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CHAPTER 1

The Path to Judicially Enforceable Unenumerated Rights

Baby Ninth Amendments did not emerge fully formed from a constitutional version of Zeus's head. A long series of historical building blocks were required before the idea of protecting unenumerated rights with an "etcetera clause" came into being. The Baby Ninths not only first needed the federal Ninth Amendment to survive spirited debate and ratification, but a series of antecedents had to be invented before they could make their way into the American constitutional milieu. This included state constitutions, judicial review, and the emergence of a mysterious set of Tenth Amendment siblings.

The Invention of State Constitutions and Declarations of Rights

States have had constitutions since before the U.S. Constitution was even a twinkle in James Madison's eye. The oldest still-operational written constitution in the world is Massachusetts's of 1780,[1] largely drafted by Madison's co-Founder John Adams. Indeed, even before the thirteen colonies declared their independence from Great Britain in July 1776, some of the states already had constitutions. New Hampshire adopted the first state constitution in January 1776.[2] Many others soon followed in the lead-up to the Declaration. Most notably for the present story,

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Virginia adopted its first constitution in June 1776, including its "Declaration of Rights," arguably the nation's first bill of rights.

"Arguably" because written statements of fundamental law were nothing new for these state framers and their English ancestors. And some English fundamental law not only applied in England, but in Great Britain's thirteen colonies. First among them would have been Magna Carta, the attempt by English nobles to restrain the tyrannical King John in 1215. The 1215 version was quickly invalidated, but parts of future versions of Magna Carta were law in England from the thirteenth century through 1776 (and, indeed, through today).[3] And there were many other examples. One important one was the English Bill of Rights of 1689 (also often called the "Declaration of Rights"). In the eyes of most (at least those who were not "Jacobite" usurpers), it helped settle the legitimacy of the Glorious Revolution of 1688, including the supremacy of Parliament over the Crown, and declared a number of liberties that look very familiar today.[4] These include the rule against excessive bail, excessive fines, and cruel and unusual punishments; the protection of subjects to be free to petition the government without fear of reprisal; and the right to keep arms for defense (well, for Protestants at least).[5]

In turn, Magna Carta and other protections of English law applied to the colonies through various royal charters. For example, the First Charter of Virginia, issued in 1606 before English colonists had even arrived at Jamestown, declared that the colonists and their descendants "shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our [i.e., the King's] other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions."[6] Thus, a Virginian colonist could later assert his rights under Magna Carta in Virginia as though he were back in England itself. Later in the colonial period, documents such as the Petition of Right of 1628 and the Bill of Rights of 1689 would also apply to the colonists through similar language in the various charters (although their legal status as enforceable law is a different story).

There are many other examples of documents that look a bit like "constitutions" in world history. The revolutionary generation would know the story of the Twelve Tables of the Roman Republic and the republic's constitutional order.[7] They also would have been familiar with the Hungarian Golden Bull of 1222, which, along with Magna Carta, was one of the first examples in medieval Europe of placing written constitutional limits on the executive.[8] And, much closer to home, they would know the colony of Connecticut's adoption, in 1639, of the Fundamen-

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tal Orders. This document structured the legislative, executive, and judicial institutions of the colony.[9] As Connecticut was not an officially recognized colony at that point, the Fundamental Orders are notable in not mentioning the English Crown, but instead asserting their legitimacy as based on God and the people.

All these constitutional precedents influenced the revolutionaries of 1776. But at least for those that supposedly applied to them—such as Magna Carta and the English Bill of Rights—there were many imperfections to overcome. Most of these "parchment barriers" largely lacked what we today recognize as inherent in a written constitution. They often only restrained one set of governmental actors and could be changed through the ordinary lawmaking process. Magna Carta protected against the king's abuses, not Parliament's, and was first adopted before Parliament in any modern sense had come to be. Its later manifestations (including those that survive in law today) were technically just statutes that a majority vote of Parliament could repeal at any time.[10] The same was true of the English Bill of Rights; it was an important document, but one that future Parliaments could repeal at will. Furthermore, the colonial charters were only binding on the king, yet many of the colonists' grievances lay with Parliament, not with the Crown.[11]

What many early state constitutions did was establish rules for the administration of their newly independent governments that could not be changed like an ordinary "law" could be. They were a higher law that only the sovereign could amend or abolish. And in the view of these framers, the "sovereign" was not any one person—such as King George III—or even Parliament or the state legislature. It was "the people" themselves. And for "the people" to manifest their will, it was best if it was done in a certain way: through a constitutional convention.[12]

George Mason and the First Unenumerated Rights Clause

Virginia's constitutional convention of 1776 thought it prudent to not only set out rules for how its government was to operate free from royal direction, but to declare rights that its citizens enjoyed vis-à-vis that very government. Given the task of drafting a Declaration of Rights for the convention, George Mason enumerated dozens of liberties in his famous draft, from freedom of the press to the right to confront one's accuser in a criminal prosecution.[13] Section One was especially expansive in its application. After a few changes in the full convention it stated:

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> THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[14]

These words became influential, as framers in other states picked them up and incorporated them into their budding declarations of rights. And most readers will notice that Mason's words sound a lot like the second paragraph of the Declaration of Independence itself, which famously declares that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This is not a coincidence. Thomas Jefferson took this fresh-off-the-press language from his colleague when he drafted the Declaration a few weeks later.[15]

Mason's invention, and its open-ended language, demonstrated the range to which a state's declaration of rights could go to protect liberty. The Virginia declaration included a number of fairly specific rights, such as freedom of religion ("all men are equally entitled to the free exercise of religion, according to the dictates of conscience") and civil jury trials ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.").[16] These are helpful if you want to practice your religion or demand a jury. But not so much in other areas of life. No one who wants to assert a right to garden, for example, would realistically turn to these for protection. But the expansive language of Section One leaves a lot of room for the imagination. What does "pursuing and obtaining happiness and safety" mean? Does it include *anything* that makes one happy, and therefore protect against any law that inhibits pursuing and obtaining happiness? What about "the means of acquiring and possessing property?" Does that encompass the right to work an occupation? Because, after all, most of us need to work in order to "acquire" property. What about making stamp collections? They are "property" after all.

