

The Ninth Amendment in Light of Text and History

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The Ninth Amendment may seem a strange subject for a lecture at a conference on the recent decisions of the Supreme Court. After all, the Court has never squarely based a holding on the Ninth Amendment and has scarcely even discussed its meaning. Some scholars regard the amendment as an “inkblot”¹ or as nothing more than a warning not to read the enumeration of powers too liberally or the enumerated rights too narrowly.² It plays virtually no role in modern constitutional litigation. And yet the Ninth Amendment is the subject of two recent books³ and many articles, and rightly so: the amendment, properly understood in light of its text and history, helps us understand the constitutional structure of powers granted and rights reserved, the relation of the Bill of Rights to the original

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¹ Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 248-49 (1987) (statement of Judge Robert H. Bork) (comparing the Ninth Amendment to an indecipherable “ink blot”); see also Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 166 (1990).

² See, e.g., Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 *Colum. L. Rev.* 1215 (1990).

³ Daniel A. Farber, *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have* (2007); Kurt T. Lash, *The Forgotten History of the Ninth Amendment* (2009); see also Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

Constitution of 1787, and the role of natural rights in American constitutionalism.

I. Text

The Ninth Amendment is only 21 words long: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” What are these rights? What is their legal status? What is their relation to the enumerated rights of the Bill of Rights? We know that we must not regard the enumeration as “denying” or “disparaging” these other rights, but what does that mean? Does it mean that these other rights are now judicially enforceable constitutional rights, just like the rights of freedom of speech and due process, and the right to confront witnesses?

Let us begin with the text. The Ninth Amendment refers to two different sets of rights. First are “certain rights” that are the subject of “enumeration in the Constitution.” These are the rights (some positive, some natural) that are spelled out in the Bill of Rights, as well as in the few rights-reserving provisions of the original Constitution, such as Article I, Sections 9 and 10 (the prohibitions on bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts), plus Article III’s guarantee of jury trials in criminal cases. Because these are express constitutional rights, they have the status in our law as judicially-enforceable “trumps”: even if violation of these rights would be an otherwise appropriate means of effectuating an enumerated power, the government may not infringe or abridge them.⁴ As James Madison explained to the First Congress, if protections for these rights

are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; *they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.*⁵

⁴ I borrow the terminology of “trumps” from Ronald Dworkin, *Taking Rights Seriously*, at xi (1977).

⁵ 1 *Annals of Cong.* 457 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison) (emphasis added).

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Significantly, as positive law, Madison insisted that these rights were judicially enforceable, and by the logic of constitutionalism, superior to enacted law, whether federal or state.

The second set of rights to which the Ninth Amendment refers are the “other” rights that are “retained by the people.” This is the language of Lockean social compact theory.⁶ At the time of the social compact—which for late-18th-century America meant the time of constitution-making—the people make an authoritative decision regarding which powers to delegate to the government and which rights to retain. As the delegates to the Constitutional Convention explained in the letter transmitting the proposed Constitution to Congress for submission to the ratifying conventions:

Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved⁷

The essence of the Lockean social compact is that we relinquish certain of our natural rights and we receive, in return, more effectual protection for certain of our rights, plus the enjoyment of positive rights, that is, rights created by the action of political society.⁸ As articulated by the New York Anti-Federalist writing as Brutus:

The common good, therefore, is the end of civil government, and common consent, the foundation on which it is established. To effect this end, it was necessary that a certain portion of natural liberty should be surrendered, in order, that what remained should be preserved: how great a proportion of natural freedom is necessary to be yielded by individuals, when they submit to government, I shall now enquire. So much, however, must be given up, as will be sufficient to enable those, to whom the administration of the government is committed, to establish laws for the promoting the

⁶ See generally John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* §§ 95–140 (1690) (constructing a social compact theory of government).

⁷ Letter to Congress (Sept. 17, 1787), in *2 The Records of the Federal Convention of 1787*, at 666 (Max Farrand ed., 1911).

