

# BOOK REVIEW

TAKING THE NINTH AMENDMENT SERIOUSLY: A REVIEW OF CALVIN R. MASSEY'S *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS*

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*What we need is an amendment forbidding the circumvention of the Constitution. It could read: "The Constitution shall not be circumvented." I just got a big laugh from any lawyers who may be reading this.*

—Joe Sobran<sup>1</sup>

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### I. Introduction: The Instrumental Value of the American Constitution

We Americans are lucky indeed to have inherited our Constitution and our classical liberal tradition. For suppose we had inherited a totalitarian form of government, a government that did not respect property rights or other individual rights, that arbitrarily discriminated against—even executed, or exterminated—certain classes of its sub-

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1. Joe Sobran, *Constitutional Legerdemain*, reprinted in SOBRAN's, May 1996, at 12.

jects from time to time.<sup>2</sup> If such a government on occasion failed to implement its totalitarian “constitution” to the letter—say, it was slow to adopt a fully socialized agriculture policy or temporarily retreated from such a policy after causing the starvation of a few million people—it is unlikely that even the strictest “originalists” in that society would complain that the government was shirking its duties under the totalitarian constitution. The totalitarian constitution itself—the basic plan underlying the government—would be seen by even the originalists as inherently illegitimate, with no purpose served by advocating stricter adherence to its precepts. No purpose in the service of liberty, at least.<sup>3</sup>

Under a totalitarian system, proponents of liberty and individual rights<sup>4</sup> would be relegated to other tactics, such as fomenting revolu-

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2. Examples of totalitarian governments include communist and fascist states, both of which are types of socialism. Socialism may be defined as a system of “institutionalized interference with or aggression against private property and private property claims.” HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS* 2 (1989).

3. To put it even more starkly, suppose the government adopts a plan to exterminate all Hungarians at a rate of ten per day, but, for some reason, is bungling the job and is only executing one Hungarian per day. No sane person would admonish the government to speed up its executions or even to investigate the cause of the government’s “inefficiency” in this regard. For a similar point, see Bruce L. Benson, *Third Thoughts on Contracting Out*, 11 J. LIBERTARIAN STUD. 44 (1994), which argues that privatization of governmental services should not always be favored, even by libertarians; for example, when the privatized service, such as the IRS, is unjust and increasing its efficiency would simply increase injustice. See also Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403, 410 (1996) (arguing that one reason we should interpret the Constitution in accordance with the Framers’ original intentions is “because we today share their intentions to limit the power of government in a way that enhances and protects the liberty of the people”).

4. By individual rights, I mean the specifically *libertarian* conception of individual rights in which the only fundamental right is to be free from aggression where “[a]ggression” is defined as the *initiation* of the use or threat of physical violence against the person or property of anyone else.” MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* 8 (1973) [hereinafter ROTHBARD, *FOR A NEW LIBERTY*]. The phrase “individual rights” is preferable to the phrase “human rights,” since the latter expression, like the term “liberal” in American usage, has acquired a leftist or socialist tinge. See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 9, at 22-26, U.N. Doc. A/810 (1948) (reciting, for example, “human rights” to “social security” to “free” “education”). Libertarian individual rights are roughly equivalent to the set of natural rights under older terminology. For libertarian justifications for the existence of individual rights, see HOPPE, *supra* note 2 (especially chapter 7); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); ROTHBARD, *FOR A NEW LIBERTY*, *supra*; MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1982); N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607 (1997); N. Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. 323 (1996); Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979); AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* (1967); AYN RAND, *THE VIRTUE OF*

tion or civil disobedience, trying to persuade or educate society or government officials to see the light of liberty, or even advocating outright dishonest interpretation of the constitution to achieve better results. A constitution, then, has only instrumental value; it is worth supporting and interpreting honestly only if such an interpretation would tend to lead to desirable results. To a supporter of individual rights, for example, a constitution providing for an explicitly totalitarian system does not have instrumental value, and he would not seek to have such a constitution put into effect, or put into effect more stringently.

Now imagine that there is a better constitution in place, one originally designed to undergird limited government and individual rights. Over the decades, however, the government has incrementally misconstrued this constitution, seizing more and more power not authorized by it and violating individual rights protected by it. Imagine also that, for a variety of reasons, the population had acquiesced, and even grown somewhat accustomed, to this state of affairs.<sup>5</sup> Advocates of

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SELFISHNESS: A NEW CONCEPT OF EGOISM (1964); LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND (1991); TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER (1991); LUDWIG VON MISES, LIBERALISM: IN THE CLASSICAL TRADITION (Ralph Raico trans., 3d ed. 1985); JAN NARVESON, THE LIBERTARIAN IDEA (1988); and LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY (1987).

5. Reasons for the populace's acquiescence might include the following: a sympathy with socialism over the years on the part of intellectuals and large portions of society; the corruption wrought by democracy itself, which breeds special interest wars and the willingness to use government to get one's piece of the pie before one is made victim by others; the welfare/warfare state, which provides recipients of redistributed tax dollars (in the form of welfare payments or government salaries) with an incentive to support ever-growing government; and public education, which inevitably results in the state's propagandizing each generation of students in favor of its programs. *See generally* FREDERIC BASTIAT, *THE LAW* (Found. for Econ. Educ. & Dean Russell trans., 1950) (1850) (discussing ever-escalating conflicts among disparate special interest groups); ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987) (discussing the public's acquiescence in expansions in government power during times of crisis, power that is never returned after the crisis is over, leading to a ratchet effect of growing government power with each new "crisis"); BRUNO LEONI, *FREEDOM AND THE LAW* (expanded 3d ed. 1991) (discussing special interest group warfare); WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* (1994) (discussing the unintended consequences of governmental programs and the large number of special interest groups that accompany big government); SHELDON RICHMAN, *SEPARATING SCHOOL AND STATE: HOW TO LIBERATE AMERICA'S FAMILIES* (1994) (tracing the history of government-sponsored education, its use as propaganda, and other pernicious effects); GIOVANNI SARTORI, *LIBERTY AND LAW* (1976) (discussing the tendency of citizens ruled by increasing legislation and regulation to become more docile and accustomed to following orders, and thus to allow fundamental rights to be trammelled by the government); Hans-Hermann Hoppe, *Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy*, 5 J. DES

limited government and individual rights in this setting have an option available to them that those in our hypothetical socialist society do not; they can insist that the government respect the constitution's original meaning. They can argue, for example, that the supreme court has been misinterpreting the constitution and should now interpret the constitution in accordance with its original understanding.<sup>6</sup> Given the country's traditional respect for the constitution and at least some widespread sentiment that the government's very legitimacy depends on its acting within limits prescribed by the constitution, this might be a reasonable, even hopeful, course to take.<sup>7</sup>

America is largely in the latter situation since our Constitution was originally designed to establish limited government. It is for this reason that I say we Americans are lucky to have inherited our Constitution and our classical liberal tradition. We are not limited to the unattractive options of revolution or despairing resignation as our only responses to government tyranny. We can urge the Supreme Court and Congress to respect individual rights and limit government powers in accordance with the original design of the Constitution. Our Constitution has instrumental value—at least for those who support limited government and both personal and economic freedom.<sup>8</sup>

One problem with trying to persuade the Court to move toward a more originalist interpretation of the Constitution is that, even if the Court wants to do this, it may be too late. Given the entrenched and accumulated accretions of government power and court decisions that have resulted from over a century of misinterpretation of the Consti-

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ECONOMISTES ET DES ETUDES HUMAINES 319 (1994) (discussing systemic features of democracy that make it likely to oppress liberty).

6. Judge Robert Bork's theory of original understanding is largely sound, although Bork himself occasionally misapplies his own theory, for example, with respect to the Ninth Amendment. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-45, 183-85 (1990). Original understanding should not be confused with original intent. The "original intent" of the Framers is relevant only insofar as it is evidence for the public's "original understanding" of the Constitution.