The story of Mason's Section One and all its many offspring (there are dozens of states today with a version of it in their own constitutions) is not the subject of our story here, although you can read about it in a fascinating article coauthored by Professor Steven Calabresi, who christens the clauses "Lockean Natural Rights Guarantees" after the natural rights philosopher John Locke.[17] But it is raised here to demonstrate

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that the idea of an expansive—arguably expansive enough to count as an "etcetera clause"—rights-protecting provision in a constitution was not novel by the time the Ninth Amendment came to be, and certainly not by the time the Baby Ninths were born. If the idea did not exist before Mason's draft, it certainly was a possibility afterward.

Declarations of rights in state constitutions grew popular after Virginia's example. By 1780, eleven of the thirteen original states (plus Vermont) had constitutions (Connecticut and Rhode Island would wait until well into the nineteenth century to adopt one). And by 1784, seven of those eleven (again, plus Vermont) had declarations of rights as part of their constitutions or adjacent to them.[18] Their popularity would weigh on the minds of "the people" when they were soon called upon to adopt another constitution *without* a bill of rights.

The Framing of the Ninth Amendment

With more than ten years of state constitutional experimentation under their belts, in 1787 the men who would become the framers of the U.S. Constitution met in Philadelphia to form a more perfect union. As the summer wore on, their tasks primarily were devoted to what the powers of the new federal government would be and how those powers would be divided among its branches. They gave little consideration to issues of individual rights,[19] unlike what had happened when many of the same framers had drafted their state constitutions over the previous eleven years. During the midst of the convention a call was made to add a bill of rights to the emerging constitution, but the motion failed amid the attendees' various pressures.[20] The delegates did, however, insert a few rights-protective clauses in the document's text, including guarantees against ex post facto laws, bills of attainder, prosecutions based on family ties, that is, "corruption of blood," and (applied to state governments only) a protection of "the obligations of contracts." Then, in the last days of the convention, the subject of a bill of rights was raised again. Perhaps largely from fatigue and a wish to present their almost-complete blueprint for a federal government to the people, the delegates voted the proposal down, even though George Mason (probably thinking of his Virginia handiwork) asserted they could bang a list out in just a few hours.[21]

But the issue of a constitutional list of rights (whether called a "declaration" or a "bill") was only to grow in importance when the draft constitution went to the states for ratification.

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One of the biggest objections from those who opposed the document—the Antifederalists—was that it lacked a bill of rights.[22] Emphasizing the seemingly expansive reach of the powers given to the new government, the Antifederalists argued these powers could infringe on basic liberties such as the freedom of the press.[23]

The Constitution's proponents—the Federalists—countered that no bill of rights was needed because the new federal government was one of limited, enumerated powers.[24] The government did not have the power, for example, to limit the freedom of the press because such a power was not enumerated.[25] In making this argument, Federalists sometimes contrasted the proposed federal government with state governments, which were understood to have general powers.[26] A bill of rights made much more sense, argued the Federalists, in a state constitution because there the government's powers are so broad that fundamental liberties might be infringed. Enumerated powers themselves, however, protected the people's rights from the new federal government, again, because it stated what the central government was allowed to do, with the presumption that it could do no more than that.[27] The people had delegated certain powers to the new federal government, but had only delegated a few well-defined ones, none of which endangered the people's rights. Further, if a bill of rights were added to the Constitution, it would only protect a handful of rights, and it might imply that the federal government *does* have the power to infringe on unnamed ones.[28] After all, given the infinite number of actions people can take, no bill of rights can name them all. The right to wear a hat was even given as an example in one debate.[29]

The Antifederalists did not buy these arguments for several reasons. Two stand out.

First, the powers granted to the new government seemed broad. This was especially true in light of the Necessary and Proper Clause, which added flexibility to the enumerated powers of Article I, Section 8.[30] With the growth of federal power since the New Deal, the Antifederalists seem to have definitely won the argument on that point. Given how broad the power to regulate interstate commerce has been interpreted,[31] it almost seems silly to think that under that same understanding Congress's power does not also reach any subject protected by the Bill of Rights (such as the interstate—or intrastate—sale of books).

Second, the original Constitution itself actually did contain some rights, such as the prohibition on bills of attainder.[32] If there truly was a

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fear that the federal government's powers would be read to intrude upon rights not enumerated, then that fear already existed due to the handful of rights in the original text. Therefore, the Antifederalists retorted, an additional bill of rights could hardly make things worse.[33]

In the state ratifying conventions where the Constitution went to receive the states' approval, many delegates voted to accept the Constitution, but only after recommending amendments for the new Congress to adopt. Several states submitted these suggested changes. They included protections for such things as freedom of the press, religion, and trial by jury, substantive and procedural rights that in some cases eventually made their way into the first eight amendments to the Constitution.[34]

But there were other suggestions that sought to clarify the federal government's powers and to try to prevent the argument the Federalists feared: a limited set of rights that nullified other rights and/or expanded federal powers.[35]

