IMPLICATIONS OF INCORPORATING STATE CREATED RIGHTS INTO THE FEDERAL CONSTITUTION THROUGH THE NINTH AMENDMENT

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OVERVIEW AND INTRODUCTION

Professor Gregory Allen in Ninth Amendment and State Constitutional Rights suggested a hypothetical conflict that could arise between state and federal courts when a state constitution provides for greater protection against governmental abuse of power than the federal constitution.\(^1\) There, he posited a situation where a state requires a warrant to tape conversations even when the parties have consented to the recording, or to seize telephone billing records while federal law does not require a warrant under either circumstance.\(^2\) If a state police officer then seized an individual’s telephone billing records without a warrant in that state, and those records were turned over to federal agents for use in a federal prosecution, should the records be admissible or excluded as illegally obtained evidence?\(^3\)

\(^3\) Id at 1660.
New Mexico has recently gone further and asked if a federal agent seizes records or evidence in violation of that state’s constitution, should the records be admissible or excluded?\(^4\)

These situations will continue to arise whenever any state chooses to “exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the federal constitution.”\(^5\) Some state courts have refused to admit evidence seized illegally according to that state’s constitution, but it remains to be seen whether a federal court will follow the lead of those state courts refusing to admit that evidence as the “fruit of the poisonous tree,” particularly if it is not required under federal law.

One possible safeguard of autonomy for those states choosing to grant their citizens greater state law protections than the federal government is the Ninth Amendment. The Ninth Amendment protects “unenumerated rights” that are retained by the people of the states. In

\(^4\) Id. See for eg. State v. Cardenas-Alvarez, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225 (holding that evidence seized by federal agents in violation of the New Mexico Constitution was not admissible in New Mexico courts), cf. State v. Mollica, 114 N.J. 329, 554 A.2d 1315, 1327 (1989) (refusing to apply the New Jersey Constitution to the actions of federal agents because doing so would hinder the principles of federalism and comity without advancing legitimate state interests).

theory, applying the Ninth Amendment would essentially federalize state law protections contained in state constitutions and guard that state from federal encroachment. A federal court would be subjected to the same law as the forum state and under the earlier hypothetical, the federal court would be required to suppress the evidence obtained in violation of the state constitutional right, which would be federalized through the Ninth Amendment.

The purpose of this paper is not to introduce the idea of what effect, if any, the Ninth Amendment should be given, a topic that has been extensively discussed. Rather, this paper will examine Professor Calvin R. Massey’s proposal for recognizing Ninth Amendment Rights, as well as explore some of the implications of adopting his three-part test. It is my hope that examining these effects will aid a federal court system contemplating whether to elevate the Ninth Amendment as an enforceable federal doctrine amid genuine doctrinal concerns against such an application.

THE NINTH AMENDMENT

The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to
deny or disparage others retained by the people.”⁶ On its face, the words of the Ninth Amendment suggest the existence of additional rights other than those specifically mentioned in the first eight Amendments that needed protection from governmental encroachment.⁷

Yet, what was the full effect of the Ninth Amendment the Framers intended? Professor Akhil Reed Amar suggests that the Ninth Amendment is based in federalism but “warns readers not to infer from the mere enumeration of a right in the Bill of Rights that implicit federal power in fact exists in a given domain.”⁸ Thus, the Ninth Amendment explicitly protects liberty by preventing Congress from going beyond its enumerated powers in Article I, section 8 and elsewhere in the Constitution.⁹

Professor Amar argues the Ninth Amendment is not merely duplicative of the Tenth Amendment, which provides: “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,”¹⁰ but the two Amendments complement one another.¹¹ He adds that “the Tenth says Congress must point to some explicit

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⁶ U.S. Const. amend. IX
⁷ See Griswold v. Connecticut, 381 U.S. 479 (1965)
⁹ Id at 123.
¹⁰ U.S. Const. amend. X
¹¹ AMAR, supra note 8, at 123-24.
or implicit enumerated power before it can act; and the Ninth addresses the closely related but distinct question of whether such express or implied enumerated power in fact exists.”¹² Thus, the Tenth Amendment is about states’ powers and the Ninth is about rights.¹³ However, as Professor Amar recognizes, the Ninth and Tenth Amendments “are at their core about popular sovereignty,” explicitly invoking “the people.”¹⁴

In seeking to protect that popular sovereignty, James Madison believed that the Tenth Amendment might be “unnecessary,” but that “there can be no harm in making such a declaration.”¹⁵ Yet, Madison’s Ninth Amendment prevented the “implied diminishment of other rights and the implied enlargement of enumerated federal power,” and was necessary to address his own concerns about the possible dangers of enumerating rights, as well as the concerns of the state conventions which would be ratifying (or which could refuse to adopt) the Bill of Rights.

**The Nature of Rights and the Ninth Amendment**

When discussing rights today what typically comes to mind are the enumerated rights that individuals seek to protect through judicial enforcement. Precisely what

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¹² *Id* at 124.
¹³ *Id*.
¹⁴ *Id*.
¹⁵ 1 Annals of Congress 439 (June 8, 1789).
“rights” were the so-called “popular sovereignty” amendments designed to protect and who were they designed to benefit? Some scholars argue that the Ninth Amendment refers to individual “natural rights,” those rights retained during the transition from the state of nature to civil society,\textsuperscript{16} while others argue that the amendment protects the collective rights of the people to govern on all matters not specifically granted to the federal government, including the ability to choose who will govern.\textsuperscript{17}

**NATURAL RIGHTS**

Natural rights are those basic rights that an individual enters into society with that no government can deny.\textsuperscript{18} The growth of individualism in the 17\textsuperscript{th} and 18\textsuperscript{th} centuries led to the belief that individuals, because they are natural beings and creatures of God, have rights that cannot be violated by any individual or any society.\textsuperscript{19} John Locke, one of the most famous writers on the subject of natural rights, argued that all human beings are naturally in “a state of perfect freedom to order their actions, and

\textsuperscript{19} *Id.*
dispose of their possessions and persons, as they think
fit...without asking leave, or depending upon the will of any
other man."  