7. Regarding the presumption of governmental legitimacy, Professor Barnett makes the interesting and promising argument that the necessary assumption that citizens have a moral obligation to obey positive law presumes that there must be some mechanism to ensure that such laws are legitimate. See Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988), reprinted in 2 *THE RIGHTS RETAINED BY THE PEOPLE* 391 (Randy E. Barnett ed., 1993). Under our system of government, this requires Ninth Amendment-based judicial review of legislation to provide a sort of "quality control" to ensure the promulgated laws do not infringe the citizens' enumerated or unenumerated rights. See *id.*; see also Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 105 (1995); Randy E. Barnett, *Implementing the Ninth Amendment*, in 2 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra*, at 1; Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853 (1993).

8. Another option, of course, is to attempt to have the Constitution amended so as to better serve liberty. See U.S. CONST. art. V.

tution,<sup>9</sup> the Supreme Court is unlikely to simply undo its own jurisprudence and interpret the Constitution anew. Further, even if the Court wanted to start reining in the federal government's powers, it would not be able to get away with it, at least not without a sufficiently sneaky or clever theory that would allow some incremental movement toward liberty in a manner not obvious enough to catch the Leviathan's eye.

In his new book, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*, Professor Calvin R. Massey seeks to provide such a "stealth" theory (my words, not his) by providing a new way to read the Ninth Amendment.<sup>10</sup> As Massey points out, this Amendment has been largely ignored since its addition to the Constitution in 1791.<sup>11</sup> In his book, Massey proposes a novel and somewhat radical theory to reincorporate the Amendment and its original purposes into the current constitutional landscape. At the heart of Massey's theory is his proposed "constitutional *cy pres* doctrine"<sup>12</sup> and his contention that the Ninth Amendment incorporates rights based in state law.<sup>13</sup> Before further exploring this theory, it is necessary to delve into, as Massey does, the history and political context of the Amendment.

## II. The Dual Purposes of the Ninth Amendment

The Ninth Amendment provides as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>14</sup> It follows, of course, the various rights enumerated in the first eight amendments in the Bill of Rights, and precedes the Tenth Amendment.<sup>15</sup> In a discussion of the original debate concerning the Ninth Amendment, Massey points out that there are many possible answers to just what the Ninth Amendment means:

Some, like former Judge Robert Bork, contend that the amendment has no discernible meaning whatever. Others . . . suggest that the amendment is merely hortatory and duplicative of the axiomatic reminder in the Tenth Amendment that the states re-

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9. See sources cited *infra* note 22.

10. CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS* (1995).

11. See *id.* at 7 (citing Alex Kozinski & J.D. Williams, *It Is a Constitution We Are Expounding: A Debate*, UTAH L. REV. 977, 981, 984 (1987)).

12. *Id.* at 97-98; see also *infra* Part II.

13. See Massey, *supra* note 10, at 122; see also *infra* notes 68-74.

14. U.S. CONST. amend. IX.

15. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

tain all powers not surrendered under the Constitution. Still others . . . contend that the amendment prohibits the federal government from exercising any power with respect to the "rights retained by the people." . . . Yet another view . . . asserts that the Ninth Amendment was merely a cautionary device to check unwarranted extension of the powers of the federal government. Some . . . suggest that the amendment is best regarded as a . . . rule of interpretation . . . [that] invalidates [the] argument that any given right (such as the right to use contraceptives) is not to be included within some enumerated right of the Constitution (such as due process) simply because the right to use contraceptives is not expressly enumerated in the Constitution. . . . Finally, . . . [some] contend that the amendment ought to be treated as an independent source of substantive and judicially enforceable individual rights, determined without reference to any of the enumerated rights.<sup>16</sup>

As Massey explains, one of the objectives of the Ninth Amendment was to preserve the states' sovereignty and independence, in part so that the states could serve as a check on expansions of federal power.<sup>17</sup> To this end, the central government was vested only with a few defined powers, reserving other powers to the states.<sup>18</sup> Protection of the natural rights of citizens, for example, would be largely a matter for the states to handle.<sup>19</sup> Because of the limited delegation of power to the federal government, the Federalists did not believe an enumerated bill of rights to be necessary.<sup>20</sup> Without the granted *power* to invade rights, the federal government would simply be unable to do so.

The Antifederalists, nevertheless, demanded a bill of rights, fearing that, without one, the federal government would both encroach on the states' sovereignty and violate the natural rights of the people.<sup>21</sup> History has proven the Antifederalists right; it would have been too dangerous to create the federal government without also providing a bill of rights. Although the current federal government has abrogated for itself vast powers not authorized by the Constitution,<sup>22</sup> it seems

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16. MASSEY, *supra* note 10, at 10-11.

17. *See id.* at 55.

18. *See id.* at 56.

19. *See id.*

20. *See id.*

21. *See id.* at 56-57.

22. For discussions of the Supreme Court's various misinterpretations of the Constitution, see RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); BORK, *supra* note 6; *ECONOMIC LIBERTIES AND THE JUDICIARY* (James A. Dorn & Henry G. Manne eds., 1987); HENRY MARK HOLZER, *SWEET LAND OF LIBERTY?: THE SUPREME COURT AND INDIVIDUAL RIGHTS* (1983); and BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

almost certain that things would have been worse had the Bill of Rights not been added as a precautionary measure.

On the other hand, as the Federalists countered, even if having no bill of rights is dangerous, enumerating rights to limit a government of purportedly limited powers is also dangerous for two primary reasons. First, the very declaration of a particular right (e.g., freedom of speech) might be construed to imply that some power had been given to the federal government to invade this right.<sup>23</sup> This could lead to the implication that the federal government possessed *unenumerated* powers, similar to the broad police powers exercised by states, rather than strictly limited, enumerated powers. These unenumerated powers of the central government could be used to invade any (unenumerated) rights of the citizenry as well as the sovereignty of the states.<sup>24</sup> Second, listing certain rights in the "bill of rights might raise the implication that the only rights possessed by the people were those enumerated,"<sup>25</sup> that is, that the listing of rights in the Constitution was exhaustive. Enter the Ninth Amendment, designed, as Massey shows, to combat both these dangers.

Some commentators acknowledge that the Amendment was meant only to address the first of these two dangers by serving as a rule of construction as to federal powers. Under this "single-purpose" interpretation, it is held that:

[T]he amendment's function was merely to restrain constitutional interpreters from construing too broadly the powers delegated to the central government. By doing so, it had the secondary effect of preserving individual liberties, because the "residual rights" of the citizenry were protected by the sheer absence of governmental power to curtail them.<sup>26</sup>

Thus, the Amendment merely served as a rule of construction regarding federal powers, and "adherents to this view reject the idea that the Ninth Amendment is itself an independent source of human rights capable of judicial cognizance."<sup>27</sup>

Massey disagrees with this single-purpose interpretation of the Ninth Amendment. He argues persuasively that the Ninth Amendment had dual, but complementary, purposes: To prevent the listing of rights from being used to imply that the federal government had powers beyond those enumerated, *and* to prevent the listing of rights from implying that the list is an exclusive and exhaustive one.<sup>28</sup> For

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23. See MASSEY, *supra* note 10, at 60-61.

24. See *id.* at 61-62; see also *id.* at 24.

25. *Id.* at 62; see also *id.* at 23-24.

26. *Id.* at 24.