Among those suggestions were several from the Virginia ratifying convention. It proposed twenty clauses to serve as a declaration of rights and twenty other clauses to limit the federal government's power. The seventeenth suggestion to the latter set of clauses read as follows:

> 17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.[36]

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

> The exceptions, here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.
>
> The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively.[37]

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These were obviously influenced by Virginia's suggested Amendment Seventeen.[38] They were referred to a select committee in the House, which left the draft of the eventual Tenth Amendment unchanged, but edited quite a few words in the eventual Ninth Amendment. After the committee was done with its edits the now Ninth Amendment read as it does today, except it had a "this" instead of the first "the:"[39] "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Both draft amendments later changed in the Senate to their present versions, with the only substantive difference being the addition of "or to the people" in the Tenth.[40] They, and the rest of what came to be known many years later as the Bill of Rights, were then ratified by the requisite number of state legislatures over the next two years.

What Did the Ninth Amendment Mean When It Was Adopted?

That is the story of how the Ninth Amendment came to be. Scholars agree that these things happened. What the Ninth Amendment actually "meant" at the time, however, is a very different matter. There are a number of different arguments for what the Ninth Amendment meant at the time it was adopted, that is, what its "original meaning" was. Professor Randy Barnett at one point helpfully organized them into five broad models.[41] Since Professor Barnett categorized these, an important sixth model has been put forward by Professor, and former judge, Michael McConnell. All six are briefly outlined here. Further, although the focus of this book is on the "originalist" understandings of the Ninth, we will look at a couple of nonoriginalist points of view as well.

First, however, a brief word on what is meant by "original meaning."[42] The value of "original meaning" as a subject of constitutional interpretation has become an issue of rabid interest over the past few decades, and it shows no signs of abating as a crucible of controversy. There are quite a few shades of "originalism," and fans and critics of it from both left and right. Some think that whatever the "original meaning" of a provision of constitutional text is, that is how courts should interpret it. Others—often referred to as "living constitutionalists"—might think that what the text meant at the time it was adopted is an interesting question of history, but should not affect in any determining way how we interpret the provision today. Still others are all over the map in between. Whether or not one thinks it is a valid, or the only, method of constitutional interpreta-

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tion, the takeaway for present purposes is that "original meaning"—or more exactly, "original public meaning"—means the meaning that language would have to the general public at the time it was produced. Thus, the "original public meaning" for language written in 1787 would be what a member of the general public would have understood that language to mean at that time.

Now to the models of the Ninth Amendment's original meaning. The first model of what the Ninth Amendment might have meant when it came into being is the state law rights model. Under this model, the Ninth Amendment simply tells us that rights enjoyed under state law "continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."[43] The Ninth Amendment does not protect these rights from the federal government, it simply says the rights "continue in force" until changed or overridden. For example, state laws regulating the formation of contracts continue in force after the adoption of the Constitution, but might be pre-empted by federal legislation in the future.

The second model for the original meaning of the Ninth Amendment is the residual rights model. Here the Ninth Amendment prevents a specific argument: that Congress has broader powers than it otherwise would have if enumerated rights had not been placed in the Constitution.[44] Under this view, it could be supposed, for example, that because there is a prohibition on violating the freedom of the press, that means Congress actually would have a power to regulate the freedom of the press if it were not for the First Amendment. This would then imply that Congress has additional, unenumerated powers. Under this model, however, the Ninth Amendment makes unavailable that particular argument.

The third model, the individual rights model, is that the Ninth Amendment tells us that just because there are enumerated rights in the Constitution does not mean that there are not other rights, and that those rights should not be "denied or disparaged" just because they are not enumerated.[45] Those rights receive *constitutional* protection because if they did not they would be "denied or disparaged" simply because they were unenumerated. What those rights *are* is a different question that scholars then subdivide themselves into. Libertarians, such as Randy Barnett, believe economic liberty is a protected unenumerated right, but that positive rights such as the right to an education are not.[46] Some left-of-center scholars, such as Dan Farber (who we should note is not him-

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self an originalist), believe some negative rights are protected (although not economic liberty) but also that some positive rights, such as the right to an education, are too.[47] We will wade into these issues, in the context of Baby Ninth Amendments, in chapter 6.

The fourth model, the collective rights model, believes the amendment is a rule of construction that does protect rights, but collective rights of people in the states. A foremost example of such a collective right, put forward by Professor Akhil Amar, is the right of the people to alter or abolish their government.[48] Another is the right of a state's body politic to choose the policies it wants to adopt free from federal government interference.[49]

The fifth model is the federalism model. It is in some ways the flip side of the residual rights model. Here the Ninth Amendment works with the Tenth Amendment to limit the federal government to a narrow reading of its enumerated powers. Instead of fighting against a conclusion that the federal government has general, unenumerated powers, the federalism model has the Ninth Amendment fighting against a conclusion that the federal government has broad enumerated powers.[50] In other words, it fights against pretty much exactly how the post–New Deal Supreme Court has interpreted the Commerce Clause, allowing just about any regulation that has anything to do with commerce of any kind, which is basically any regulation.

The sixth model, that of Professor McConnell, pays close attention to the use of the word "retained" in the Ninth Amendment. McConnell argues the Ninth was adopted with the backdrop of the state of nature theory of philosopher John Locke. Under Locke's view—recognized as influential at the time of the American Revolution and the Constitution's framing—people have "natural rights" in the state of nature, the theoretical mode of living before people ever came together to form a government and establish civil society.[51] People discover that it benefits them to give up *some* of their rights in exchange for creating a government that will then allow them to live in greater security and achieve greater prosperity. Thus they form a society where they give up rights, such as the right to punish others for wronging them, and turn those rights over to their collective body, the government. But they by no means give up all natural rights. Those rights that they do not relinquish they "retain."