Perhaps the most recognizable expression of
this concept comes from Thomas Jefferson’s Declaration of
Independence:

“We hold these truths to be self-evident, that all men
are created equal, that they are endowed by their
Creator with certain unalienable Rights, that among
these are Life, Liberty and the pursuit of
Happiness.”

The Declaration of Independence, coupled with the
enumeration of specific, individualized rights in the first
eight amendments, illustrate why some scholars believe the
Ninth Amendment was designed to protect individual, natural
rights. Professor Massey argues that the Ninth Amendment
was influenced by an understanding of natural law and was
designed to protect individualized rights:

“The structural role thereby envisioned for the Ninth
Amendment can only be obtained today by treating the
amendment as a source of individual rights judicially
enforceable against...the federal government.”

Professor Massey adds that even if the framers
intended the Ninth Amendment only to “hem in federal
legislative power,” that objective can only be realized
today by reading the Ninth Amendment as a source of

20 John Locke, The Second Treatise of Civil Government (1690), available at
http://www.constitution.org/jl/2ndtr02.txt.
22 Calvin R. Massey, The Natural Law Component of the Ninth Amendment,
individual rights designed to “frustrate the boundless exercise of federal legislative power.”

COLLECTIVE RIGHTS

However, as Professor Amar notes, “to see the Ninth Amendment...as a palladium of countermajoritarian individual rights—like privacy—is to engage in anachronism.” He suggests that at the time the Ninth and Tenth Amendments were adopted, the collective rights of “the people” were the basis for the recognition of popular sovereignty, or popular rights, rather than rights of a purely individual nature. “If the Ninth is mainly about individual rights,” Professor Amar asks, “why does it not speak of individual ‘persons’ rather than the collective ‘the people’?” He answers that “the conspicuously collective meaning of ‘the people’ in the Tenth Amendment (and elsewhere) should alert us that its core meaning in the Ninth is similarly collective.” He adds that along with the Preamble’s “We the people,” the Tenth Amendment’s similarly collective phrase “to the people” serve as “perfect bookends, fittingly the alpha and omega of the Founders’ Constitution.”

23 Id. at 52.
24 AMAR, supra note 8, at 120.
25 Id. at 121.
26 Id at 120.
27 Id.
Professor Amar argues that the ultimate supremacy of power lies in the "people," and by accepting this notion, Constitutional federalism is a double-edged sword with two systems of government, state and federal. He explains that "each constitutionally limited government can deploy its powers to police the constitutional limits on the other’s powers and remedy the other’s constitutional violations."²⁸ Specifically, the state governments retain "the people’s" right to revolt in extraordinary times at the first sign of a national abuse of power, which will, "in all possible contingencies, afford complete security against invasions of the public liberty by the national authority."²⁹

"ENUMERATED" RIGHTS IN THE 18TH CENTURY

The early state constitutions and declarations of rights, as well as the debates on the national Bill of Rights itself, provide a clue as to what additional rights the founders arguably intended to protect.

New York, for example, was more concerned with protecting "collective rights" by establishing a liberty-enhancing republican government. New York’s Bill of Rights did not appear in its original 1777 constitution, and "seeming individual liberties in the body of the

²⁹ Id. at 1500-01.
constitution, stated in mandatory form, were concerned primarily not with individuals, but with the structure of government.”

Nowhere did New York’s constitution explicitly address the protection of individual rights. However, collective rights such as the right to a jury trial, freedom of religion and due process, rights that have individual characteristics, were protected within the text of the New York constitution.

However, at the New York ratifying convention on the federal Constitution the concerns expressed about the proposed measure focused on both the civil liberties of the citizens of the state as well as the collective rights of the people. Even before New York voted to ratify the Constitution, John Lansing in his June 20, 1788 address at the New York ratifying convention recognized that the proposed document did not adequately protect civil liberties, and amendments would be necessary down the road. Lansing explained he was apprehensive about a consolidated federal government because the proposed constitution as written, which gave power to that government, could not adequately protect the essential rights and liberties of

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30 Robert F. Williams, New York’s State Constitution in National Context, 14 Touro L.Rev. 611, 620 (1998). It wasn’t until 1821 that a separate bill of rights, similar to those in most states, was adopted in New York. Id.
31 Id.
the people. Lansing said that he would support any amendments down the road that would shield civil liberties from the possibility of abuse by a centralized Republican government.

Just three days earlier, Robert Livingston argued that governmental power, whether state or federal, stems from the collective “people,” pointing to a “little understood, old world” principle that all power is derived from “the people.” Livingston pointed out that although all power stems from and remains with “the people,” those collective rights are not diminished when those people divide that power between the state and federal governments for “their own happiness.” He added that the division and grant of power actually serves as an additional safeguard of the collective rights of the people.

However, the natural rights theory was just as prevalent in the constitutional debate in other states. In Massachusetts, many delegates of the convention were concerned that the proposed Constitution had no declaration of rights. Samuel Nason argued that he would gladly give

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33 Id.
34 Id. (June 17, 1788).
35 Id.
36 Id.
up some natural rights for the greater good, but not if there were no declaration of protected, individualized rights written into the document.³⁷

Theophilus Parsons and others answered this criticism by arguing that a bill of rights was not necessary since no governmental entity, either local or federal, could impede on the natural rights each private citizen enjoyed:

“It has been objected to that we have no bill of rights. If gentlemen who make this objection would consider what are the supposed inconveniences resulting from the want of a declaration of rights, I think they would soon satisfy themselves that the objection has no weight. Is there a single natural right we enjoy, uncontrolled by our own legislature, that Congress can infringe? Not one.”³⁸

At the time the federal Bill of Rights was proposed, several states had in place their own bills of rights that contained language promoting both the individual natural rights of the people, as well as the collective rights of the citizens of their states. Virginia’s bill of rights, established several weeks before the Declaration of Independence, established the collective rights principles that “all power is vested in, and consequently derived from, the people,” and that “government is, or ought to be,

³⁸ Id.
instituted for the common benefit, protection, and security, of the people, nation, or community.”