⁸ Locke, *supra* note 6, at §§ 122–131.

happiness of the community, and to carry those laws into effect. But it is not necessary, for this purpose, that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered. Of this kind are the rights of conscience, the right of enjoying and defending life, etc. Others are not necessary to be resigned, in order to attain the end for which government is instituted, these therefore ought not be given up. To surrender them, would counteract the very end of government, to wit, the common good. From these observations it appears, that in forming a government on its true principles, the foundation should be laid in the manner I before stated, by expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with.⁹

Madison offered a similar account of social compact theory on the floor of the House in the First Congress. He explained that a bill of rights would “specify” two types of rights: those “which are retained when particular powers are given up to be exercised by the Legislature,” and “positive rights,” like trial by jury, which “cannot be considered as a natural right, but a right resulting from a social compact.”¹⁰

Brutus and Madison thus employed the common language of Lockean rights theory. Certain natural rights are “surrendered” or “relinquished,” while others are “retained” or “reserved.” In interpreting the rights language of the Constitution, it is important to understand the meanings then attached to these words, and to bear in mind the differences between those meanings and modern usage.

The key words here, as used by Brutus, Madison, and the transmittal letter, are *natural* rights, *positive* rights, *retained* rights (also called *reserved* rights), and *relinquished* rights. “Natural rights” are rights human beings possess in the state of nature—principally ownership of one’s own body and the product of one’s labors, and the right to use violence against others to punish violations of the law of nature.¹¹ Importantly, these natural rights do not necessarily survive into civil society; some are “retained” and others are “surrendered” in

⁹ Brutus, On the Lack of a Bill of Rights, in *The Complete Federalist and Anti-Federalist Papers* 749, 750 (2009).

¹⁰ 1 *Annals of Cong.*, *supra* note 5, at 454.

¹¹ Locke, *supra* note 6, at §§ 26–28.

exchange for greater security in those that are retained.¹² They are not the same as modern “human rights,” which governments everywhere and always must respect. “Positive rights” are rights not enjoyed in the state of nature.¹³ Madison gives the example of trial by jury; no one has the right to a jury trial in the state of nature. “Retained rights” comprise only a subset of natural rights. No positive rights—no rights that are the product of civil society—are included. As the Federal Farmer explained, many important rights, such as the right to trial by jury, to the writ of habeas corpus, to the assistance of counsel, and to confront witnesses, are not “reserved” natural rights but “stipulated rights” that “individuals acquire by compact.”¹⁴ And in this compact some natural rights—such as freedom from taxation or military conscription—are relinquished.

Thus, the “other rights” to which the Ninth Amendment refers, which are “retained” by the people, comprise the set of natural rights that have not been surrendered or relinquished under the social compact in order to promote the good, prosperity, and safety of society. This set does not include positive rights, which are not “retained” but rather are created by the social compact—such as the enforcement of contracts. Nor does it include those rights “expressly stipulated for in the Constitution by the declaration of rights.”¹⁵ Examples of unenumerated natural rights that might be “retained by the people” include the right to control the upbringing of one’s children, the right to travel, the right to engage in nonprocreative sex, the right to read, the right to control one’s own medical care, the right to choose one’s own friends and associates, the right to pursue a job or profession, the right of self-defense, and many others.¹⁶ During the Bill of Rights debates, reference was jokingly made to the right to wear a hat, and to go to bed when one pleases.¹⁷

¹² *Id.* at §§ 128–31.

¹³ *Id.* at §§ 136–39.

¹⁴ Federal Farmer No. 16 (Jan. 20, 1788), reprinted in *Empire and Nation* 157, 158 (Forrest McDonald ed., 1962).

¹⁵ 1 *Annals of Cong.*, *supra* note 5, at 457.

¹⁶ I make no argument as to whether any of these natural rights would be constitutionally protected under a proper interpretation of the Constitution, but only mention them as examples of rights enjoyed in the state of nature that might arguably have been retained by the people.

¹⁷ 1 *Annals of Cong.*, *supra* note 5, at 759–60 (statement of Rep. Sedgwick). Professor Kurt Lash argues that, in addition to its application to individual natural rights, the Ninth Amendment protected the people’s collective political right to enact policies

II. Legal Status of Natural Rights Before and After the Bill of Rights

What is the legal status of retained natural rights? The Ninth Amendment seems to say that retained natural rights have precisely the same status they had before adoption of the Bill of Rights or the rights-protecting provisions of the original Constitution. They are neither “denied or disparaged,” nor are they elevated to the status of expressly enumerated rights. As Professor Randy Barnett has written, “The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before.”¹⁸

In order to understand what force these unenumerated retained rights have under the law, we must therefore examine how natural rights were invoked before the Constitution. Some scholars, among them Professor Barnett, argue that unenumerated natural rights are now constitutional rights, with the same status as rights spelled out by the First through Eighth Amendments. Other scholars regard the Ninth Amendment as a protection for federalism, for certain collective rights of a republican nature, or as a unenforceable truism or inkblot.¹⁹ My reading of the historical materials suggests a middle ground: that unenumerated natural rights are protected through some combination of political self-control on the part of the political branches (reinforced by the separation of powers) and equitable interpretation by the courts, which entails the narrow construction of statutes so as to avoid violations of natural rights. In other words, *natural rights control in the absence of sufficiently explicit positive law to the contrary*. This can be understood as a clear statement rule for abrogating unenumerated natural rights.