According to Professor McConnell, it was believed at the time of the framing of the Ninth Amendment that retained natural rights were protected, but that the government could infringe on them if the lawmaker—such as Parliament—explicitly made clear it was doing so.

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This amounted to a rule of construction: courts were to read a statute as not infringing on retained natural rights unless it was clear that was its intent. When the Bill of Rights was adopted, some of those retained natural rights became constitutionalized; they were now protected *even if* Congress was clear it wanted to infringe them. For McConnell, the purpose of the Ninth Amendment is to make clear that just because some retained natural rights (and a few non-natural or positive rights, such as the right to a jury trial) are raised up to the constitutional level does not mean that other retained rights are suddenly meaningless. Instead, the Ninth Amendment tells us they have the same protection they had before the Bill of Rights was adopted: presumptions of liberty, but not constitutional protections of liberty.

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

As is discussed later in this work, whichever view of the Ninth Amendment itself is right, the *only* originalist view that makes sense for Baby Ninth Amendments in state constitutions is the individual rights model. As we shall see, when that same language is found in the text of a *state* constitution, most of the other readings of the amendment's language do not make any sense. For example, states have general, not enumerated, powers, thus arguments about enumerated powers are beside the point. In addition, there is no sovereignty to share with another level of government. Cities and counties might have charters, but they are not sovereign, as the states are understood to be. Thus, there is no federalism problem of dual sovereignty to deal with. Further, although a fascinating application of Enlightenment natural rights theory, Professor McConnell's view is completely absent in later discussions of Baby Ninths, diminishing its status as the original meaning of them, even if he is right about the Ninth Amendment itself. Therefore, whatever one's views on the Ninth Amendment, when reviewing the history of how the Baby Ninths came to be, remember that asserted meanings of the Ninth Amendment itself do not always map well onto the Baby Ninths.

Other Than Originalists

While the focus of this book is on originalist understandings of the Ninth Amendment and of the Baby Ninths themselves, it is worth spending

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a brief digression here on other "nonoriginalist" views of the Ninth Amendment so we have a better idea of how it is seen. One such view is that of Professor Laurence Tribe. He thinks the Ninth Amendment is important, but only as a reminder that the fact that a right is not enumerated is not a reason to conclude it is not constitutionality protected. In this way he is essentially in league with the originalist proponents of the individual rights model, although not entirely and only in a general sense. He argues that the Ninth Amendment does not *itself* protect rights, but prevents the argument that a right is not protected because it is not enumerated:

> For, read properly, the ninth amendment *creates* no rights at all. There are *no* "ninth amendment rights" in the sense in which there are, for example, first amendment rights or fourth amendment rights. That there are individual rights fully derivable from no single provision but implicit in several, or in the structure of the Bill of Rights as a whole, is a proposition implicit in the ninth amendment. But that amendment is not itself the *fount* of any such rights, and it in no way obviates the need to argue that the Constitution does indeed impose upon government the particular limitation for which the advocate contends.[52]

Thus the Ninth Amendment itself does not protect a right, but tells us not to *not* find a right in the Constitution just because it is not specifically enumerated. The right to privacy still needs some kind of constitutional hook, although that hook might be the Due Process Clause of the Fourteenth Amendment, for example, even though the clause does not mention "privacy." In interpreting that clause, and other clauses, we should be mindful of their more expansive interpretations.

Meanwhile, Professor Sanford Levinson takes a modest view of the Ninth, which he also amusingly—and correctly—calls "the stepchild" of the Constitution.[53] After weighing various interpretations he suggests that using the Ninth as a kind of "remand" device might be in order. Under this idea, the courts would apply a kind of "suspensive veto" to some laws that seem to offend some kind of long-protected liberty and where it seems there was not a proper legislative assessment on the offending law's merits.[54] The legislature can then keep the law after "a sober second look."[55] Levinson does not argue that this *should* be the interpretation of the Ninth Amendment, only that it might be worthy of serious consideration as a way to operationalize the amendment's reference to unenumerated rights.

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Finally, perhaps the most famous view of the Ninth Amendment is the only one ever seriously explored at the United States Supreme Court, Justice Arthur Goldberg's view as set forth in his concurrence in *Griswold v. Connecticut*. That case concerned a challenge to Connecticut's ban on the use of contraceptives, specifically in the context of married women trying to acquire them. The majority opinion by Justice William O. Douglas, in a famously imprecise passage, said "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" and that from those penumbras and emanations the Court could locate a right to marital privacy that the contraception ban ran afoul of.[56] Justice Goldberg, joined by two other justices, wrote separately to say that while he agreed with the Court's ruling, he thought its decision to protect the right to marital privacy was better anchored in the Ninth Amendment. Although the Ninth did not directly protect the right (given that the Ninth was not a part of the Bill of Rights that had been found to apply to the states), Goldberg argued it nevertheless told the Court that there were other rights beyond just those in the Constitution that were protected.[57] And on the question of how to figure out what rights those other rights were, Goldberg, in a manner almost as imprecise as Justice Douglas, claimed we should look to our traditions and "conscience" as a people for which liberties are "fundamental."[58] Applying this test to Connecticut's contraception ban, he thought it failed and was unconstitutional.