Virginia’s bill of rights also expressly acknowledged that all men are by nature free and independent, recognizing that “the people” have certain inherent rights which cannot be deprived or divested, “namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

However, Virginia’s Declaration of Rights accompanying its constitution also protected individualized civil liberties, such as the right to the free exercise of religion, the right to a trial by jury, and the right of freedom of the press.

Similarly, Maryland’s Constitution also began with a declaration of rights, establishing first that the right of government originates from “the people” and is “instituted solely for the good of the whole.” The declaration also grants “the people” the exclusive right of regulating and policing the internal government, including the right of

39 VA. CONST. OF 1776 (June 12, 1776), available at http://www.constitution.org/bor/vir_bor.txt
40 Id.
41 VA. DECLARATION OF RIGHTS (June 12, 1776), available at http://www.yale.edu/lawweb/avalon/virginia.htm
42 CONST. OF MARYLAND (Nov. 11, 1776), available at http://www.yale.edu/lawweb/avalon/states/ma02.htm
revolt to reform the old or establish a new government.\textsuperscript{43} In addition to the collective rights of the people, the document also protected the individual’s right to freedom of speech and debate, the right of free individuals to participate in the legislature, the right to petition the government for the redress of grievances, and the right against self-incrimination.\textsuperscript{44}

New Hampshire’s bill of rights, which also pre-dates the federal Bill of Rights, recognized that each of its citizens was born with “certain natural, essential and inherent rights,” which included “enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.”\textsuperscript{45} At the same time the New Hampshire constitution also recognized that some of its citizens’ inherent natural rights would be surrendered in order to provide for the common welfare of its citizens, although it was silent as to what those rights would be.\textsuperscript{46}

Pennsylvania was perhaps the most explicit in identifying specific rights within its declaration of rights, many of which were later embodied in the federal

\begin{itemize}
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} NH. CONST. OF 1783, art. 2 (October 31, 1783), available at http://www.state.nh.us/constitution/billofrights.html
\item \textsuperscript{46} Id. at art. 3.
\end{itemize}
Bill of Rights. For example, in addition to protecting the collective rights of the people to govern for the benefit of the community and the right of revolt to alter or abolish government, as well as the individual rights of the free exercise of religion and the right to a trial by jury, Pennsylvania’s document protected the right to a speedy trial, the right to confront witnesses, and the right to be free from warrantless searches and seizures.47

THE LASH APPROACH

Contrary to the positions that Professors Massey and Amar have taken that the Ninth Amendment is either about natural rights or collective rights, Professor Kurt T. Lash argues that “at the time of the Founding [of the Ninth Amendment], it was possible to embrace both natural rights and a strong belief in the collective right of the people to local self-government.”48 Professor Lash points to the dual protections inherent in the state constitutions (as illustrated above), as well as to the beliefs of the Founders themselves.

For instance, the North Carolina convention declared on August 1, 1788, that there are certain natural rights, of which men, “among which are the enjoyment of life and

47 CONST. OF PENN., available at http://www.yale.edu/lawweb/avalon/states/pa08.htm
liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." While this shows a strong belief in natural rights, North Carolina also proposed an amendment declaring that “each state...shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States,” which exhibits an understanding of the need to protect the collective rights of the people as well. 

Professor Lash explains that while many of the Founders believed in natural rights, that does not necessarily conflict with the notion that their colleagues also had the collective rights of the people in mind. For example, Jefferson believed in the natural rights of the states, and when Congress violated the natural right of free speech in passing the Alien and Sedition Acts, Madison argued that the acts violated the collective rights of the states. Thus, although there is a certain level of ambiguity as to exactly what unenumerated rights the Founders envisioned when they created the Ninth Amendment, as Professor Lash points out, the Ninth Amendment can

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50 Id.
51 See Lash, supra note 47, at 364.
protect both natural and collective rights consistent with its role as a constitutional safeguard.

**Madison’s Proposal**

When he announced his intention to introduce a federal bill of rights on May 4, 1789, James Madison did so in order to enhance the liberties and protections of the Constitution without disparaging state and individual rights.  

Though Madison once agreed with some critics that carefully enumerated grants of power in the Constitution automatically granted all personal liberties, and that further enumerating some rights might by implication diminish unenumerated rights, he ultimately defended a national bill of rights:

“If we can make the Constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations as shall produce that effect.”

However, there was widespread criticism of a proposed bill of rights. The first was the position that enumerating powers in a federal bill of rights could justify a major expansion of federal powers, eroding the state’s authority against the federal government, precisely what the fledgling nation rebelled against a decade

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53 Id.
earlier. Alexander Hamilton explained the position, arguing that bills of rights were not only unnecessary but dangerous since they could contain various exceptions to powers which are not granted by the Constitution, thus “affording a colourable pretext to claim more than were granted.”

This anti-federalist position expressed not a simple fear of having a central government of enumerated powers; rather, the concern was how could the states constrain the possible unfettered governmental expansion of those powers once they were enumerated in a bill of rights? As Professor Lash points out, the concern was that enumerating rights might imply the “constructive enlargement” of enumerated powers, which would diminish “the scope of nondelegated powers, jurisdiction, and rights.” For example, federal courts, which are empowered to construe the Constitution and, as branches of the federal government, would likely do so in favor of federal authority when conflicts between federal and state governmental authority arise.

The second criticism was that a national bill of rights, which would almost certainly be incomplete or

54 The Federalist No. 84 (A. Hamilton) (Bantam Classic ed. 1982).  
55 Id.  
56 See Lash, supra note 47, at 361.
inaccurate, would jeopardize any unwritten, but retained, rights of the people which were protected by the constitutions of the various states.

Thus, it was necessary to draft a rule to address both criticisms, one that would prevent an unduly broad or unnecessary expansion of federal power when enumerating certain rights and at the same time ensure that states would retain their autonomy over matters that they had traditionally controlled.