27. *Id.*

28. See *id.* at 62, 93. Hereinafter, I will sometimes refer to these as the limited-powers purpose or function, and the unenumerated-rights purpose or function, respectively.

example, as Massey notes, many states admitted to the Union in the nineteenth century added a version of the Ninth Amendment to their own constitutions:

It is hard to understand why any group of state constitution makers would have done so if they had thought the Ninth Amendment was simply a device to confine federal legislative power. . . . The presence of Ninth Amendment analogues in state constitutions is reason to conclude that nineteenth-century legal actors continued to regard the federal Ninth Amendment as instantiating dual paths to a single end of preserving human liberty.<sup>29</sup>

The distinction between the dual purposes of the Ninth Amendment was not completely clear two hundred years ago. One reason for this, Massey claims, is that in the Founding Fathers' generation, "rights were thought of as the absence of governmental powers,"<sup>30</sup> that is, individual rights were merely conceived of "as the complement of governmental powers."<sup>31</sup> Thus, to the Framers, the distinction between these two purposes was "blurry at best."<sup>32</sup> Individual rights could be secured simply by limiting government power, since "rights could not lawfully be invaded by a government lacking power to do so."<sup>33</sup> However, today's conception of the relation between individual rights and governmental power is different. Massey claims that

[t]oday we would be unlikely to converse in the same vernacular. We are likely to think of rights as trumping governmental powers. Thus, pursuant to the commerce clause, Congress may have the *power* to enact a law forbidding the interstate shipment of Bibles, but its effective ability to do so is trumped by at least two First Amendment *rights*—freedom of speech and the right to free exercise of religion.<sup>34</sup>

Massey provides a brief survey of Supreme Court jurisprudence to document the changing conception of rights vis-a-vis powers.<sup>35</sup> Because of this "shift in perspective over the past two centuries," there is disagreement today over what the Framers originally meant by the Amendment.<sup>36</sup> Modern observers tend to ascribe to the Ninth Amendment merely the first objective, that of preventing the enumer-

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29. *Id.* at 86-87.

30. *Id.* at 93.

31. *Id.* at 67.

32. *Id.* at 93.

33. *Id.* at 67.

34. *Id.* at 67; *see also id.* at 79 ("Today, . . . we perceive rights as uncoupled from governmental powers. Limiting governmental powers may indeed preserve liberty obliquely, but creating enforceable rights is a far more direct way of preventing governmental abuse of individual liberty, given our modern conception that rights 'trump' powers.").

35. *See id.* at 88-93.

36. *Id.* at 67.

ation of rights from implying that the federal government must therefore possess unenumerated powers to invade rights, since this seems to be synonymous with the purpose of the Tenth Amendment, that is, to preserve a separate sphere of state powers. This view, however, ignores the Ninth Amendment's other purpose of ensuring "that the catalog of constitutional rights did not stop with the enumerated rights. As rights no longer were thought of as the absence of governmental powers, but rather as independent restraints upon governmental powers, it was inevitable that the lost function of the Ninth Amendment would again be perceived."<sup>37</sup>

Massey also argues that the interrelationship between the Ninth and Tenth Amendments can be better explained if one realizes that the founding generation viewed rights and powers as complementary, that is, merely two sides of the same coin.<sup>38</sup> In order to secure individual rights against infringement by the federal government, both Amendments were necessary to constrain the government's powers.<sup>39</sup>

The Ninth would do so by guarding against either the inference of nonexistent unenumerated rights or the inference of constructive powers. The Tenth would do so by an explicit statement that the central government possessed only its specified powers. The Tenth Amendment may be seen as performing the principal function of rebutting the Antifederalist concern that the new government might be presumed to possess all powers not specifically retained, while the Ninth Amendment may be seen as primarily addressing the Federalist concern that any enumeration of rights might be viewed as recognition of the existence of implied governmental powers. But both amendments are more complex. The Ninth Amendment also addresses, in part, the fear that rights enumeration would eliminate other rights, and the Tenth also preserves to the people their discretionary authority to allocate (or not) powers to their state governmental agents. The complex and dual nature of the two amendments is deeply rooted in the founding generation's perceptions of the inextricable relationship between rights and powers. Thus, the lack of either amendment would be inimical to the preservation of a zone of individual autonomy where governments could not intrude.<sup>40</sup>

As Massey points out, even if it is admitted that the Ninth Amendment "could be a proper constitutional basis for unenumerated rights[, this] does nothing to solve the enormous problem of selecting *which* unenumerated rights deserve designation as

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37. *Id.* at 94.

38. *See id.* at 79.

39. *See id.* at 79-80.

40. *Id.* at 78; *see also id.* at 80, 106; *infra* note 81.

constitutionally protected.”<sup>41</sup> Under Massey’s theory of “constitutional cy pres,” elaborated in Part III of *Silent Rights*, he lets the states do most of this work for us.<sup>42</sup> It is to this doctrine that we now turn.

### III. Constitutional Cy Pres

It is largely undisputed, even by single-purpose theorists, that the Ninth Amendment was intended to prevent the enumeration of rights from implying federal powers not explicitly granted in the Constitution. However, “apart from a radical reconstruction of existing doctrine, that intent can no longer be accomplished.”<sup>43</sup> As Massey puts it,

After two centuries of constitutional development, we no longer make any serious attempt to control the extent of the implied powers of Congress. If the Ninth Amendment’s original intent was only to provide a rule of construction by which claims of implied congressional power would be rejected, that function has been irretrievably eclipsed by the awesome breadth of contemporary federal power.<sup>44</sup>

In other words, it is now, perhaps regrettably, “impossible” to achieve the Ninth Amendment’s original function of limiting the implied powers of the federal government (the limited-powers function). The genie is, irrevocably, out of the bottle.

It is here that Massey borrows from the concept of cy pres, to announce his “constitutional” cy pres doctrine. Under the doctrine of cy pres, “[w]hen faced with the problem of an expressed testamentary intent that is impossible to achieve, courts seek to effectuate as nearly as possible (cy pres) the testator’s intent.”<sup>45</sup> Similarly, if we still wish to “preserve the supposed original function of preventing implied federal powers,”<sup>46</sup> a new interpretation must be given to the Ninth Amendment to attempt to limit governmental power.<sup>47</sup> In fact, “To effectuate the original intent as nearly as possible, it is necessary to constrain governmental power by reading the Ninth Amendment as a source of judicially enforceable individual rights that operate to limit the exercise of governmental power.”<sup>48</sup> Thus, in today’s context, even those who attribute only the limited-powers function to the Ninth Amendment must be willing to accept use of the Amendment to generate unenumerated rights if the Amendment is to be at all effective in

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41. *Id.* at 94.

42. *Id.* at 97.

43. *Id.* at 98.

44. *Id.* at 97.

45. *Id.*; see also LA. REV. STAT. ANN. § 9:2331 (West 1991) (relating to cy pres).

46. MASSEY, *supra* note 10, at 97.

47. See *id.* at 97–98.

48. *Id.* at 98.

limiting the exercise and unwarranted expansion of governmental power.

If the original intention of the amendment was to confine governmental power, the reason for doing so was entirely to preserve rights. We have failed to confine those powers, partly because we now regard the affirmative assertion of rights as the vehicle for controlling the unwarranted assumption of governmental power. Thus, the only way the Ninth Amendment can be applied in our times to accomplish its original purpose is to regard the amendment as an independent source of individual rights.<sup>49</sup>

Massey notes that the second (unenumerated-rights) purpose of the Ninth Amendment (preventing the implication that enumerated rights were the only rights capable of blocking governmental action) is not really impossible, as is the limited-powers purpose, "but the legitimacy of this endeavor is badly eroded by our undue reliance upon an inappropriate and ill-suited vehicle—the due process clause—for the task of providing constitutional recognition to unenumerated rights,"<sup>50</sup> that is, only a strained interpretation of the Due Process Clause allows it to be mined as a source for unenumerated rights. Therefore, "[s]traightforward recognition of the Ninth Amendment as the vehicle for this project would be consistent with the founding intentions as well as provide a more ready answer to those critics of unenumerated rights who loudly question the connection of those rights to the constitutional text."<sup>51</sup>

Massey consoles those who are uncomfortable with using a cy pres-type doctrine to interpret the Constitution by showing that this type of reasoning is not really without precedent, although Massey's jazzy term "constitutional cy pres" appears not to have been used before. For example, the Court gave "an expansive reading to the due process and equal protection clauses of the Fourteenth Amendment in order to accomplish the intended purposes of the privileges and immunities clause"<sup>52</sup> when the *Slaughter-House Cases*<sup>53</sup> decision, and the lack of will to overturn that decision, made it impossible to implement the original purposes of this clause. Other supposed examples of constitutional cy pres include cases involving the Eleventh and Fourteenth Amendments.<sup>54</sup>

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49. *Id.* at 98-99.