In later unenumerated rights cases the Supreme Court has, for whatever reason, shied away from Justice Goldberg's suggestion. That has not prevented it from using tests looking to "traditions" and the like for "fundamental rights" worthy of its protection, such as in famous unenumerated rights cases like *Roe v. Wade* (abortion), *Troxel v. Granville* (parents' right to direct the upbringing of their children), or *Lawrence v. Texas* (right of same-sex intimate sexual conduct).[59] But in none of those or related cases has it invoked the Ninth Amendment beyond, at best, a passing reference. Thus, Justice Goldberg's undeveloped but interesting thoughts on the matter are the only more than transitory statements on the Ninth Amendment from the nation's highest court.

The Baby Tenths

Before moving on to how the Ninth Amendment birthed the Baby Ninths, we need to examine a couple of other issues. One, discussed in

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a few pages, is judicial review. Another is a mysterious and even more forgotten sibling of the Baby Ninths, what we will here call the "Baby Tenths." These shadowy figures crystallize the views of state sovereignty, constitutional authority, and constitutional rights that framers in the early Republic held. They are a key to understanding why a bill of rights might be crafted to encompass more rights than just those explicitly stated in one.

After a spring and summer of drafting the Bill of Rights, Congress sent the proposed amendments to the states on September 25, 1789. Meanwhile, Pennsylvania was gearing up for a constitutional convention to redraft its own constitution. The state had been living under its relatively "radical" constitution since it was adopted in the revolutionary fervor of 1776, and after much acrimony had finally come to a place where the elites of Pennsylvania society were about to tame the state's perceived democratic excesses.

The convention appointed various committees to redraft different articles of the previous Pennsylvania constitution, including the article constituting the state's declaration of rights. This committee was appointed on December 10, 1789,[60] and reported a draft on December 23, 1789.[61] The last clause of the new declaration of rights that this committee proposed looked similar to the then proposed amendment we now know as the Tenth Amendment. It read:

> To guard against transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.[62]

It appears that this collection of phrases was first put together in December 1789 at the Pennsylvania convention. The author has found no earlier examples in American constitutions of the "transgressions" or "excepted out" terminology. The language about delegation is, however, similar to the language in the then proposed Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Both speak of how the government the respective constitution concerns has been delegated certain powers. Thus, given the timing of this proposal and the federal Bill of Rights, this language seems at least inspired by the Tenth Amendment itself.

Indeed, the connection between the Tenth itself and this Baby Tenth becomes more apparent when considering the political circumstances at

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the convention. It appears the provision was meant to please Antifederalists as part of a series of compromises between Federalists and Antifederalists in reforming the prior Pennsylvania constitution: "If, as Federalists had argued, the states were the guarantors of individual rights, this statement [the Baby Tenth] would be a further protection against federal encroachments."[63] Today we might ask how this provision in a state constitution could protect against the federal government, especially given the Supremacy Clause of the U.S. Constitution, but it is plausible that at the time this would have been a compromise the two factions settled upon.

Although it seems to have been inspired by the Tenth Amendment, this provision was noticeably changed in a couple of ways. These demonstrate that its Pennsylvanian drafters understood the differences between the federal government and state governments and how those differences called out for different constitutional protections.

First, it refers to "high powers" and "general powers," not enumerated powers.[64] Powers *are* delegated, but those powers are "general" and are also recognized as of a "high" variety. Perhaps "the people" *could* have delegated only certain enumerated powers to the state government, like they have to the federal government, but instead they delegated "general powers." If they had delegated only enumerated powers then the undelegated powers would simply be reserved to "the people" individually, a state of semi-anarchy in a sense.

Second, what are held back from that delegation are not simply powers not delegated—which is what the Tenth Amendment says—but the powers, *any* powers, that intrude upon the rights in Pennsylvania's declaration of rights. This has an echo of the Federalists' now-discarded argument that a federal bill of rights was not needed because the enumerated powers did not include the power to violate fundamental liberties. Here, because the powers are "high" and "general," Pennsylvania's framers recognized there well might be "transgressions" against those liberties. Thus, to protect against any power being used to violate the rights in the declaration of rights, such rights-violating powers are expressly not delegated as part of those "general powers." It is not simply that the constitution affirmatively protects those rights, but that the power to violate them is not given to the state government in the first place. This, in a sense, was an answer to Hamilton's and the Federalists' promise that enumerated powers would not infringe on rights: we will not only spell those rights out, but explain that those powers do not extend to those rights at all. Pennsylvania's framers intended to hold up their liberties with a belt *and* pair of suspenders.

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The Baby Tenth demonstrates a belief in popular sovereignty, something commonly held at the time of the U.S. Constitution's adoption. This view of the legitimacy of government asserts that sovereignty did not reside in the federal *or* state governments, but ultimately in the people themselves.[65] The people can delegate their sovereignty however they wish, either through enumerated powers (à la the federal government) or general powers (à la the states). They could also, presumably, delegate *no* powers to any government and live in complete anarchy. Pennsylvania's Baby Tenth asserts that the people are delegating quite broad powers that are in keeping with how "sovereign governments" generally operate, but that they are safeguarding some of their rights out of those powers. It is also worth remembering that Pennsylvania's declaration of rights contained (both before and after the constitution of 1790) a Lockean natural rights guarantee. Thus it could be argued that the Baby Tenth exempted out of the state's general powers the broad rights that the Lockean provision protected, such as the right to pursue happiness.[66] We will return to this idea in a moment when we discuss the role of judicial review.