Madison addressed these criticisms in Congress during the Bill of Rights debates:

“It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution”57

57 1 Annals of Congress 439 (June 8, 1789). When proposed, the Ninth Amendment was originally the eleventh of twelve proposed clauses. However, the first two failed, changing the eleventh and twelfth clauses into what is today the Ninth and Tenth Amendments. For purposes of this paper, I will refer to these as the Ninth and Tenth Amendments. See KETCHAM, supra note 52 at 291.
Madison addressed the concerns of the Federalists and Anti-Federalists alike by introducing the preliminary version of the Ninth Amendment:

"The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."\(^58\)

Shortly after his speech in Congress introducing his draft of the Bill of Rights, Madison was appointed to a Select Committee consisting of eleven members of the House of Representatives to consider his proposed amendments to the Constitution. The Select Committee, appointed on July 21, 1789, consisted of one Congressional representative from each state that ratified the Constitution, excluding only North Carolina and Rhode Island that had not yet ratified the Constitution.

Roger Sherman of Connecticut sat with Madison on the Select Committee and proposed a draft amendment that essentially combined the Ninth and Tenth Amendments:

"And the powers not delegated to the government of the United States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively. [N]or Shall any [limitations on] the exercise of power by the government of the united

\(^58\) 1 Annals of Cong. 454, 452 (1789).
States the particular instances here in enumerated by way of caution be construed to imply the contrary."^59

Sherman deleted Madison’s reference to “other rights retained by the people,” choosing to address state autonomy instead. However, the Select Committee eventually adopted Madison’s approach and reinserted his express reference to rights.^60 On July 28, 1789, the Select Committee reported back to the House of Representatives with the version of the Ninth Amendment that we are familiar with today.^61

The Ninth Amendment was formally adopted on December 15, 1791, when the Bill of Rights was ratified by three-fourths of the states, a little more than two years after it was approved by the House and Senate.^62 Through the adoption of the Ninth Amendment, Madison effectively brought the Federalists and the Anti-Federalists together to assure that “the Constitution would leave intact those individual rights contained in the state constitutions, statutes, and common law.”^63

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^60 Id.

^61 Id.


^63 Id at 259. See eg. The Federalist No. 83 (A. Hamilton) (Bantam Classic ed. 1982) (Hamilton argued that the adoption of the Constitution would not disparage the right to trial by jury retained by the states: “It is equally true that in those controversies between individuals in which the great body of the people are likely to be interested, that institution (trial by jury) will remain precisely in the same situation
The Ninth Amendment in the United States Supreme Court

Despite its elite position as the ninth of ten amendments to the Constitution in the Bill of Rights, discussion of the Ninth Amendment remains infrequent in Supreme Court jurisprudence. Presumably, this is because of the legitimate fear that recognizing the Ninth Amendment, which has no structural starting or ending point, could lead to an explosion of federally enforceable rights. Or, perhaps the Supreme Court has not been able to formulate a structured way to incorporate rights while providing distinct boundaries on the process to minimize potential abuse. In any event, there are no cases that directly analyze the Ninth Amendment as an enforceable doctrine, and few that discuss it at all.

According to Professor Lash, the earliest discussion of the Ninth Amendment came from Justice Story’s dissent in Houston v. Moore.\(^{64}\) Professor Lash argues that many Ninth Amendment scholars have failed to include Houston in their analyses because Justice Story refers to the Ninth Amendment as the Eleventh Amendment, its original place in which it is placed by the state constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration.”).  

\(^{64}\) 18 U.S. 1 (1820) (Story, J. dissenting). 

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among the proposed amendments prior to the adoption of the Bill of Rights.  

In Houston, the State of Pennsylvania prosecuted a private in the Pennsylvania militia under a state law requiring militia members to serve when called into service. In 1814, President Madison ordered the Governor of Pennsylvania to provide militia members for the war against Britain, and the private refused comply. He contended that the state law was contrary to the Constitution, arguing that federal power over the militia was exclusive of state regulation.

The Court held that the Constitution did not provide the federal courts with exclusive jurisdiction over militia matters, so the state and federal laws did not conflict. However, Justice Story dissented, arguing that the federal militia law required a federal prosecution, making Pennsylvania's law unconstitutional.

Justice Story began by declaring that federal power only extended to those areas delegated to Congress by the

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65 Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment, 83 Tex. L. Rev. 597, 614 (Feb. 2005). Professor Lash also points out that in the late 18th and early 19th century, many individuals, including Madison, referred to the Ninth and Tenth Amendments as the Eleventh and Twelfth according to their position on the original proposed list, rather than their final position upon ratification.

66 Houston, 18 U.S. 1, 2.
67 Id. at 11.
68 Id. at 11-12.
69 Id. at 68-69.
Constitution, and in all other cases the states retain concurrent authority with Congress, “not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning.”\textsuperscript{70} He added that in those instances of concurrent authority when state and federal law collide, federal law is “of paramount authority.”\textsuperscript{71}

Thus, Justice Story argued that simply because the Constitution has granted some authority to Congress in one particular area does not necessarily equal an “enumeration of all the powers which belong to the States” in that area.\textsuperscript{72} What those unenumerated powers are must “depend upon their (the states) own constitutions; and what is not taken away by the Constitution of the Unites States, must be considered as retained by the states or the people.”\textsuperscript{73}

Professor Lash explains that Justice Story’s treatment of the Ninth Amendment was aligned with the Madisonian view that the Ninth “limited the extension of enumerated federal power into areas of local concern retained by the people as a matter of right.”\textsuperscript{74} He adds that “to Story, constraining federal power (as opposed to

\textsuperscript{70} Id. at 49.
\textsuperscript{71} Id. at 49-50.
\textsuperscript{72} Id. at 51.
\textsuperscript{73} Id.
\textsuperscript{74} See Lash, supra note 65, at 622.
guarding particular rights) was the central purpose of the Ninth,” and Houston shows how Justice Story believed the Ninth Amendment should be applied to achieve that end.\textsuperscript{75}

More than a century late in Ashwander v. Tennessee Valley Authority,\textsuperscript{76} Chief Justice Hughes argued that maintaining rights retained by the people through the Ninth Amendment “does not withdraw the rights which are granted to the federal government.” There, the Court examined a congressional grant of authority to sell electricity, despite the claim that the state of Tennessee had the right to local regulation of power.\textsuperscript{77} Justice Hughes explained that the Ninth Amendment question was whether a grant of federal power to regulate electricity impeded impermissibly on the collective right of Tennessee to local regulation.\textsuperscript{78} Finding that the federal regulation did not deny or disparage any state right, the Court upheld the Congressional authority.\textsuperscript{79}

Several other cases more briefly detail the Supreme Court’s treatment of the Ninth Amendment. In Woods v.