50. *Id.* at 114.

51. *Id.*

52. *Id.* at 99.

53. 83 U.S. (16 Wall.) 36 (1873).

54. See MASSEY, *supra* note 10, at 100-01 (discussing *Hans v. Louisiana*, 134 U.S. 1 (1890) (Eleventh Amendment)); *id.* at 102-04 (discussing *Brown v. Board of Education*, 347 U.S. 483 (1954) (Fourteenth Amendment)).

But the utility of Massey's appeal to constitutional *cy pres* is unclear. In a standard *cy pres* situation where, for some external reason, it is actually impossible to achieve the testator's will, the court attempts to effectuate as nearly as possible the testator's intent. However, if today it is impossible to honestly interpret the Constitution and to give the Ninth Amendment its original reading, this is not due to some impersonal, external cause about which the Court is helpless to do anything. Instead, it is largely the Court's own twisting of the Constitution over the last two centuries, as well as its current unwillingness to return to a traditional reading of the Constitution, that lies behind the current impossibility of limiting the federal government's powers.<sup>55</sup> The government will be equally unable to implement a proposed law or regulation if it is declared by the Court to be unconstitutional on the grounds that (a) it did not have the power (an "impossible" result nowadays), or (b) unenumerated Ninth Amendment rights stand in the way (Massey's *cy pres* method). Thus, one wonders why the Court would overturn a law based on an unenumerated right, given its unwillingness to do so on the ground that there is a lack of legitimate governmental power to implement the law in the first place. It is not as if Congress or the President would be any less upset at being thwarted by the Court in the second manner as opposed to the first.<sup>56</sup>

Massey appears to believe that the reason for the current impossibility of using the Ninth Amendment to limit directly the federal government's powers is the aforementioned shift in how rights and powers are viewed.<sup>57</sup> He claims that "[w]e have failed to confine [the federal government's] powers, partly because we now regard the affirmative assertion of rights as the vehicle for controlling the unwarranted assumption of governmental power."<sup>58</sup> This claim is unconvincing, however, since Massey does not provide a clear case as to just how the alleged shift in viewing powers and rights has led to a failure to confine the government's usurpation of more and more powers. Massey's account makes decades of misinterpretation of the Constitution by the Court seem downright innocent, an honest mistake caused by simple confusion over the conceptual relation between rights and powers. More conventional, and less benign, explanations for this unfortunate state of the Court's modern jurisprudence would

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55. See sources cited *supra* note 22.

56. In fact, given that these proposals would seem to be equally unacceptable to the ruling elites, the Framers' view of the complementary nature of rights and powers seems correct, not "sloppy thinking about the methodology of protecting human liberty." MASSEY, *supra* note 10, at 79. As Massey claims, we now tend to regard the founding generation's view that "the distinction between rights and powers [is] of no consequence." *Id.*

57. See *id.* at 98-99.

58. *Id.* at 99.

seem more appropriate.<sup>59</sup>

Additionally, there are other, though less serious, problems with Massey's cy pres approach. First, Massey's theory claims to work even if one adheres only to the limited-powers purpose. In this case, however, it is inexplicable why so much attention is given earlier in the book to proving that the Amendment had a dual purpose. After showing in Part II that the Ninth Amendment had dual purposes,<sup>60</sup> Massey largely omits the second purpose and assumes, for the sake of argument, only the limited-powers purpose.

Second, in Part II, prior to his cy pres analysis in Part III, Massey argues, *without* appealing to cy pres, that one function of the amendment was to generate enforceable, unenumerated rights.<sup>61</sup> It is, therefore, not clear why one needs to use cy pres to turn the limiting-powers function into the unenumerated-rights function. The unenumerated-rights function should stand alone, and can apparently be reasonably argued, without the aid of constitutional cy pres. In fact, in an earlier incarnation of Massey's theory, the doctrine of constitutional cy pres is not invoked at all.<sup>62</sup> As best I can tell, the primary purpose of constitutional cy pres is to convince those who favor the limited-powers function but who shun the unenumerated-rights function that, in today's constitutional landscape, the only way to achieve the limited-powers function is to allow the Ninth Amendment to be construed to protect unenumerated rights. Since Massey sets forth other, independent grounds for the unenumerated-rights function of the Ninth Amendment, it is not clear why constitutional cy pres is given such prominent attention in the book, nor why it is brought up again and again once this point is made. For example, Massey's application of constitutional cy pres to the unenumerated powers purpose of the Ninth Amendment is confusing. If the unenumerated powers purpose is not impossible to attain but has merely had its legitimacy eroded, why is cy pres applicable at all, since the doctrine has to do with impossible or unattainable purposes?

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59. See sources cited *supra* note 22.

60. See MASSEY, *supra* note 10, at 53.

61. See *id.* at 93-94.

62. See Calvin R. Massey, *Antifederalism and the Ninth Amendment*, 64 CHI.-KENT L. REV. 987 (1989), reprinted in 2 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 7, at 267, 277 (arguing "that individual liberties secured by state constitutions against state invasion were federalized by the ninth amendment" without resort to a "cy pres" theory, and without even resorting to the argument that it is "too late" or "impossible" to now use the Ninth Amendment to limit government powers directly); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987), reprinted in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 7, at 291 [hereinafter Massey, *Federalism and Fundamental Rights*]. Massey's first discussion of constitutional cy pres of which I am aware came after these two articles, in *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992).

Third, it appears to be quite an ordinary and reasonable interpretive method to try to interpret difficult or ambiguous constitutional provisions in accordance with the provision's original objectives, just as was done in the cases cited by Massey as examples of "de facto" applications of constitutional cy pres. But this technique is just one of dozens of standard canons of interpretation of legislation or constitutional provisions,<sup>63</sup> and it is not clear why a new terminology and doctrine is suddenly needed for this one particular technique.<sup>64</sup>

Continuing with the development of his theory, Massey next argues that "there are three major ways in which constitutional cy pres can be applied to the Ninth Amendment."<sup>65</sup> First, the amendment can be used to secure "against federal invasion individual rights having their origin in state constitutions."<sup>66</sup> Massey refers to this as the positive law component of the Ninth Amendment, or "positive Ninth Amendment rights."<sup>67</sup> Second, it can be read as a rule of interpretation in favor of generalizing explicitly enumerated constitutional rights to protect unenumerated rights that are *consistent with* the enumerated rights. Third, the Ninth Amendment can be used "to locate and enforce rights having their origin in natural law."<sup>68</sup> Massey refers to this third approach as the natural law component of the Ninth Amendment, or "natural Ninth Amendment rights."<sup>69</sup>

The listing of these three proposals reveals further problems with Massey's theory. One is that this list of three ways to apply constitutional cy pres seems arbitrary. Further, it is unclear whether this list is exhaustive: Are there more ways to apply constitutional cy pres? Why, for example, could not his cy pres theory be used to argue that the Fourteenth Amendment and the incorporation doctrine should be reinterpreted to return more power to the states, to better accomplish the original constitutional goal of federalism?

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63. For example, a law should be interpreted, if possible, so as not to produce absurd or unconstitutional results. One explicit canon of interpretation in Louisiana is: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." LA. CIV. CODE ANN. art. 9 (West 1993).

64. As Ayn Rand explained in her doctrine known as "Rand's Razor": "The requirements of cognition determine the *objective* criteria of conceptualization. They can be summed up best in the form of an epistemological 'razor': *concepts are not to be multiplied beyond necessity*—the corollary of which is: *nor are they to be integrated in disregard of necessity*." AYN RAND, THE AYN RAND LEXICON: OBJECTIVISM FROM A TO Z 403 (Harry Binswanger ed., 1st ed. 1986); see also *supra* note 62 and accompanying text.