The Pennsylvania convention voted to include the Baby Tenth language, and, as the convention continued, the language stayed in the various drafts. Meanwhile, the state legislature ratified what we now call the federal Bill of Rights on March 10, 1790.[67] A few months later, the state officially adopted its new constitution, including the Baby Tenth, on September 2, 1790.[68] The federal Bill of Rights was not actually adopted until December 15, 1791, with the Virginia legislature's ratification.[69]

After Pennsylvania's experience, Baby Tenths grew to be popular among constitution drafters. Conventions in Delaware (1792), Tennessee (1796), Kentucky (1799), Ohio (1802), Indiana (1816), and Mississippi (1817) included similar language in their revised or brand-new constitutions.[70] Often they were a conclusion to a bill of rights, not in a numbered clause but set forth at the end to then exempt out of the state's powers the preceding rights.[71]

At the same time, George Mason's Lockean natural rights guarantee continued to be popular. Versions of it specifying its various expansive protections of the rights to pursue happiness and acquire property had been adopted by seven states by 1818.[72] Therefore, by the early nineteenth century state constitutional drafters had learned to do two things: protect rights broadly through fairly open-ended constitutional language, and exempt rights out of the powers that the people extend to state governments. But some people wanted to take things a little further.

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Judicial Review of Unenumerated Rights

Now that we have heard about the origins of the Baby Ninths' mother and siblings, but before we proceed to their actual birth, we should talk a little bit about how constitutional rights come up in the practical lives of the people and how that was viewed in the early Republic. Although constitutions are supposed to be interpreted and followed by all officers of government, the barrier a constitutional provision places on state actors typically arises in one forum: the courts. This is not to say that legislators, governors, police officers, etc., do not withhold from passing certain laws and abstaining from certain actions because they believe a constitutional provision forbids them. Or that structural provisions regulate the government in a way that no one questions and generally do not get to court, such as the requirement that a bill pass both houses of the legislature before becoming law. But where the rubber usually hits the road, and where the meaning of the constitution is publicly discussed, is in court where a party asserts that a law or an action is unconstitutional.

For the most part, that was as true in the late eighteenth and early nineteenth centuries as it is today. The institution of judicial review, where courts declare laws to be unconstitutional, goes back at least to this period. The absolute latest date where judicial review became a generally recognized tool of government is 1803, with the famous case of *Marbury v. Madison*. There is an incorrect but popular notion, not so much among scholars but among lawyers and the general public, that judicial review was "invented" by Chief Justice John Marshall in that case.[73] But the evidence demonstrates that judicial review in fact goes back earlier to at least the framing of the U.S. Constitution. And arguably, at least as an idea, back to inventive common law judges in England, especially Lord Edward Coke (pronounced "cook"). We'll start this review of judicial review with Coke and then work our way forward to Justice Marshall.

Coke had an astounding career of many different trades.[74] He served as judge, counsel for the Crown, member of Parliament, even court reporter. His biggest long-term impact was his magisterial compilation of the common law, his *Institutes*.[75] That work was the basis for the legal education of two centuries of lawyers—including many of the U.S. Constitution's framers—until William Blackstone's clearer prose (Coke's work was not exactly a page turner) passed it by. But he made many other contributions to Anglo-American law, among them to popularize the ability of judges to stand up to the executive when it violates the law, and perhaps even to Parliament as well.

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When Coke served as a judge, and even as an advocate, he was involved in a few cases concerning the granting of monopolies, typically monopolies the Crown had granted to a favored subject. Examples include tailoring, the mining of saltpeter, the manufacture of playing cards, and the practice of medicine. Several times his cases determined that the monopoly in question was unlawful, enraging the Crown in the process.[76] It should be emphasized that most of these involved the question of whether the Crown itself had the authority to grant the monopoly without Parliament's permission. We would think of these today as administrative law cases: does the executive have the authority to act even though the legislature has not clearly stated it can? But they were still important victories over the Crown that the king did not take kindly to and where the courts defied the wishes of those in power to protect the liberties of the people.

One case in particular, *Doctor Bonham's Case*, arguably (and we need to emphasize "arguably") said something that was much more radical. Whether it actually inspired American ideas about judicial review is debated, and for present purposes it does not matter whether or not it did. But we will briefly review the case because it demonstrates what is at issue when we ask whether a court can defy an act of the legislature.

The case concerned Dr. Thomas Bonham's right to practice medicine. Although trained at both Oxford and Cambridge, when he moved to London the College of Physicians refused to admit him as a member.[77] He then went forward and began practicing in the city anyway. As Parliament had granted the college the power to punish nonmembers who practiced in London, the college had him arrested and imprisoned. Bonham's lawyers argued that Parliament only granted the college the power to prevent malpractice, not simply practicing without a license. Coke agreed, and on this ground Bonham won his case. But Coke went further. He stated that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void." This was arguably dicta—reasoning that is not essential to decide the case—as many critics of the decision have long pointed out.[78] The licensing law did not need to be ruled void as the court also decided it did not apply to Bonham's situation. But even so, it appears to be an assertion that there are some laws that even Parliament cannot pass, laws that are against "common right and reason." In other words, there is a higher law than Parliament and the Crown.

Coke did not elaborate much on what that "common right and rea-

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son" was; England, of course, had no written constitution and so Coke seemed to not be making an argument about anything more than simply the strength of the common law. And, indeed, in the long run, this dicta was ignored by English jurists. It is an odd outlier in the grander evolution of English law toward Parliamentary supremacy.