\textsuperscript{75} Id. This also explains why Justice Story’s dissent dealt heavily with enumerated powers, a Tenth Amendment (or twelfth to Justice Story) concept, yet he failed to mention that amendment in Houston.
\textsuperscript{76} 297 U.S. 288, 338 (1936).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 330-31.
\textsuperscript{79} Id. at 338.
Cloyd W. Miller Co.,\textsuperscript{80} the Court upheld the Housing and Rent Act of 1947 as a valid exercise of Congressional War Power, noting that the exercise of war powers in times of peace would not threaten the Ninth Amendment’s retained rights. In Richmond Newspapers, Inc. v. Virginia,\textsuperscript{81} the Court held that the First Amendment provided a right of the press to attend criminal trials based on the Ninth Amendment.\textsuperscript{82}

To this day the most notable discussion of the Amendment was Justice Goldberg’s concurrence in Griswold v. Connecticut.\textsuperscript{83} There, the Court held that a Connecticut statute prohibiting the use or assistance in use of contraceptives was unconstitutional because it “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”\textsuperscript{84} The Court noted that it was dealing with a “right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”\textsuperscript{85}

\textsuperscript{80} 333 U.S. 138, 141 (1948).
\textsuperscript{81} 448 U.S. 555 (1980).
\textsuperscript{82} See Christopher J. Schmidt, Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process, 32 U. Balt. L. Rev. 169 (2003), where Schmidt argued that the Ninth Amendment argument in Richmond Newspapers was inappropriately used as a rule of construction rather than an explicit guarantee of a right.
\textsuperscript{83} 381 U.S. 479 (1965).
\textsuperscript{84} Id at 485. The Court additionally held that the statute violated the First, Third, Fourth and Fifth Amendments, explaining its reasoning for each. See Id at 484.
\textsuperscript{85} Id at 486.
But, in recognizing the antiquity of the fundamental right to privacy in marriage, the majority opinion only quoted the text of the Ninth Amendment and failed to analyze how the “unenumerated right” of marital privacy was deserving of protection under the Ninth Amendment. Justice Goldberg, realizing the deficiency in the majority’s opinion, added “words to emphasize the relevance of that [Ninth] Amendment to the Court’s holding.”

In his concurring opinion, Justice Goldberg argued the Ninth Amendment supports the right of a married couple’s privacy in the first substantial judicial body of work advocating a Ninth Amendment rights issue. Concluding that the concept of liberty embraces the fundamental and basic right of marital privacy within the language and history of the Ninth Amendment, he stressed the importance of giving the Amendment its due effect:

“To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first

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86 Id at 487.
eight amendments or elsewhere in the constitution would violate the Ninth Amendment."\textsuperscript{88}

Yet, after discussing that the Ninth Amendment should be an enforceable doctrine, Justice Goldberg provided no test for recognizing Ninth Amendment rights, merely concluding that the Ninth Amendment was not an independent source of rights.

Finally, Justice Scalia made a brief mention of the Ninth Amendment in his dissent in \textit{Troxel v. Granville}.\textsuperscript{89} There, the court held that South Carolina’s grandparent visitation statute violated a parent’s Fourteenth Amendment due process right to raise children. Explaining his position that the right of parents to direct the upbringing of their children is among the “unalienable rights” with which the Declaration of Independence proclaims “all men...are endowed by their creator,”\textsuperscript{90} Justice Scalia argued that the right to raise children is “among the other rights retained by the people which the Ninth Amendment says the Constitution’s unenumeration of rights ‘shall not be construed to deny or disparage.’”\textsuperscript{91} According to Justice Scalia, since the right is one of the “other retained rights” contemplated by the Ninth Amendment rather than a

\textsuperscript{88} \textit{Griswold}, 381 U.S. at 491.
\textsuperscript{89} 530 U.S. 57 (2000).
\textsuperscript{90} \textit{Id} at 91.
\textsuperscript{91} \textit{Id}.
fundamental right, state legislatures have the power to pass laws concerning a parent’s right to make decisions regarding their child’s upbringing, but the federal courts and government lacked the power to affect such a right.\textsuperscript{92}

**THE MASSEY TEST**

Professor Massey argues that the Ninth Amendment’s text, history and structural role in the Constitution “compels the conclusion that it establishes judicially enforceable federal constitutional rights with their substantive source in state constitutions.”\textsuperscript{93} Because any Ninth Amendment rights are those retained by “the people,” the best expression of “the people’s” intent logically lies within the state constitutions.

Massey challenges Justice Goldberg’s conclusion that the Ninth Amendment is not an independent source of rights, arguing that in order to enforce the doctrine the Ninth Amendment must have the capacity to serve as an independent source of rights. However, Massey’s view is not inconsistent with Justice Goldberg’s despite his assertion to the contrary. Under Massey’s view the Ninth Amendment would not serve as an independent source of rights. Rather, as Justice Goldberg’s conclusion suggests, the

\textsuperscript{92} Id.
Ninth Amendment would essentially serve as an incorporation doctrine, similar to the Fourteenth Amendment, to federalize rights created by the state constitutions, thus protecting them from federal intrusion:

“Just as Congress may not use its legislative power to establish a state religion, it may not use its legislative power to trench upon [N]inth [A]mendment rights. Since the substance of those rights is to be found in state constitutions, the citizens of a state, through the medium of their constitutions, possess the apparent authority to disable Congress from limiting any rights the states specify as worthy of constitutional protection.”  