65. MASSEY, *supra* note 10, at 106.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 106, 182.

Another problem with Massey's constitutional *cy pres* theory is that the second and third proposals do not need constitutional *cy pres* to be recommended, and in fact have been advanced by others, without requiring Massey's innovative *cy pres* theory.<sup>70</sup> Massey himself has previously argued for the first proposal, without even mentioning constitutional *cy pres*.<sup>71</sup> Massey seems to view the second proposal as largely subsumed by, and inferior to, the first and third proposals,<sup>72</sup> and thus devotes most of the remainder of the book—chapters 5 and 6—to elaborating positive and natural Ninth Amendment rights.

#### IV. Positive Ninth Amendment Rights

The most innovative and controversial aspect of Massey's thesis is his view that the Ninth Amendment ought to be read to include judicially enforceable rights having their origin in state constitutions, as well as natural rights. Massey argues that the unenumerated rights contemplated by the Ninth Amendment were of the following two types: "natural" and "civil," or "positive," rights.<sup>73</sup> Natural rights include, in the words of Madison, "those rights which are retained when particular powers are given up to be exercised by the Legislature,"<sup>74</sup> and positive rights are those that "result from the nature of the compact."<sup>75</sup> For example, freedom of speech is a natural right; trial by jury is not a natural right, but results "from the social compact which regulates the action of the community."<sup>76</sup> However, Massey cleverly reasons that

the founding generation did not use the distinction between natural and positive rights as a basis for selection of the rights worthy of constitutional enumeration. The package of rights expressly enumerated in the Constitution contains natural and positive rights. It is a fair inference, then, that the unenumerated rights of the Ninth Amendment were thought to consist of both varieties. Positive rights had their source in state common, constitutional, and statutory law. Natural rights stemmed from Lockean notions concerning the inalienable rights of the people.<sup>77</sup>

Thus, the Ninth Amendment's unenumerated rights include both positive and natural rights.

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70. See, e.g., LAURENCE TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION*, 54, 110, 111 (1991), cited in MASSEY, *supra* note 10, at 245 n.20 (suggesting the second proposal); Barnett, *supra* note 7 (suggesting the third proposal).

71. See *supra* note 62 and accompanying text.

72. See MASSEY, *supra* note 10, at 109-10.

73. *Id.* at 118.

74. *Id.*

75. *Id.* at 118 n.6.

76. *Id.*

77. *Id.* at 118.

As Massey notes, most of the Framers looked “to the states not only as the source of, but as the vehicle for, protection of their cherished liberties.”<sup>78</sup> “The inclusion of the Ninth Amendment was, in part, an attempt to be certain that rights protected by state law were not supplanted by federal law simply because they were not enumerated.”<sup>79</sup> Since “the Ninth Amendment was as much an enumerated right for purposes of judicial enforcement as any other aspect of the Bill of Rights,”<sup>80</sup> both types of unenumerated rights—natural rights and positive rights having their source in state law—are subject to judicial protection. In other words, any federal law that violates an unenumerated positive (i.e., state law-based) right is subject to being stricken down by federal courts as violative of the Ninth Amendment.<sup>81</sup> In giving effect to the Ninth Amendment, then, the courts are to recognize that one source of the unenumerated rights protected by the Ninth Amendment is state constitutions.

One advantage that Massey sees in this understanding of the Ninth Amendment is that it would give “citizens of the states . . . the power, through their state constitutions, to preserve areas of individual life from invasion by the federal Congress in the exercise of its delegated powers.”<sup>82</sup> This, in turn, would “prevent Congress from using its delegated powers to contravene an unenumerated federal right contained within a state constitution.”<sup>83</sup>

Massey recognizes that his theory “is radical stuff,”<sup>84</sup> and also admits that the implementation of his theory would give rise to “a number of difficulties,” none of which, however, “are indisputably insuperable.”<sup>85</sup> The first difficulty is whether state-sourced positive rights protected by the Ninth Amendment “are a set of rights antecede-

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78. *Id.* at 118 n.5.

79. *Id.* at 121-22.

80. *Id.* at 119.

81. *See id.* at 124. In support of this theory, Massey discusses the symbiotic relationship between the Ninth and Tenth Amendments:

The Tenth Amendment . . . was intended to complement the power limiting aspect of the Ninth Amendment. If the Ninth Amendment was intended in part to prevent the accretion of federal power implied by virtue of the existence of enumerated rights exempt from the reach of federal power, the Tenth Amendment was designed to prevent the accretion of federal power by implication from any other source in the Constitution. . . . Both Amendments were intended to preserve to the people of the states the sovereign's prerogative to confer powers upon their state governmental agents (recognized in the Tenth Amendment) and to maintain all manner of individual rights secure from governmental invasion (recognized in the Ninth Amendment). An intended medium for doing so, in both cases, was the state constitution.

*Id.* at 106-07.

82. *Id.* at 124-25.

83. *Id.* at 124.

84. *Id.* at 125.

85. *Id.* at 128.

dent to the federal Constitution and, thus, effectively frozen in time and content, or whether such rights are a dynamic, evolving list that change as sentiment shifts within the states."<sup>86</sup> Massey admits that there is much to be said for the static view, but ultimately concludes, albeit unsatisfactorily and confusingly,<sup>87</sup> that "a dynamic concept holds more promise."<sup>88</sup> (Interestingly, in an earlier version of his theory, Massey *rejected* the dynamic concept in favor of the static, on the grounds that the "more radical" dynamic conception "poses enormous practical problems" that make it "hopelessly unworkable."<sup>89</sup>)

The dynamic view leads to further difficulties. For example, can these federalized, state-sourced rights be applied uniformly across the nation? Can such rights, once created, be altered or abolished by the states by simply removing the rights from their constitutions?<sup>90</sup> Massey grapples mightily with these and other thorny problems that his own theory engenders. On the one hand, positive Ninth Amendment rights could be uniformly applied across the entire nation, what Massey terms the "national concept" of positive Ninth Amendment rights.<sup>91</sup> Where state constitutional norms conflict, however, the Court would have to decide which to prefer, a job "of considerable difficulty and uncertainty."<sup>92</sup> As for whether these rights are permanent or not, Massey concludes, for reasons that are not made entirely clear, that once such rights are recognized, "they would presumably be immune from elimination as a constitutional right at the hands of the state polity that sowed the seed of the federal right."<sup>93</sup>

On the other hand, it could be acknowledged that, because positive Ninth Amendment rights

have their origin in state constitutions, the substance of federal positive Ninth Amendment rights varies with the differing state constitutions. On this view, Ninth Amendment decisional law would develop a richly variegated pattern. A federal Ninth Amendment right of privacy would be recognized with respect to Californians and Alaskans, for example, because both states explicitly recognize such a right. In contrast, Missouri does not recognize that right. As a result, the citizens of each state would be uniquely and separately entitled to define the nature of their relationship with *all* of their governmental agents. They would be able to do this immediately (with the state via the state constitution) and . . . mediately (with the national government

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86. *Id.* at 129.

87. *See id.* at 128-31.

88. *Id.* at 131.

89. Massey, *Federalism and Fundamental Rights*, *supra* note 62, at 326 & n.109.

90. *See MASSEY*, *supra* note 10, at 131-32.

91. *Id.* at 132.

92. *Id.*

93. *Id.* at 133.

via the Ninth Amendment's incorporation of state constitutional guarantees).<sup>94</sup>

Although this state-specific concept of positive Ninth Amendment rights would effectively result in a different federal constitutional law (with respect to the content of such rights) for each of the fifty states, Massey quite correctly points out that such a scheme is similar to the current federal practice, under *Erie Railroad Co. v. Tompkins*,<sup>95</sup> by which the federal courts in diversity cases follow the law of the appropriate state.<sup>96</sup> Further, under the state-specific concept of positive Ninth Amendment rights, unlike under the uniform national concept, a state could eliminate a positive Ninth Amendment right by eradicating it from its own constitution (although the reason for this difference in treatment is unclear).<sup>97</sup>

One of the most serious disadvantages of the national concept of positive Ninth Amendment rights, Massey points out, is the Fourteenth Amendment and the incorporation doctrine. The Bill of Rights, when enacted in 1791, was intended to bind only the federal government, not the states.<sup>98</sup> Under the incorporation doctrine, most of the guarantees of the Bill of Rights have been held to be applicable to the states by reading them into the Due Process Clause of the Fourteenth Amendment. Although it is unclear whether unenumerated rights applicable against the federal government through the Ninth Amendment would be applied against states via the incorporation doctrine, it is possible, and even likely, at least under the national conception of positive Ninth Amendment rights.<sup>99</sup> This would mean that positive Ninth Amendment rights would be applied against states by the federal government. In the state-specific conception of positive Ninth Amendment rights, this would amount to the federal government's forcing the state to abide by its own law. Massey sees little problem with this, since "[s]urely, a requirement that a government abide by its own law is the essence of due process."<sup>100</sup> (So formulated, Massey's conception of due process is bizarre, and the "surely" here is surely misplaced. I fail to see how abrogating federalism and transforming the states from sovereign entities into mere administrative units of the federal government has anything to do with due process.)

