

**BABY NINTH AMENDMENTS SINCE 1860: THE
UNENUMERATED RIGHTS AMERICANS REPEATEDLY WANT
(AND JUDGES OFTEN DON'T)**

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ABSTRACT

Americans have deliberately chosen to explicitly protect unenumerated rights dozens of times. On sixty-six occasions, groups of Americans charged with crafting a fundamental law for their state have written and adopted a state constitution that includes a "Baby Ninth Amendment." These provisions, modeled after the Ninth Amendment itself, can only be understood to protect individual rights. Today they are a part of thirty-three state constitutions. They demonstrate that unenumerated rights are not just constitutional. They are popular.

Well, they are popular with the people. With judges, it is a different story.

This is my second article about these provisions. In my first article, I told the history of their invention and adoption in the antebellum era, and I demonstrated that their original meaning is that they protect unenumerated individual rights and are judicially enforceable. In this Article, I complete the job of telling their history, from 1860 through today. This includes how Americans repeatedly chose to include protections of unenumerated rights in their state constitutions, but also how judges have more often than not winced at doing what the provisions command them to do. Although some judges have

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taken Baby Ninths seriously over the years, for the most part they have systematically ignored them, abdicating the commands of their citizenries to protect unenumerated rights. The Article concludes with some thoughts about why we have so many Baby Ninths and why courts have mostly ignored them. It calls upon state judges to do what their constitutions require them to do: protect unenumerated individual rights to the same degree as the rights explicitly set forth in their constitutions.

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INTRODUCTION

Americans have been explicitly protecting unenumerated rights in their constitutions for two hundred years. They have done it so often that unenumerated rights are almost as American as the First Amendment, separation of powers, baseball, and apple pie.

The most common way that Americans have sought to protect unenumerated rights is through enacting “Baby Ninth Amendments” in state constitutions. At the time the Civil War’s first shots were fired, twelve states out of the thirty-four in the Union had these provisions in their constitutions.¹ From 1861 to the present, another twenty-three states adopted a “Baby Ninth,” while only two of those states later permanently removed one.² Today, thirty-three states have a Baby Ninth Amendment in their constitutions.³ Altogether, during U.S. history, on sixty-six occasions a state’s delegates have chosen to include a Baby Ninth in a new constitution that then became that state’s fundamental law.⁴

These constitutional provisions, modeled on the Ninth Amendment to the U.S. Constitution,⁵ can only be understood to protect unenumerated individual rights, and to be judicially enforceable just like the other rights in each state’s bill of rights.⁶ Their drafters, elected by their citizenries to frame the fundamental governing documents of their states, deliberately crafted Baby Ninths to protect unenumerated rights. They have deliberately done so time after time in state after state.

1. See *infra* notes 22–23 and accompanying text.

2. See *infra* Part II, note 118 and accompanying text.

3. Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 *MERCER L. REV.* 389, 392 (2017).

4. I reach this number by comparing the findings in this article and my previous article with the state constitutions enumerated in Albert L. Sturm’s comprehensive chart in *The Development of American State Constitutions*, 12 *PUBLIUS: J. FEDERALISM* 57, 58 (1982), plus the two constitutions adopted since its publication: Georgia (1983) and Rhode Island (1986). I also note that a handful of these “delegates” were not at constitutional conventions, but instead either part of “commissions” that were used by a few states in the twentieth century, or an unelected committee in conjunction with a legislature, as happened in Nebraska (in a somewhat dubious fashion) in 1866. *Id.* at 84–86; ROBERT D. MIEWALD, PETER J. LONGO & ANTHONY B. SCHUTZ, *THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE* 8–12 (2d ed. 2011).

5. The Ninth Amendment states “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

6. See *generally* Sanders, *supra* note 3, at 433–43 (detailing the argument and evidence for Baby Ninths only protecting individual rights and being judicially enforceable).

And yet, we hear today that the protection of unenumerated rights is something courts should do very sparingly, if at all.⁷ One of the reasons frequently given is that because unenumerated rights are not “in” constitutions, their enforcement is not the “will of the people.”⁸ But this criticism does not come to grips with the implications of Baby Ninths, or at best does not understand the history of Baby Ninths—how they have been repeatedly adopted, and re-adopted, in state constitutions from early in American history through the present era. Baby Ninths are assertions of power *by citizens* to give *judges* power to protect unenumerated rights from encroachments by the state and local governments. And yet, as we shall see, the biggest opponents of this delegation of power to judges have been judges themselves.