Additionally, under Massey’s approach, Ninth Amendment rights are capable of alteration or abolishment by the citizens of the state that defined those rights once they are federally incorporated. As a matter of constitutionalism, the states would remain free to establish and alter their constitutional law “with any minor collateral impact on a federal constitutional right as a recognized part of the design of the Ninth Amendment.”

“While [N]inth [A]mendment rights are federal, their substance is derived wholly from state constitutional law. This is consistent with the animating desire of the [N]inth [A]mendment’s proponents: to reserve to the people their rights under local law, and to insulate those rights from federal invasion. With these principles in mind, it seems appropriate for a state polity to

94 Id at 1246.
have within its own control the continued vitality of any given state constitutional right."\textsuperscript{96}

Thus, in essence the Ninth Amendment gives state citizens the power to preserve certain areas of their lives from federal intrusion. Massey notes that applying such a dynamic view of Ninth Amendment rights some citizens of certain states will undoubtedly enjoy more federally enforceable individual liberty than others.\textsuperscript{97} However, he argues that all Americans will continue to enjoy the same basic package of express federal Constitutional rights under federal law, but only those rights recognized through the Ninth Amendment will vary from state-to-state.\textsuperscript{98} When the package of federal liberties is insufficient for the citizens of one jurisdiction, they have the ability to alter their state constitutions or depart to other jurisdictions that offer greater individual protections.\textsuperscript{99}

Massey argues that this is an incidental effect, and one the Framers intended, for “if Californians believe privacy to be constitutionally desirable and Michiganders do not, Michiganders can hardly complain if Congress invades their personal privacy in a fashion the [N]inth

\textsuperscript{96} Massey, \textit{supra} note 93, at 1249.
\textsuperscript{97} \textit{Id.} at 1248.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.}
Amendment would not permit with respect to Californians.”

Additionally, Massey argues that once created, Ninth Amendment rights must be applicable to both the federal government and the state that created that right. Because Ninth Amendment rights would be federal rights that derive their substance from another source of law, the state constitutions, application of the amendment to the states amounts to a federally enforced right to make the states abide by their own law. The logical problem with this view arises when a state chooses to amend its constitution. Is it bound to abide by the earlier state created federal right “incorporated” through the Ninth Amendment? Massey argues that this situation reinforces his earlier conclusion that once a state alters its constitutional rights, the substance of the federal Ninth Amendment right changes with it.

However, an additional problem arises in that the federal government would be compelled to abide by state created law as a matter of federal Constitutional law, a form of “reverse preemption” that would essentially operate

100 Id.
101 Id at 1251.
102 Id.
103 Id at 1253.
as a state power veto on Congress.\textsuperscript{104} Specifically, the Ninth Amendment would act as a safeguard preventing Congress from using its carefully defined delegated powers to encroach upon an unenumerated federal right contained within a state constitution, much in the same manner that the Fifth Amendment prohibits Congress from compelling a criminal defendant to testify against themselves.\textsuperscript{105} While this “veto” power could provide an important mechanism to protect unenumerated rights, such a constraint on Congressional power could also lead to abuse by a state disagreeing with a legitimate federal legislative scheme.

In order for his theory to work and potentially avoid such conflicts, Massey proposed a test to define the Ninth Amendment’s positive rights: a test that preserves the fundamental liberty of the people of the several states while protecting the legitimate federal governmental right to promulgate a sound national policy. His test operates only when the asserted Ninth Amendment right is not preempted by the federal Constitution or federal Constitutional case law, and would “sift the wheat—fundamental ‘liberty-bearing’ rights—from the chaff.”\textsuperscript{106}

\textbf{MASSEY’S FIRST PRONG}

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\textsuperscript{104} \textit{Id.} at 1232-33.  \\
\textsuperscript{105} \textit{Id.}  \\
\textsuperscript{106} \textit{Id at} 1257.
\end{flushright}
First, the proposed right must be fundamental, and must be limited to those rights that preclude government action. Asking whether a Ninth Amendment right within a state constitution is fundamental ensures that only those rights that are compatible with the "ethos" of the nation are recognized. Massey recognizes that determining what constitutes a fundamental right is tricky, but current tests that rely upon history and tradition could be employed. Additionally, Massey argues that governmental intrusion on otherwise lawful individual conduct would be presumed invalid unless the government can show a justification for the intrusion: "The Constitution established islands of governmental powers 'surrounded by a sea of individual rights,' not 'islands [of individual rights] surrounded by a sea of governmental powers.'"

For example, to determine whether a state’s constitutional guarantee of a patient’s right to access medicinal marijuana is fundamental, we must first look at historical and traditional views of patient’s rights. For instance, in California patients have a historically fundamental interest in alleviating pain under the

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107 Id.
108 Id at 1259.
109 Id.
110 Id. at 1260 (quoting Stephen Macedo, The New Right v. The Constitution 27 (1986)).
California Constitution. Applying the first prong of Massey’s test, the burden would then shift to the government to prove that it has a valid justification for intruding on the patient’s private conduct, such as keeping citizens off of illegal substances or removing those substances from interstate commerce.

**MASSEY’S SECOND PRONG**

Second, the proposed right must not significantly impair other existing and recognized fundamental rights, since the creation of new right has the capability of “reducing the stock” of rights already held by other people. To discharge this aspect of the test, Massey asserts, the judiciary would have the responsibility of weighing rights against one another:

“The court would be required to assess the ‘fundamental’ status of the right being infringed by a claimed. If deemed fundamental, it would be necessary to determine the degree of infringement. Only if the infringement were substantial should the putative [N]inth [A]mendment right be denied recognition, since it will be recalled that this test operates only when the source of the right in collision with the [N]inth [A]mendment right is also located outside of the Constitution.”