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94. *Id.* at 134.

95. 304 U.S. 64 (1938).

96. *See* MASSEY, *supra* note 10, at 134, 136.

97. *See id.* at 136.

98. *See* U.S. CONST. amend. XIV; BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS, *supra* note 22; BERGER, GOVERNMENT BY JUDICIARY, *supra* note 22; MASSEY, *supra* note 10, at 138.

99. *See* MASSEY, *supra* note 10, at 138-41.

100. *Id.* at 140.

Under the national conception, Massey notes, incorporating positive Ninth Amendment rights into the Fourteenth Amendment's Due Process Clause would be likely, and would result in the constitutional rights of one state being used to override contrary rights in other states.<sup>101</sup> For example, suppose Louisiana provides for a state constitutional right of the fetus to life, while most other states provide for a constitutional right to abortion. Further suppose that the Supreme Court decides that the right to abortion is a positive Ninth Amendment right.<sup>102</sup> In this case, the local decision of some states with respect to the abortion issue would be used to trump the decisions of other states. For this reason, "[t]he incorporation problem would be experienced most acutely if a national concept of positive Ninth Amendment rights were adopted. The state-specific concept . . . avoids these problems."<sup>103</sup> In the end, after much vacillating and consideration of the myriad and complicated pros and cons of each of the national and state-specific concepts of positive Ninth Amendment rights, Massey tentatively comes down in favor of the state-specific conception.<sup>104</sup>

Before further assessing the merits of Massey's theory, I first turn to Massey's discussion, in chapter 6, of natural Ninth Amendment rights.<sup>105</sup>

## V. Natural Ninth Amendment Rights

After the extensive discussion in chapter 5 concerning positive Ninth Amendment rights, Massey argues in chapter 6 that the Ninth Amendment should also be read to include natural rights, rights that are "prepolitical retained rights"<sup>106</sup> (although Massey asserts, inexplicably and without support, that "the fact is that there is probably no such thing"<sup>107</sup>). As in his theory of positive Ninth Amendment rights, Massey's theory of natural Ninth Amendment rights also bears some innovative features.

Massey begins by noting that we should not "expunge natural law

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101. *See id.* at 142.

102. My own example, not Massey's.

103. MASSEY, *supra* note 10, at 42.

104. *See id.* at 137, 186. *But see id.* at 138 (stating that "it is not clear that the best concept of the substantive content of positive Ninth Amendment rights is state-specific").

105. In the remainder of chapter 5, Massey addresses many other issues related to implementing positive Ninth Amendment rights. For example, a state-specific positive Ninth Amendment right could be incompatible with a constitutional right based in federal law. *See id.* at 147-73. In this case, Massey recommends that one right be chosen over another by examining the competing rights' "constitutional fundamentality" and by engaging in a complicated balancing test. *See id.*

106. *Id.* at 174-75.

107. *Id.* at 187.

from the Constitution”;<sup>108</sup> however, the attempt to inject natural law into constitutional adjudication must be tempered by the realization that “[n]atural law cannot be forced on an unwilling and disbelieving community.”<sup>109</sup> Also, natural Ninth Amendment rights are difficult to determine, and judges and legislators are inherently fallible “as the prophets of natural Ninth Amendment rights.”<sup>110</sup> Thus, there should be a role for natural Ninth Amendment rights, but they should be given only “contingent” status, so as to provide “an iterative dialogue between the courts and legislatures whenever the subject is the content or scope of natural Ninth Amendment rights.”<sup>111</sup> This iterative dialogue is meant to ensure that there is “a sufficiently widely shared cultural understanding to support recognition”<sup>112</sup> of an asserted natural right.

Massey notes that there are several devices to accomplish this dialogue and to make sure that any declared natural Ninth Amendment rights are merely contingent. For example, in recognizing any natural Ninth Amendment right, the Supreme Court could make it clear that its decision is provisional and subject to congressional override.<sup>113</sup> Alternatively, the Court could weaken its usual rule of stare decisis with respect to natural Ninth Amendment rights so that it is free “to change its mind if it realizes that its earlier recognition of a natural Ninth Amendment right was inappropriate.”<sup>114</sup>

As for identifying an asserted right in the first place as a natural Ninth Amendment right, Massey provides various methods that a court could use to make this decision. First, natural rights can be identified from the nature of rights already guaranteed (e.g., locating the right to privacy in the penumbra of other enumerated rights).<sup>115</sup> Second, a presumption of validity can be given to any asserted right that is consistent with rights enumerated in the Constitution.<sup>116</sup> The right would be recognized unless the government could overcome the presumption.<sup>117</sup> Finally, to recognize a natural Ninth Amendment right, “[i]n addition to demanding consistency with enumerated rights and some logical nexus with the themes that inform the enumerated rights, we might also require that any claimed natural Ninth Amendment right be consistent with our dynamic history and traditions.”<sup>118</sup>

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108. *Id.* at 182.

109. *Id.*

110. *Id.* at 188.

111. *Id.*; *see also id.* at 182.

112. *Id.* at 193; *see also id.* at 187.

113. *See id.* at 189.

114. *Id.*

115. *See id.* at 193.

116. *See id.*

117. *See id.* at 194-95.

118. *Id.* at 200-01.

Whereas Massey is not quite sure whether state-specific positive Ninth Amendment rights would be applicable to the states via the incorporation doctrine,<sup>119</sup> he is not so hesitant regarding natural Ninth Amendment rights.<sup>120</sup> Since natural rights are "prepolitical entitlements," they are necessarily "fundamental" in the sense relevant to the Fourteenth Amendment.<sup>121</sup> Thus, any recognized natural Ninth Amendment rights presumably would be applicable against the states by the incorporation doctrine, since the Due Process Clause of the Fourteenth Amendment is seen as incorporating rights of sufficient fundamentality.<sup>122</sup>

## VI. Massey's Ninth Amendment

I have mentioned above some problems with Massey's constitutional *cy pres* theory.<sup>123</sup> At this point, it is appropriate to address further weaknesses in Massey's theory. Most seriously, Massey's argument that the Ninth Amendment actually *does* incorporate state-sourced rights is unconvincing.<sup>124</sup> The contention seems to be pulled out of thin air, not rooted in the text or history of the Constitution. The Ninth Amendment does not *state* this, for example, and even if it were understood in 1791 to protect the set of natural rights, some of which happened to also be enumerated at the time in state constitutions, there is no reason to think that *new* positive rights *subsequently* added to various state constitutions were to be included in the original set of natural rights contemplated by the Ninth Amendment.

Furthermore, regardless of the merits of Massey's reasoning in support of the thesis that the Ninth Amendment protects state-sourced unenumerated rights, it is not clear how this reasoning is strengthened by appeal to the constitutional *cy pres* doctrine.<sup>125</sup> Both his theories of natural and positive Ninth Amendment rights seem to be supported by quite respectable (though ultimately unpersuasive) reasoning that is independent of *cy pres*-type reasoning. Indeed, Massey's constitutional *cy pres* doctrine seems to be more of an after-

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119. *See id.* at 186

120. *See id.*

121. *Id.*

122. *See id.*

123. *See supra* text accompanying notes 45-72.