In the colonies, however, there was a more receptive audience. How much of an impact Coke's dicta had on the Founding generation is a matter of great debate, and its importance can be overstated.[79] It seems to have been modest, most famously influencing lawyer James Otis in his attack on writs of assistance in a Boston trial in 1761.[80] But the overall jurisprudence of Coke and monopolies, both regarding the power of Parliament and the power of the Crown, gave the Founders a primer on the importance of judicial review. The point of retelling Dr. Bonham's story, and Coke's related cases, is not to say that Coke "invented" judicial review. But it is to demonstrate how the idea of judicial review, including judicial review applying a "higher law," was not alien to the framers of the early state constitutions and the U.S. Constitution itself if they wanted to draw inspiration from the past. This is particularly true in the "Revolutionary" times of 1776–1780, when the first state constitutions were adopted. And not long after that time—and the transfer of constitutional authority from one embracing Parliament to one embracing constitutions delegated from the people—judicial review of the constitutionality of duly enacted laws began to occur.

Although constitutional judicial review of statutes was controversial in the early Republic, it was not uncommon. One analysis counted thirty-one times a court held a statute unconstitutional even before *Marbury v. Madison*. "The sheer number of these decisions not only belies the notion that the institution of judicial review was created by Chief Justice Marshall in *Marbury*, it also reflects widespread acceptance and application of the doctrine."[81] Many of these concerned fairly clear examples of a law violating a specific constitutional command. For example, courts in New Hampshire found a 1785 law, the "Ten Pound Act," barring jury trials in actions for less than ten pounds in damages to be unconstitutional because the state constitution required a jury trial in "all suits" without a monetary qualification.[82] This does not mean that courts were aggressive in striking down laws, nor did they not give deference to the government in resolving constitutional disputes, especially when the issue was a close one. But it does mean that judicial review was a not uncommon feature of American constitutionalism by the early nineteenth century, and even in the eighteenth century before the Constitution itself was ratified.

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And in the use of judicial review, there are indications of courts going beyond instances of clear violations of constitutional text, to readings of broad statements of principle or even invocations of natural justice. For example, a 1783 Massachusetts court found slavery to be incompatible with the state's Lockean natural rights guarantee that people are born "free and equal."[83] Another case, in 1793 in Virginia, declared that the state legislature could not discharge debts Virginians owed to British citizens, citing "the law of nature" among other authorities of common justice and going beyond constitutional text altogether.[84]

Thus, while states were adopting new constitutions—including new Baby Tenths—in the late eighteenth and early nineteenth centuries, the possibility that a court would use a constitution's language to find a law or action unconstitutional was by no means unknown. This included open-ended language, such as in Lockean natural rights guarantees, and even no constitutional language at all, as Lord Coke had tantalizingly come close to doing in *Doctor Bonham's Case*. The coming of *Marbury* in 1803 only accelerated this acceptance.

Therefore, if a state were to adopt a provision in its constitution with an open-ended commitment to unenumerated rights, it would be adopted with two things in mind. First, that constitutional provisions, including provisions in declarations of rights, are judicially enforceable and the constitutionality of legislation and other governmental action can be attacked in court. Second, that even when a law is not explicitly in tension with a constitutional provision, the law nevertheless can be declared unconstitutional. These understandings set the foundations for the coming of the Baby Ninths.

The Birth of the Baby Ninths

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

Congress created the Alabama Territory in 1817.[85] The territory soon moved toward statehood, and in 1819 Congress authorized a constitutional convention for the expected new state.[86] After the territory's counties elected delegates, they arrived in Huntsville, Alabama, in July 1819 to draft their new foundational document.[87]

One of the convention's first tasks was to appoint a committee to write

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a draft of the state constitution. It selected a group of fifteen men, chief among them the committee's chairman Clement Comer Clay, a future governor.[88] Of the fifteen, Clay and two others—plus one nondelegate, the territorial governor William Wyatt Bibb—were the resulting draft's "chief architects."[89] The committee was selected on July 6 and issued their draft constitution to the convention as a whole on July 13, after a mere week of constitution writing.[90] And somewhere in those seven days the concept known today as a Baby Ninth Amendment was born. Whether it was Clay, Bibb, or a random member of the committee who volunteered the idea of using the Ninth Amendment as a basis for part of Alabama's Constitution, we do not know. For some reason someone in their drafting room had an idea that had not been implemented in any state constitution up until that point.

The draft state constitution was later changed in some ways by the convention as a whole. It was, after all, simply a starting point. But the draft declaration of rights, Article I of the draft constitution, met little resistance in the convention.[91] Article I was largely modeled after next-door Mississippi's constitution of 1817. If one sets the declaration of rights from both documents side-by-side they are substantially identical, with only eight of Alabama's thirty provisions differing in substance from Mississippi's.[92]

So we know that the committee members were influenced by Mississippi's constitution, if only out of expediency. But we do not know much more than that.[93] A scant journal has survived with some clues on what was said in the convention as a whole, but on many topics the convention did not disagree with the committee's draft and had no comment on a constitutional provision.[94] When it came time for the Baby Ninth in the committee's draft, nary a word is recorded in the convention journal (as, indeed, was also true for most of the rights provisions).[95] This lack of discussion or recording of one is all too common a story for constitutional conventions. All legal historians have to work with are the constitutional texts themselves, and (if you are lucky) the drafting history. This is not always the case, but it was in Alabama in 1819.

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

> To guard against transgressions of the high powers, herein delegated, We Declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and

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> that all laws contrary thereto, or to the following provisions, shall be void.[96]

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

> **This enumeration of certain rights shall not be construed to deny or disparage others retained by the people**; and, to guard against *any encroachments on the rights herein retained*, or any transgression of any of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.[97]

First, there is the language italicized for emphasis. This seems to come from the Indiana Constitution of 1816, which was the one state with a Baby Tenth that had used the emphasized language instead of the "transgressions" language before stating "we declare."[98] Alabama's committee apparently liked both introductory clauses, and joined them together.