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111 See Raich, supra note 5.
112 Massey, supra note 93, at 1257.
113 Id at 1262.
114 Id at 1262-63.
For instance, a state constitutional provision that seeks to guarantee its citizens the right to practice private racial discrimination directly conflicts with federal Constitutional law, so there is no need to apply Massey’s test in this situation.\textsuperscript{115}

However, an individual citizen’s state constitutional right to be free from unlawful searches and seizures could directly conflict with a federal agency’s duty to protect the public, which is an exercise of federal regulation rather than an enforcement of a Constitutional provision. Thus, Massey’s test would be proper in this situation.

Similarly, as was the case in \textit{Ashwander}, the federal government’s regulatory right in a particular field could conflict with a state’s collective right to locally manage that area.\textsuperscript{116} Thus, applying the second prong of Massey’s test, a court would have to balance the two competing interests involved before determining which of the two rights should prevail.

\textbf{MASSEY’S FINAL PRONG}

The final prong of Massey’s test provides that the asserted Ninth Amendment right cannot operate in a fashion that unreasonably exports the social costs of the right.\textsuperscript{117}

\begin{footnotes}
\item[115] \textit{Id} at 1263.
\item[116] See \textit{Ashwander}, supra note 75.
\item[117] \textit{Id}.
\end{footnotes}
He argues that once Ninth Amendment rights are recognized, units of government could be susceptible to “factional alliances” set-up to capture the “machinery of government and deliver benefits to the faction’s members, the costs of which will be borne by citizens not affiliated with the dominant factions.”

Massey’s third prong closely resembles the dormant commerce clause, under which a state law that benefits its citizens while exporting the cost of that benefit out of state will violate the Constitution. For example, in Kassel v. Consolidated Freightways Corp., the Supreme Court determined that an Iowa statute limiting the use of certain large trucks within the state unconstitutionally limited interstate commerce.

There, the state statute prohibited the use of 65-foot trucks, while most trucks were limited to 55-feet. Although the state argued the truck size limit was related to safety, the Court found that Iowa “seems to have hoped to limit the use of its highways by deflecting some through traffic,” which violates the Commerce Clause. Thus, the costs of the benefit to the state’s citizens (less traffic

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118 Massey, supra note 93 at 1263.
120 Id. at 665-66. Some trucks carrying farm equipment, livestock and mobile homes were permitted to be 60-feet long.
121 Id. at 677.
on the state highways, which would translate to lower costs for maintaining those highways) would be exported out of the state.

Massey proposes two questions to address this issue. First, if the state right at issue is one that on its face is designed to capture benefits for local residents at the expense of outsiders (as was the case in Kassell), the right cannot be elevated to Ninth Amendment status.\textsuperscript{122}

Second, if the right is facially neutral but imposes a disproportionate share of costs on outsiders while vesting a disproportionate share of benefits with insiders, that right must also fail Ninth Amendment scrutiny.\textsuperscript{123} For instance, in a resource-rich state that can generate electrical energy cheaply, the state amends its constitution to provide its citizens with free electricity and pays private companies to provide that service with revenue generated by new taxes on all electricity exported out of the state. In that situation, the benefit of the right would lie with the citizens of the state while arguably the costs would be exported out of the state. Thus, a federal court examining such a case would have to weigh the state’s interest in exercising their state

\textsuperscript{122}Massey, supra note 93, at 1264.\textsuperscript{123} Id.
constitutional right against the burden such an exercise would export to citizens outside the state before giving that right Ninth Amendment status.

Massey concludes that utilizing his three-pronged test, though not void of problems, would preserve the delicate balance between state autonomy and national uniformity as envisioned by the Framers:

"Use of the [N]inth [A]mendment in the fashion advocated here will create some friction at the margins; such a condition is probably always present in federal systems. But that friction can be alleviated by a judiciary that understands the importance of federalism to the preservation of human liberty. The [N]inth [A]mendment stands as a (now) silent reproach to those who urge the abandonment of judicial efforts to police the frontier between federal power and state-guaranteed rights."

**APPLYING THE MASSEY TEST TODAY**

The most important benefit of applying Massey’s test is that states would retain their autonomy as a distinct sovereign government free to protect their citizens, consistent with the intent of the Founders and the spirit of the Ninth Amendment. However, there are several additional problems that stem from the collision of the federal government’s right to set a national policy and a

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124 Id. at 1266.
125 Id.
state’s ability to veto that policy by enforcing its unenumerated rights. ¹²⁶

MORE THAN FIFTY ONE DIFFERENT BODIES OF LAW WILL APPLY IN THE FEDERAL SYSTEM

The first and most obvious implication of adopting Ninth Amendment rights in the manner suggested by Massey is that there could be fifty one different bodies of state law that would be potentially applicable in federal court through the Ninth Amendment, sacrificing whatever uniformity federal Constitutional law was once thought to have. Massey noted that his approach would produce a federal system with a “richly variegated pattern.”¹²⁷ By recognizing Ninth Amendment rights, whenever a state adopts a new principal of state constitutional law, it adds to the substantive body of law in that jurisdiction. If a federal court examining a federal question had to look to different bodies of law each time a Ninth Amendment right was

¹²⁶ See New Mexico Governor Calls for Legalizing Drugs, CNN.com (October 6, 1999), available at http://www.cnn.com/us/9910/06/legalizing.drugs.01/, for an example of just such a situation. Former New Mexico Governor Gary Johnson attempted to legalize marijuana and heroin in New Mexico because he deemed the national war on drugs a failure in part because the social and financial costs of the failed effort fell directly on the citizens of New Mexico. If the New Mexico legislature had approved such a measure, a situation similar to that in Raich would arise.