124. Thomas McAfee has concluded that "Massey's claim that the Ninth Amendment secures state-created rights as affirmative limitations on federal power had not been advanced by a single commentator between 1789 and the 1980s. This reading, moreover, presents an incoherent amalgamation of diametrically opposed readings of the text and history of the Ninth Amendment." Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 B.Y.U. L. REV. 351, 374.

125. *See supra* note 62 and accompanying text.

thought—a sophisticated justification or overarching framework added after the fact—to his original insight that the Ninth Amendment might be read to directly incorporate state-sourced rights.

Additionally, even if we accept Massey's contention that the Ninth Amendment ought to incorporate state-sourced rights, why would this include only rights explicitly enumerated in state constitutions? As in the federal system, some rights might be protected by the states in other ways—by decisions of their state supreme courts, by legislation, by common law, or even by mere state practice.<sup>126</sup> In Louisiana, for example, a civil-law jurisdiction,<sup>127</sup> its Civil Code, according to the civilian tradition, is treated more like a constitution than like mere legislation.<sup>128</sup> Massey's focus on state constitutions does avoid the seemingly insurmountable problems that his theory would face if all of these potential state sources of rights were to be considered, but the focus seems arbitrary nonetheless.

Massey's theory is also worrisome because it gives natural rights relatively short shrift in comparison to positive rights; Massey's discussion of the latter is much more extensive than the former.<sup>129</sup> Also, unlike positive Ninth Amendment rights, which would presumably be very large in number due to the potentially unlimited number of rights provided in state constitutions, Massey's natural Ninth Amendment rights would likely be very few in number.<sup>130</sup> Natural Ninth Amendment rights are granted reluctantly, and have only contingent status.<sup>131</sup> Massey does not similarly insist that the Court's recognition of *positive* Ninth Amendment rights be merely contingent. Further, Massey provides no method for resolving conflicts between incompatible natural and positive Ninth Amendment rights, and, indeed, does not even allude to the possibility of such a conflict. This is inexplicable, given Massey's extended discussions of how to resolve potential incompatibilities between Ninth Amendment rights and other federal rights.<sup>132</sup>

Consider, for example, the following conflict between natural and positive rights. Assume that the original understanding of Ninth

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126. Indeed, as Massey himself points out, "[P]ositive rights had their source in state common, constitutional, and statutory law." MASSEY, *supra* note 10, at 118.

127. Puerto Rico is also a civil-law jurisdiction, although it is not, as of this writing, a state.

128. In civil-law systems, a code is more like a constitution, which changes only rarely, relative to legislation. See Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1079 (1988); Vernon Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221, 235 (1988).

129. See MASSEY *supra* note 10, at 218.

130. See *id.*

131. Query: Under this approach, would previously recognized unenumerated rights suddenly become merely contingent?

132. See, e.g., MASSEY *supra* note 10, at 142-73, 193-94.

Amendment rights is largely consistent with the libertarian conception of rights as being strictly negative rights, that is, rights against aggression—the initiation of force.<sup>133</sup> In this case, one could very well argue that there is a natural Ninth Amendment right against having one's property forcibly taken by the government and redistributed as welfare benefits to others. Now suppose that California enshrines various welfare rights in its constitution—a right to education, to housing, to a minimum income, and the like (in contravention of natural law). Under Massey's doctrine of positive Ninth Amendment rights and the state-specific conception, this could also result in a *federal* Ninth Amendment right to these things, at least for California citizens. This would be a disastrous result, if only because an illegitimate conception of rights, formerly localized to California—and such localization of policy is one of the benefits of federalism—is now imposed on the entire federal government.

Even worse, under the national concept of positive Ninth Amendment rights, the federal government (acting through its agent, the Supreme Court) could adopt this welfare right as a positive Ninth Amendment right of national scope, and force *all* the states to provide education and welfare rights, an even worse attack on the principle of federalism and an illegitimate result to boot (since there are, in truth, no such welfare rights). The only possible saving grace to this situation would be if the courts were to find that the natural Ninth Amendment right to not have one's property expropriated and redistributed to others somehow outweighed the positive Ninth Amendment welfare right. But Massey does not address how such potential conflicts between natural and positive Ninth Amendment rights would be resolved; in any event, it is contrary to principles of federalism to allow the federal government to resolve such conflicts. Additionally, lest it be thought that my interpretation that Massey's theory would yield positive rights is paranoid, it should be noted that Massey himself explicitly states that the Ninth Amendment, when interpreted under today's conceptions of rights, might require non-negative rights such as welfare rights.<sup>134</sup>

In my view, if the Ninth Amendment is to be judicially enforceable, it is unnecessary to use a *cy pres*-type theory or to include positive rights in the Ninth Amendment. Rather, it ought to be recognized that the Ninth Amendment essentially protects unenumerated natural rights in the same way that enumerated rights are protected as long as the natural rights can be identified with sufficient certainty. By now, this reading of the Ninth Amendment has been adequately estab-

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133. See *supra* note 4 (discussing the libertarian conception of rights and Rothbard's definition of aggression).

134. See MASSEY *supra* note 10, at 128.

lished.<sup>135</sup> For example, as Randy Barnett has pointed out, even if the Framers' view of natural rights was incorrect—even if there are no natural rights—it is relevant that the *Framers* believed in natural rights and embodied a certain conception of these rights in the Constitution. Thus, anyone who “allow[s] a role for [the] Framers' intent” and who “view[s] the Constitution as a kind of contract entered into at the time of ratification” should “make some effort to discern and protect at least the kinds of rights the Framers had in mind when they ratified the Ninth Amendment.”<sup>136</sup>

In *identifying* what these rights are, the various techniques proposed by Massey, Barnett, and others are useful. It seems reasonable that one way to discover the content of the natural rights included within the scope of the Ninth Amendment would be to examine the rights guaranteed by state constitutions, especially since, as Massey points out, protection of natural rights was to be left primarily to the states.<sup>137</sup> However, in this view, state-sourced rights are merely *evidence* of which natural rights are protected by the Ninth Amendment. Whether these rights are dynamic and ever-evolving and growing, as Massey maintains,<sup>138</sup> or static is another question, but I am unconvinced by Massey's argument that both positive and natural Ninth Amendment rights should be envisioned as changing with the times. It is a written constitution that we are interpreting, after all.

Further, given that the modern conception of rights and legitimate state power is thoroughly statist, the Framers' conception of

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135. See, e.g., sources cited *supra* note 7. For an (unconvincing) opposing view, see Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508 (1994).

136. Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 7, at 1, 33; see also *supra* note 7 (discussing Barnett's “constitutional legitimacy” argument for judicial enforcement of unenumerated Ninth Amendment rights). There is another argument in favor of protecting rights unenumerated by the Ninth Amendment. The Constitution was ratified in 1789 only on the understanding that a bill of rights would be added. However, since the actual Bill of Rights was not completed and adopted until 1791, at the time of ratification the rights that were to be added by a bill of rights were unspecified. Since these rights were unspecified, but the Constitution was initially conceived as being limited by whatever these rights were, merely enumerating some of these rights at a later time in the Bill of Rights does not necessarily exhaust all the background rights that *could have been* enumerated in the Bill of Rights (i.e., there is no guarantee that the Bill of Rights captured all of the enumerated rights on which the Constitution's ratification was dependent). Thus, for the ratification to be effective and for the Constitution to have validity, the rights enumerated in the Bill of Rights cannot be seen as an exhaustive list. For a complementary argument, see Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 29 (1988) (“Only a handful of the many rights proposed by state ratification conventions were eventually incorporated in the Bill of Rights. The Ninth Amendment was offered precisely to ‘compensate’ these critics for the absence of an extended list of rights.”).

137. See Massey *supra* note 10, at 56.

138. See *supra* text accompanying notes 84-89.

rights is vastly preferable, at least for anyone who favors individual rights. For example, as mentioned above, the dynamic view of unenumerated rights might result in the cross-pollination and thus the spreading of (illegitimate) welfare-type rights.<sup>139</sup> Interpreting the Constitution in accordance with its original, that is, static, understanding is therefore preferable to reading socialist rights into it, as it is a more honest interpretation and is also more likely to be in accord with individual rights.