The historical evidence indicates that natural rights in the pre-constitutional world did *not* have the status we now ascribe to constitutional rights—meaning supreme over positive law. With the possible exception of *Dr. Bonham’s Case*,²⁰ a hotly contested and frequently

at the state and local level. See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *Stan. L. Rev.* 895 (2008). This article will focus only on individual rights.

¹⁸ Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1, 2 (2006).

¹⁹ For a summary of five leading views on the meaning of the Ninth Amendment, see *id.* at 10–21.

²⁰ 8 *Co. Rep.* 107a, 113b (1610); see Theodore F.T. Plunknett, *Bonham’s Case and Judicial Review*, 40 *Harv. L. Rev.* 30 (1926).

misinterpreted decision by the great Chief Justice of the Court of Common Pleas, Sir Edward Coke, there appear to be no examples in English jurisprudence of courts upholding natural rights claims in the teeth of contrary statutes passed by sovereign authorities.²¹ John Locke himself presupposed that “the body of the people” is the only available judge of “whether the prince or legislative act contrary to their trust,” and that if the government should “decline that way of determination,” the people’s only recourse is rebellion: the “appeal . . . to heaven.”²² As Blackstone explained in his *Commentaries on the Laws of England*, Parliament had “no superior on earth,” and if Parliament made its intent clear, “there is no court that has power to defeat the intent of the legislature.”²³ With minor departures, this became established doctrine in American colonial and state courts as well.²⁴

A striking example of pre-constitutional natural law jurisprudence was Lord Mansfield’s 1772 decision in *Somerset’s Case*, involving the legality of slavery within the Kingdom of England. Mansfield operated on the premise that “[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law It is so odious, that nothing can be suffered to support it, but positive law.”²⁵ Finding no positive law to support slavery within England, Mansfield required Somerset’s captors to set him free. This famous decision, well known to the American colonists, illustrates how natural law could be enforced in court, but it also made plain that natural law cannot trump explicit positive law, however odious. Despite its odiousness, under the logic of the *Somerset* decision, slavery remained legal and enforceable in parts of the empire where there were slave codes or other authoritative pronouncements establishing slavery.

A particularly clear illustration of the relation of natural rights to positive law may be found in the famed Virginia Bill for Establishing

²¹ See Philip Hamburger, *Law and Judicial Duty* 237–54 (2008).

²² Locke, *supra* note 6, at § 242.

²³ William Blackstone, 1 *Commentaries* *90–91.

²⁴ For this proposition, I rely on the definitive research of Professor Philip Hamburger. See Hamburger, *supra* note 21, at 274–80.

²⁵ *R. v. Knowles, ex parte Somerset*, 20 State Tr 1 (1772), reprinted in *The Eighteenth-Century Constitution 1688–1815*, at 387–88 (E. Neville Williams ed., 1960).

Religious Freedom, authored by Thomas Jefferson and championed by Madison. It concludes with the following observation:

And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.²⁶

This concluding observation makes clear that the founding generation, despite its regard for “the natural rights of mankind,” believed that in the absence of express constitutional protections, legislatures had the power (if not the right) to infringe those natural rights. If the rights affirmed by the Virginia Bill, which Madison regarded as not only “natural” but “unalienable,”²⁷ could in fact be revoked, repealed, or narrowed by future legislatures, this demonstrates that (at least prior to express constitutionalization) “natural” and “unalienable” rights enjoyed a status inferior to legislation.

That natural law did not trump positive law as a legal matter in court did not mean that it was wholly without effect. To begin with, legal theorists regarded natural law as morally binding on Parliament itself. It may have been true that courts were not free to hold acts of Parliament “unconstitutional” or “void,” but Parliament remained subject to the unwritten constitution of the realm, and was under an obligation, albeit not judicially enforceable, to control itself.²⁸ Even after the ratification of a written constitution, Americans expected that Congress and the president, and ultimately an alert and engaged citizenry, would be the principal bulwarks against

²⁶ A Bill for Establishing Religious Freedom § III (1786), reprinted in Jefferson and Madison on Separation of Church and State 50 (Lenni Brenner ed., 2004).