¹²⁷ Massey, supra note 93, at 1248.
claimed, the federal system of laws might become unmanageable.\footnote{Diversity jurisdiction is the only time a federal court would have to examine more than one body of law since in all other situations a federal court applies the law of its forum state.}

However, Massey points out, the federal system consistently applies the Erie\footnote{Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).} doctrine in diversity cases:

“It has not proven burdensome for the federal courts to manage with fifty-one different legal regimes in diversity cases under the rule of Erie...Thus, it is unlikely to be much more difficult for the courts to rely on state constitutional law to breathe life into this substantive dimension of the [N]inth [A]mendment.”\footnote{Massey, supra note 93, at 1248.}

In Erie, the Supreme Court struck down the \textit{Swift v. Tyson}\footnote{41 U.S. 1 (1842).} rule that federal courts were not required to apply the decisions of local tribunals, but only state statutes and long-established local customs having the force of laws.\footnote{See \textit{The Erie End of Swift}, 32 Am. Jur. 2d Federal Courts § 471 (Updated May 2004).} The Court recognized that there is no federal general common law, and Congress has no power to declare substantive rules of common law applicable in a state, “whether they be local in their nature or ‘general,’ be they commercial law or part of the law of torts...no clause in the Constitution purports to confer such a power upon...
the federal courts.” It then invalidated *Swift*, holding that “this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.” Thus, except in matters governed by the federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.

Therefore, from this language it appears that *Erie* is entirely compatible with Massey’s approach, and any test that is developed should seek to apply the doctrine.

**IF AN AREA OF STATE LAW IS UNCLEAR**

Applying an *Erie* like analysis it is clear that when a Ninth Amendment right is asserted, a federal court should look to the law of the state creating the right. However, what if the issue presented to the federal court involves an area of state law that is either unclear or undefined?

This is an area where unlike the *Erie* doctrine, the federal court should not guess as to the meaning of the state constitution in defining the boundaries of the asserted Ninth Amendment. Otherwise, the states would lose their ability to “check” the power of the federal government the moment their fundamental rights are defined by the federal judiciary. The federal courts could refuse

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133 *Erie*, 304 U.S. at 78.  
134 *Id* at 80.  
135 *Id* at 78.
to recognize any such rights, denying judicial enforcement of the asserted Ninth Amendment right, and “the fox would be guarding the henhouse.”

There are two ways to handle these situations when they arise. The first, easiest, and most logical approach is to utilize the state’s certification procedure if one exists. The state court would then clarify the unclear area of state law for the federal court, which could then proceed with Massey’s test:

“Certification…allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.”

Most states have just such a certification process in place, so extending those provisions to include unclear areas of state law whenever a Ninth Amendment claim is asserted is feasible.

If no certification procedure is available, the federal court could utilize a Pullman-type abstention and refrain from deciding the Ninth Amendment question when the area of state law is unclear. In this context, however,

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136 Allen, supra note 1, at 1662.
138 See R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (establishing that a federal court may, and normally should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid
rather than a Pullman-like retention of jurisdiction, the federal court should deny the Ninth Amendment Claim. The reasoning behind this is if a claimed state right is unclear under state law, it should not be considered a right for purposes of the Ninth Amendment because there would be no clear expression of the intent of “the people.”

ONE FINAL PROBLEM

Perhaps the most intriguing problem arises when asking what, if any, appellate jurisdiction the Supreme Court should have to review decisions of a federal court looking to state law. Under *Michigan v. Long*, if a state court decision is clearly and expressly based on separate, adequate and independent state law grounds, the Supreme Court does not have jurisdiction to review that decision. *Long* was decided in order to avoid examining state law to decide the nature of a state court decision and to avoid the danger of “rendering advisory opinions.”

Nevertheless, in order to federalize Ninth Amendment rights it would be necessary, at least initially, for a federal court to review state law under Massey’s test. While those rights would be federalized through the Ninth

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the need for deciding the constitutional question). However, with the development of certification, abstention is discouraged.


Id. at 1041.

Id.
Amendment, the basis for the formation of those rights lies on separate, adequate and independent state law grounds. Thus, the question to be answered before Massey’s test could be implemented is whether the decision in Long applies to the Supreme Court’s review of federal decisions recognizing Ninth Amendment rights.

The answer is complicated, particularly since the Supreme Court has the power to review federal Constitutional questions, which includes the Ninth Amendment but not state constitutional rulings that do not violate federal law. However, if the Supreme Court were allowed to choose what unenumerated rights were deemed worthy of federal incorporation, the Court would encroach on that state’s autonomy, defeating the original purpose and intent of the Ninth Amendment.

There is, however, a way around the perceived Long problem. The Supreme Court would not decide whether there is a right under state law, it would simply examine the federal court’s application of the Massey balancing test. When a Ninth Amendment right is claimed in federal court, the court would apply the Massey test and determine whether the state constitutional right should be federally
incorporated.\textsuperscript{142} If the federal court determines that a
Ninth Amendment right exists after applying the Massey
criteria, the right would then be federally enforceable
through the Ninth Amendment, so the Supreme Court would
have jurisdiction to examine the new Constitutional
question. However, the Supreme Court would not be
examining whether the state right exists or the state
court’s application of its constitutional law that created
the right. Rather, it would only review the federal
court’s application of the Massey test to determine whether
the test’s criteria have been met.

\textbf{CONCLUSION}

As Justice Brennan suggested,\textsuperscript{143} the Ninth Amendment
will never take its rightful place in the Constitution as
the guardian of unenumerated rights unless a system is
established that can adequately protect state autonomy
without seriously hampering Congressional power to pursue a
legitimate national policy. Professor Massey’s test is a
plausible and effective method through which the goals of

\textsuperscript{142} This would also be applicable to questions involving unclear areas of
state law that a federal court certifies to the state’s supreme court,
but only if the state court determines that a fundamental right exists
under state constitutional law. If the state court determines that no
right exists, or if the federal court chooses to abstain from answering
the state law question rather than certifying the question, the false
\textit{Long} problem would be moot.

\textsuperscript{143} William J. Brennan, Jr., \textit{State Constitutions and the Protection of
the Ninth Amendment can finally be realized, consistent with the intent of the Framers.