Finally, there is another serious weakness in Massey's theory. As Massey readily acknowledges, one of the original purposes of the Constitution was federalism, the sovereignty of each state.<sup>140</sup> Indeed, one of Massey's reasons to support constitutional *cy pres* and positive Ninth Amendment rights is to help limit the powers (though indirectly, by trumping these powers with Ninth Amendment rights) that the federal government has illegitimately usurped over the years.<sup>141</sup> Yet there can be little doubt that, in this age of an untrustworthy federal government and Supreme Court, expanding the Court's jurisdiction to declare rights would result in the further weakening of federalism.<sup>142</sup>

Massey admits that Ninth Amendment rights would likely be applied to the states by the incorporation doctrine.<sup>143</sup> But the incorporation doctrine is one reason why Massey's theory should be rejected, for as long as it is in place, further federal judicial activism only imperils our rights, leading to further erosion of federalism by making state policy subject to federal control. One would think that Massey, since he is obviously willing to urge an innovative interpretation of the Ninth Amendment, would have used his constitutional *cy pres* doctrine or at least ordinary reasoning to build a rejection of the incorporation doctrine into his theory. Federalism, in the American constitutional system, is essential to the protection of individual rights,

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139. See *supra* text accompanying notes 133-34.

140. See MASSEY, *supra* note 10, at 56; see also RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); BORK, *supra* note 6, at 52-53; JOHN C. CALHOUN, *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* (Ross M. Lence ed., 1992) (discussing the advantages of federalism); PAUL K. CONKIN, *SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS & DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE & SEPARATION OF POWERS* (1974); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (1995). For Massey's own views of the importance of federalism, see Massey, *Federalism and Fundamental Rights*, *supra* note 62.

141. See, e.g., *supra* notes 82-83 and accompanying text.

142. See, e.g., MARSHALL L. DEROSA, *THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE: DISPARAGING THE FUNDAMENTAL RIGHT OF POPULAR CONTROL* (1996).

143. See *supra* text accompanying notes 98-104, 119-22.

both enumerated and unenumerated.<sup>144</sup> The greatest violator of individual rights, even if measured by such a simple parameter as the overall level of taxation, is the federal leviathan; in comparison, the states are monarchist utopias. Although Massey's proposal is intended to increase the protection of individual rights, it involves ceding more power to the federal government to control and oversee the states and to define what rights are to apply at which level of government.<sup>145</sup> As Ludwig von Mises wisely observed in a related context, "No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power—whether it is called humanity, society, nation, state, or government—could act in a way of which he himself disapproves."<sup>146</sup> In other words, the central government cannot be trusted to safely exercise any extra power that is given to it, even if the purpose of the power is ostensibly to protect rights. Accordingly, as Paul Conkin has noted, "Ironically, the tremendous expansion of federal power in all areas, including the expanded role in protecting individual rights, has finally transformed the often fantastic eighteenth-century fears of a federal leviathan into prophetic admonitions."<sup>147</sup> Handing more power to the federal government, as Massey's theory unfortunately does, would ill-serve the original understanding and purpose of the Ninth Amendment.

Unlike the Supreme Court, most modern constitutional scholars, and other intellectuals, Massey takes the Ninth Amendment seriously. He has written a provocative study of the Ninth Amendment, but, due to the problems with Massey's thesis detailed above, I believe a better approach to the Ninth Amendment may be found in the writings of other scholars, such as Randy Barnett<sup>148</sup> and Marshall DeRosa.<sup>149</sup>

## VII. Conclusion: Constitutional Interpretation or Political Theory?

If Massey is correct that it is too late to limit the federal government to its proper powers, it is unlikely that the Court will try to, or even want to, accomplish the same thing by trumping those powers with Ninth Amendment rights. The truth is, and I doubt Massey

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144. See *supra* note 140.

145. See *supra* note 94 and accompanying text; see also McAfee, *supra* note 124, at 386 ("Recognizing that the Supremacy Clause and structural analysis cannot do all of the work required to avoid unwelcome outcomes of his states' rights thesis, Massey eventually simply delegates to the Supreme Court the task of preventing potential state abuses that such a guarantee might permit.").

146. LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 692 (3d rev. ed. 1966).

147. CONKIN, *supra* note 140, at 141.

148. See sources cited *supra* note 7.

149. See DEROSA, *supra* note 142.

would demur, that Massey's theory stands no realistic chance of being adopted by the Supreme Court. Most likely, from the Court's point of view, it is too radical, too academic, and at least has the potential of imposing some limits on federal power. So Massey's theory is not *really* a theory of how the Constitution should be interpreted. What, then, is it? In truth, it is a proposal to amend the Constitution.

There are, however, better and simpler alternatives available—alternatives that strengthen, rather than weaken, federalism. One such alternative is that of Marshall DeRosa, as explained in his recent book *The Ninth Amendment and the Politics of Creative Jurisprudence*.<sup>150</sup> DeRosa proposes an ingenious constitutional amendment, which would read as follows:

When a national majority of each State's chief judicial official declares a decision by the U.S. Supreme Court to be inconsistent with the U.S. Constitution, the said decision shall thereby be negated and precedent restored. The States' designated chief judicial officers shall convey their declarations to the U.S. Solicitor General, who in turn will notify the Chief Justice of the U.S. Supreme Court to take appropriate measures consistent with this amendment.<sup>151</sup>

As DeRosa explains, this would allow controversial Supreme Court decisions to be overturned "more expeditiously and competently" than at present.<sup>152</sup> The states would not have to "resort[ ] to a cumbersome amendment process or the national congress that is significantly detached from states' interests."<sup>153</sup> Also, the amendment would have a chilling effect on the Supreme Court, making it more reluctant to issue unreasoned or unconstitutional decisions,<sup>154</sup> just as lower courts are reluctant to issue decisions that may be overturned by higher courts. In essence, this amendment would "heighten popular control over unenumerated rights jurisprudence, and to that extent a significant portion of originalism would be recovered."<sup>155</sup>

As for other potentially useful amendments, unfortunately, Sobran's proposed amendment, "The Constitution shall not be circumvented," would be easily circumvented, as Sobran recognized.<sup>156</sup> However, Sobran proposes another "amendment that would actually

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150. *Id.*

151. *Id.* at 192. This proposed amendment is preferable to an amendment recently suggested by Robert Bork, which would have little beneficial effect on federalism. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996) (proposing a constitutional amendment to make "any federal or state court decision subject to being overruled by a majority vote of each House of Congress").

152. DE ROSA, *supra* note 142, at 192.

153. *Id.* at 193.

154. *See id.*

155. *Id.* at 194.

156. Sobran, *supra* note 1, at 12.

restrain the federal government. It would read: 'Any state may, by an act of its legislature, secede from the United States.'"<sup>157</sup> Either Sobran's or DeRosa's proposed amendment (or both) would straightforwardly enhance federalism and increase the likelihood that our individual rights would be respected.<sup>158</sup>

And while we are at it, let us amend the Constitution to repeal the incorporation doctrine. We also might as well eliminate judicial supremacy (sometimes confusingly referred to as "judicial review"), the idea that the Supreme Court is the sole and final arbiter of the Constitution and constitutionality. Instead, the original scheme of separation of powers required concurrent review, sometimes referred to as Jefferson's tripartite theory of constitutionalism.<sup>159</sup> Under concurrent review, each branch (executive, legislative, judicial) has an equal right to determine the constitutionality of government action. But enough of making my wish-list. Any one of these changes would be enough to warm the heart of a true constitutionalist.

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157. *Id.*

158. The proposed amendments are also consistent with Jefferson's "belief that the states were the prime interpreters of the federal compact." CONKIN, *supra* note 140, at 72.

159. *See id.* at 69-73; DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 131, 259, 263, 269-72 (1994); WILLIAM J. QUIRK & R. RANDALL BRIDWELL, *JUDICIAL DICTATORSHIP* at xiv, 10-11, 13 (1995).