²⁷ James Madison, Memorial and Remonstrance against Religious Assessments (1785), reprinted in Jefferson and Madison, *supra* note 26, at 68.

²⁸ See Hamburger, *supra* note 21, at 252–54.

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violations.²⁹ This was, indeed, the principal reason the Federal Farmer gave for supporting enactment of a Bill of Rights: “If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book.”³⁰ Rights should be declared so “that the people might not forget these rights, and gradually become prepared for arbitrary government.”³¹ Recall the stern warning the enactors of the Virginia Bill for Establishing Religious Freedom gave to future legislators who might contemplate repeal.

But natural rights were not merely political principles. They also had purchase in court, albeit not as constitutional rights—that is, not as superior to positive law. It was understood that courts had the power to engage in equitable interpretation, under which statutes were interpreted narrowly so as to avoid violating the law of nature.³² As Blackstone explained:

[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it. . . . But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. . . . [T]here is no court that has power to defeat the intent of the legislature, when couched in such

²⁹ See *The Federalist* No. 33, at 199 (Hamilton) (Clinton Rossiter, ed. 1961[1788]) (“If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.”). For an interpretation stressing popular enforcement of constitutional principles, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

³⁰ *Federal Farmer* No. 16 (Jan. 20, 1788), reprinted in 1 *Classics of American Political and Constitutional Thought: Origins through Civil War* 568 (Scott J. Hammond et al. eds., 2007).

³¹ *Federal Farmer* No. 16, *supra* note 14, at 153.

³² See generally Hamburger, *supra* note 21, at 344–57, 622–30; J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* 28, 28 n.96 (2001); S.E. Thorne, *Dr. Bonham’s Case, Essays in English Legal History* 275 (1985).

evidence and express words, as leave no doubt whether it was the intent of the legislature or no.³³

In part, this equitable interpretation was predicated on the charitable assumption that the legislature likely did not intend, by the use of broad language not explicitly addressed to the point at issue, to violate the law of nature. As one American judge stated in a 1784 decision that closely followed and quoted from the above Blackstone passage: “When the judicial make these distinctions, they do not controul the Legislature; they endeavour to give their intention its proper effect.”³⁴ Equitable interpretation was interpretation according to the animating purpose or spirit of a law, rather than its letter.³⁵

This equitable approach to the enforcement of constitutional rights changed with adoption of the Constitution. By declaring the document part of the “supreme Law of the Land,”³⁶ the sovereign people made the Constitution positive law, superior to any act of the legislature. By authorizing the federal courts to hear cases “arising under” the Constitution,³⁷ the people made clear that the positive law of the Constitution would be judicially cognizable. And by enumerating certain rights through the Bill of Rights, the people made those rights as much a part of the positive law of the land as any power of Congress. They did not, however, constitutionalize those natural rights that remained unenumerated.

The Framers thus drew upon natural rights when they created a written constitution, but they recognized a distinction between constitutional law, which is a species of judicially enforceable positive law, and natural law or natural justice. As George Mason explained at the Constitutional Convention: “[Judges] could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under

³³ Blackstone, *supra* note 23, at *90.

³⁴ *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. 1784), quoted in *Hamburger, supra* note 21, at 351.

³⁵ See *Hamburger, supra* note 21, at 344–57; *Brutus*, No. 15, in 2 *The Complete Anti-Federalist* 437–41 (Herbert Storing ed., 1981).

³⁶ U.S. Const. art. VI, cl. 2.

³⁷ U.S. Const. art. III, § 2, cl. 1.

this description, they would be under the necessity as Judges to give it a free course."³⁸

With this background, the Ninth Amendment can best be understood as ensuring that rights arising from natural law or natural justice are not abrogated on account of the *expressio unius* effect of incomplete enumeration. But it did not elevate those rights to the status of constitutional positive law, superior to ordinary legislation.

III. How Does This Work?

We are left with this construction of the Ninth Amendment: Courts should give presumptive protection to natural rights (but not make up new positive rights), but natural rights are subject to congressional override through explicit and specific legislation. In other words, the rights retained by the people are indeed individual natural rights, but those rights enjoy precisely the same status, and are protected in the same way, as before the Bill of Rights was added to the Constitution. They are not relinquished, denied, or disparaged. Nor do natural rights become "constitutional rights." They are simply what all retained rights were before the enactment of the Bill of Rights: a guide to equitable interpretation and a rationale for narrow construction of statutes that might be thought to infringe them, but not superior to explicit positive law. This understanding of the relation of unenumerated natural rights to positive law closely resembles the relation between common law and legislation: the common law governs in the absence of contrary legislation, and sometimes even guides or limits the interpretation of ambiguous or overbroad statutes, but does not prevail in the teeth of specific statutory overrides.

