
73. *Id.* at 482-85 (discussing cases involving the First, Fourth, and Fifth Amendments).
74. *McDonald*, 561 U.S. at 763.
75. *Id.* at 805 (Thomas, J., concurring).
76. *Id.* at 759-66 (majority opinion) (discussing history of incorporation doctrine).

D. Incorporation through the Privileges or Immunities Clause of the Fourteenth Amendment

Finally, I come to the Privileges or Immunities Clause theory of incorporation of the Bill of Rights against the states. Most scholars now agree that it was the Privileges or Immunities Clause that the post-civil war drafters intended to hold the Bill of Rights against the states.[77] Moreover, as noted above, many, if not most, scholars agree that the Ninth Amendment, a provision of the Bill of Rights, should protect unwritten rights.[78] It would seem that the Court's acceptance of the original understanding of the Privileges or Immunities Clause (and, for that matter, the original understanding of the Ninth Amendment as a protector of unwritten rights) would likewise incorporate the rights discovered through the Ninth Amendment against the states.

Therefore, for any of the above three reasons, various rights discovered in the Ninth Amendment should be considered incorporated against the states.

CONCLUSION

For many generations, the Ninth Amendment has been forgotten. Only at certain points in our history has it begun to glow with potential. But, at each turn, that potential has fizzled out. Part of the issue with this Amendment has been a lack of clarity as to how courts might protect unwritten rights through the Ninth Amendment. However, by applying the modalities of constitutional interpretation that our society has accepted as legitimate, this article has (1) maintained that the Ninth Amendment does protect unwritten rights and (2) suggested a rubric that courts may use to determine whether the Ninth Amendment protects a proposed unwritten right. Thus, the Ninth Amendment's long slumber should finally come to an end.

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77. *See, e.g.*, Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1052 (2011); Ryan D. Shaffer, *Jurisprudence of Retreat: The Supreme Court's (Continued) Misreading of Reconstruction*, 99 N.Y.U. L. REV. 1856, 1863-66 (2024).

78. *See generally supra* text accompanying note 20.