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

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

But perhaps, instead, a member of the committee liked the Ninth

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Amendment itself and simply wanted a parallel provision in the state constitution. Coupling it with a Baby Tenth Amendment might seem to make sense—instead of making them separately numbered clauses—because they both are "all inclusive" provisions, covering rights and powers, respectively, that are not dealt with elsewhere. Using Indiana's language, they were natural together as they both used the word "retained" to describe the rest of the declaration of rights.

In any case, no one at the convention is recorded to have objected to this draft language. The constitution eventually ratified contained the same language. The state was then admitted to the Union later that year. A similar version of the provision, still with a Baby Ninth and a Baby Tenth, is in Alabama's constitution today, although the Baby Tenth has been significantly trimmed over the years.[99]

Maine's Baby Ninth

Alabama can rightfully call itself the first "Baby Ninth State." But not by much. Just three months after Alabama's drafting committee invented its Baby Ninth, Maine did a similar thing. In Maine, however, there apparently was no hunger for a Baby Tenth as well. So Maine had, and still has, the first stand-alone Baby Ninth.

For years the residents of what was then the District of Maine debated whether they should leave the Commonwealth of Massachusetts and create their own state. After a number of failed referenda on the subject, Maine's voters finally voted to become their own member of the Union.[100] To do so, of course, the prospective state needed its own constitution, and just like Alabama, they elected delegates to a constitutional convention. The convention began in October 1819. One of Maine's political leaders, William King, had planned for this moment for years and wanted to write a constitution anew, instead of copying from John Adams' Massachusetts Constitution of 1780.[101] But given the time constraints when the convention was actually called, the convention did begin with Massachusetts's version as a template, although many changes were then made.[102]

Maine's convention spun off the business of drafting various provisions of the constitution to different committees. The declaration of rights committee was composed of thirty-three members.[103] As in Alabama, no detailed record has been found of the committee's delibera-

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tions. There is a (non-exhaustive) journal of the convention's proceedings, but, as in Alabama, no remarks are recorded that were made about the Baby Ninth Amendment.[104]

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

> The enumeration of certain rights shall not impair nor deny others retained by the people.[105]

This was similar, of course, to the actual Ninth Amendment, but different in a couple of interesting ways. First, instead of "deny or disparage" it says the enumeration of rights shall not "impair nor deny." "Impair" seems to ring with a stronger protection than "disparage."[106] Furthermore, the phrase "shall not be construed" is completely absent. In Maine, the Baby Ninth does not forbid a reader from construing the bill of rights to mean other rights can be denied or impaired, but says the enumeration of certain rights *itself* shall not impair or deny other rights. Perhaps this difference is immaterial, but perhaps it is meant to be a stronger clause than a "mere" rule of construction.

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

A "Proto–Baby Ninth" in Tennessee?

Before we see where the examples of Alabama and Maine lead to, we must add an asterisk to this story and consider what happened in Tennessee in 1796. As noted above, along with other states that adopted constitutions in the years following Pennsylvania's 1790 constitution, Tennessee included a Baby Tenth in its first constitution of 1796.[107] Tennessee, however, included a phrase absent in Pennsylvania's and in those of the other states that adopted Baby Tenths before 1819. Its Baby Tenth stated, in relevant part,

> And to guard against transgressions of the high powers which we have delegated, We declare, that every thing in the bill of rights contained, *and every other right not hereby delegated*, is excepted out of the general powers of government, and shall for ever remain inviolate."[108]

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

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

The answer is not entirely clear. It could be that "every other right" actually means powers of government. But that does not seem to work because "powers" was already used to mean powers of government, and "every other right" comes directly after a reference to the state's bill of rights. A more plausible reading is that "every other right not hereby delegated" means that there are *some* rights delegated over to the government, beyond those in the bill of rights, and that the people therefore do not have those rights anymore. But, of those "other" rights that are *not* "hereby delegated" they are "excepted out of the general powers of government" just as the rights enumerated in the bill of rights are. In other words, through the Tennessee Constitution the people have alienated some rights, but not the rights that are reserved to the people in the bill of rights *plus some others*. This accords well with Professor McConnell's discussion of how the Founding Era viewed constitution making through the prism of Lockean natural rights theory. Some rights are given over to the government, but some rights are retained. But unlike in his view of the Ninth Amendment (where the Amendment does not constitutionalize unenumerated rights) here those retained rights ("rights not hereby delegated") *are* constitutionalized, as they are excepted out of the general powers of government.

The provision is also different from a Baby Ninth because it does not talk about denying, disparaging, or impairing unenumerated rights. It just says that some unenumerated rights—that is, all unenumerated rights that are not delegated to the State of Tennessee—are reserved to the people. Perhaps the best way to describe it is as a weak or "proto" Baby Ninth. Some "other rights" *are* denied or disparaged because they are not enumerated, but the "other rights," the vast majority of the rights citizens of the state are supposed to enjoy, are protected in some way.

It appears this language was never litigated in a published case in

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Tennessee during the thirty-nine years of the constitution's existence. Then, for good or bad, in the Tennessee Constitution of 1835 the "every other right" language was removed, although the rest of the Baby Tenth stayed in.[109]

As the 1820s began, two states had tried something new when it came to protecting the rights of citizens within their states from state intrusion. They referred to unspecified "retained" rights in their constitutions, and they stated that those rights cannot be, alternatively, "denied," "disparaged," or "impaired." And they did this with a common background understanding that rights in state constitutions can be enforced in court under a system of judicial review. Were these new additions going to be isolated experiments that perhaps die out a few years later—like Tennessee's language—or would they lead to more action, both in state constitutional conventions and in state courts? The answer came slowly, but steadily.

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