This mode of interpretation offers a middle way between the two usual poles of unenumerated rights jurisprudence. One pole maintains that if a claimed right cannot be found in the Constitution, even applying a liberal construction to its terms, it is entitled to no protection at all. That is the jurisprudence of *Bowers v. Hardwick*.³⁹ The other pole maintains that there are unwritten natural rights

³⁸ Records of the Federal Convention, *supra* note 7, at 78. This was not an argument on Mason's part for judicial restraint, but rather an argument to augment judicial authority with regard to unjust or pernicious laws, by creation of a council of revision.

³⁹ 478 U.S. 186 (1986) (upholding constitutionality of state law criminalizing sodomy).

whose content must inevitably be determined, finally and without possibility of legislative override, by judges. These rights then receive full constitutional protection even when the representatives of the people have reached the contrary conclusion. That is the jurisprudence of *Roe v. Wade*⁴⁰ and *Lochner v. New York*.⁴¹ If I am correct about the meaning of the Ninth Amendment, neither of these approaches is entirely correct. Rather, an assertion of natural right (generally founded on common law or other long-standing practice) will be judicially enforceable unless there is specific and explicit positive law to the contrary. This allows the representatives of the people, rather than members of the judiciary, to make the ultimate determination of when natural rights should yield to the peace, safety, and happiness of society.

For example, suppose that a federal statute defined the crime of murder without reference to traditional common-law justifications such as self-defense. The Ninth Amendment would come into play because a defendant could show that the right of self-defense is a natural right, and that the relevant statute was silent on the subject. The court would conclude that the natural right to self-defense would continue to prevail, because there was no specific indication of an intention of the legislature to abrogate the right.⁴² This mode of analysis differs from finding that there is a “constitutional right of self-defense,” because such a right would be judicially defined and impervious to legislation. Under an equitable understanding of the Ninth Amendment, if Congress were to pass a statute explicitly defining or narrowing the traditional common law defense—for example, by denying the right to inflict injury on another in defense of one’s property—the statute would prevail.

⁴⁰ 410 U.S. 113 (1973) (holding that a woman’s right to terminate her pregnancy by means of abortion prevails over state statute protecting unborn child, at least prior to viability).

⁴¹ 198 U.S. 45 (1905) (holding that a worker’s “liberty of contract” prevails over a state law limiting the number of hours bakers could contract to work).

⁴² It should go without saying that this is not how the Supreme Court has actually approached the question. See *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 490 (2001) (calling it “an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute”); cf. *United States v. Patton*, 451 F.3d 615, 637 (10th Cir. 2006) (assuming the existence of a common-law defense of necessity).

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This may sound unfamiliar but it should not. In fact, without alluding to the Ninth Amendment or to pre-constitutional natural rights jurisprudence, the Supreme Court frequently employs the adjudicative method I have outlined here. For example, in *Zadvydas v. Davis*,⁴³ the Court was faced with a statute providing that aliens subject to a final order of removal may be held in custody for 90 days, but that they “may be detained beyond the removal period” if the attorney general determines they pose a risk to the community.⁴⁴ Can this detention be indefinite? The United States argued that it could. The Court summarized the government’s argument as follows:

The Government argues that the statute means what it literally says. It sets no “limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained.” Hence, “whether to continue to detain such an alien and, if so, in what circumstances and for how long” is up to the Attorney General, not up to the courts.⁴⁵

A lower court granted habeas relief to Zadvydas on due process grounds, but the applicability of due process to aliens subject to removal is at least questionable, and the boundaries of the due process right are hard to define. The Supreme Court took a different tack, concluding, without reaching the constitutional question:

We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. See 1 E. Coke, *Institutes* *70b (“*Cessante ratione legis cessat ipse lex*”) (the rationale of a legal rule no longer being applicable, that rule itself no longer applies).⁴⁶

⁴³ 533 U.S. 678 (2001).

⁴⁴ *Id.* at 689.

⁴⁵ *Id.* (quoting Br. for Pet’rs 22).

⁴⁶ *Id.* at 699.

This reasoning bears close resemblance to a proper Ninth Amendment analysis. Under the Ninth Amendment, the habeas petitioner would invoke the natural right to freedom from indefinite restraint, and the question would become whether the statute invoked by the executive specifically and explicitly abrogated that right. If the Court is correct that neither the text nor the history of the statute demonstrates such an intent, it would follow that *Zadvydas* was entitled to habeas relief.⁴⁷ However, this is not the same as saying that *Zadvydas* had a due process right to release; when Congress (or the executive, through delegated authority) subsequently amended the statute to be more specific, as it did, the subsequent enactment was enforceable.⁴⁸

The Supreme Court followed a similar approach in *Hamdan v. Rumsfeld*.⁴⁹ There, the government argued that the congressional Authorization for Use of Military Force provided authorization for the military commission that was convened to try *Hamdan*.⁵⁰ Again, there were important issues under due process and international law, but the Court did not reach or resolve them. The Court stated: “we assume that the AUMF activated the President’s war powers, and that those powers include the authority to convene military commissions in appropriate circumstances, [but] there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the Uniform Code of Military Justice.”⁵¹ Thus, “[a]bsent a more specific congressional authorization, the task of this Court is . . . to decide whether *Hamdan*’s military commission is so justified.”⁵² There was no mention of the Ninth Amendment, but the mode of

⁴⁷ I do not necessarily mean to endorse the result in *Zadvydas* in all respects. *Zadvydas* sought not just freedom from indefinite detention, which vindicates the natural right of liberty, but release *into the United States*. It is not clear to me that any alien has a natural right to that.

⁴⁸ See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251–56 (10th Cir. 2008). The main difference between my suggested approach and that taken by the Court is that the Court’s approach hinges on the existence of constitutional doubt; under my approach, natural rights could be protected even if not plausibly covered by an enumerated right.

⁴⁹ 548 U.S. 557 (2006).

⁵⁰ *Id.* at 594.

⁵¹ *Id.*

⁵² *Id.* at 595.

reasoning is familiar. A broad and indefinite statute like the AUMF is not a sufficient basis for overcoming deeply rooted natural and international law norms. Only when and if there were “a more specific congressional authorization” would the Court have to answer the ultimate constitutional question.

IV. Implications

I have offered this interpretation of the Ninth Amendment because it best comports with the text and history of the provision. But some may ask why it would make a difference and whether constitutional adjudication would be improved if it were adopted. I think it would. As a middle way between the no legal effect and the fully enforceable rights approaches, Blackstonian equitable interpretation achieves much of the purpose of the latter while mitigating its judicial imperialism.

The most controversial of Supreme Court decisions have involved the identification and enforcement of unenumerated rights. Some such decisions have so enraged parts of the citizenry as to call the legitimacy of the judicial power into question. If the Court were to take a middle-ground position of equitable interpretation grounded in the Ninth Amendment, its decisions might well gain democratic legitimacy. Most likely, if the Court’s explication of natural rights is persuasive, Congress would follow the Court’s lead. In some cases, politicians will be able to forge pragmatic compromises that are beyond the institutional competency of the courts. (That seems to have been what happened to the *Zadvydas* decision.) In other cases, the representatives of the people may squarely reject the Court’s conclusion (as Congress rejected the Supreme Court’s conclusions about partial-birth abortion and the meaning of free exercise of religion). These will be difficult cases, but I see no reason to presuppose that courts are wiser (or even necessarily more libertarian) than legislatures when it comes to controversial moral questions; they certainly are less representative.

Equitable interpretation in cases of unenumerated natural rights would permit further public deliberation. Instead of a judicial pronouncement purporting to place an issue outside democratic debate,⁵³ a judicial decision would govern by the force of its reason

⁵³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

and persuasiveness, with the possibility of a democratic override if the representatives of the people reject the court's arguments. Courts are not, after all, infallible. Some of the most grievous injuries to American constitutional principle have been inflicted by judicial error: think of *Dred Scott*, *Plessy v. Ferguson*, *Buck v. Bell*, or others too recent in memory to be uncontroversial examples. And it should be remembered that courts do not always err on the side of rights, or of vulnerable minorities. Perhaps judicial review would be improved if, when courts stray beyond the "rights expressly stipulated for in the Constitution," as Madison called them, their judgments were subject to further debate and revision by more representative institutions. Introduction of a democratic element might embolden courts to act when they should, and ameliorate the effects when they should not. In any event, a return to Blackstonian equitable interpretation of unenumerated rights claims would, in my judgment, make more sense of the text of the Ninth Amendment in light of its history.