This Article is the second installment in the story of the Baby Ninths. In my first article, I told the story of Baby Ninths from their birth in Alabama and Maine in 1819 to the eve of the Civil War.⁹ I now bring us through the war, Reconstruction, the Gilded Age, the various epochs of the Twentieth Century, and up to today, adding Baby Ninths in various states along the way. The Article begins in Part I with a brief review of what the earlier article found. It then moves on, in Part II, to the adoption of Baby Ninths since 1860. In Part III, it examines how both the framers of various Baby Ninths and the courts have interpreted them. Finally, in Part IV it examines the implications of citizens repeatedly adopting these provisions and why the courts have not been more enthusiastic in interpreting them.

The story of Baby Ninths since 1860 is every bit as interesting as the story of their birth decades prior. It is the story of Americans reaffirming, over and over again, their comfort with the concept of unenumerated rights. This runs counter to the story of unenumerated rights being a product of the *Lochner* court, errantly foisted on the public by a runaway judiciary, vanquished by the New Deal, and then brought back in a

7. See my discussion of the debate between various defenders and detractors of unenumerated rights in Sanders, *supra* note 3, at 390.

8. See, e.g., Thomas B. McAfee, *The Constitution as Based on the Consent of the Governed—Or, Should We Have an Unwritten Constitution?*, 80 OR. L. REV. 1245, 1288 (2001) (“A decision to render unenumerated rights enforceable at the highest level of generality is a decision to be ruled by judges.”); Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 616 (1991) (“When rights are not referenced to specific constitutional guarantees and articulation of those rights entails choices that are essentially political in nature, I question whether the judiciary should become directly involved.”).

9. See generally Sanders, *supra* note 3, at 393–94.

different, truncated form by *Griswold* and *Roe*.¹⁰ No, unenumerated rights are something that American constitutional drafters have been comfortable with across our history. While federal judges bickered about whether the Fourteenth Amendment protects unenumerated rights,¹¹ state constitutional drafters repeatedly protected such rights in black and white language. So much so that they eventually wound up in two-thirds of our state constitutions.

In short, unenumerated rights *are* as American as apple pie. The drafters of our constitutions wanted them protected. The original meaning of Baby Ninths is that they are protected. But, while state judiciaries have occasionally used them to protect our rights, all too often state judges have ignored unenumerated rights and kept their chief protectors—the Baby Ninths—lying dormant. It is my hope that telling this story will help move this history in a different direction to fulfill the promise of these completely normal constitutional clauses.

I. HOW THE BABY NINTHS CAME TO BE AND HOW THEY PROTECT INDIVIDUAL RIGHTS

My previous article had two projects: tell the history of the adoption and interpretation of Baby Ninth Amendments from the drafting of the Ninth Amendment itself through the outbreak of the Civil War and explore the original meaning of these provisions. This Article completes the job of the first project, bringing the history of the Baby Ninths up to the present. It does not address the second project—the original meaning of the Baby Ninths—to the same degree as the prior article because, as can be seen from the sources in Part III, the original meaning of Baby Ninths adopted after the Civil War is largely the same as that of Baby Ninths adopted before it.¹² Even though I stand by my prior work on Baby

10. For a brief version of this standard, and repeatedly told, story see Justice Stevens's description of the *Lochner* court and the subsequent halting protection of fundamental rights. *McDonald v. City of Chicago*, 561 U.S. 742, 878–83 (2010) (Stevens, J., dissenting).

11. To fully enumerate this bickering would require a very long footnote, indeed. To include just a handful of examples, see *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (affirming that some unenumerated rights are protected by Due Process Clause of Fourteenth Amendment if they are “deeply rooted” in the nation’s history) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (sharply limiting protection of unenumerated rights in a case involving the Fifth Amendment’s Due Process Clause); *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (holding the right to contract is protected by due process); *Slaughter-House Cases*, 83 U.S. 36, 80–81 (1872) (holding the Privileges or Immunities Clause of the Fourteenth Amendment does not protect the right to earn a living).

12. Instead, in this Article I ask why state judges have not interpreted Baby Ninths according to their original meaning. *See infra* Part IV.

Ninths' original meaning, I address the subject where it makes sense in what follows.

But, before moving on to the post-1860 history of Baby Ninths, I give a brief summary of my findings for each project from the prior article.

A. *The Birth, and Growth, of Baby Ninths*

The Ninth Amendment itself came to be in 1789 in the crafting of what we now know as the Bill of Rights.¹³ But it was not for thirty years that a similar provision was included in a state constitution.¹⁴ State constitutions predated the U.S. Constitution itself, and new state constitutions were frequently adopted in the Republic's early years—either through a new state being admitted to the Union or by a state concluding its existing constitution was inadequate and convening a constitutional convention to draft a new one.¹⁵ Several new state constitutions were adopted in the 1790s, 1800s, and early 1810s, but none contained anything modeled after the Ninth Amendment itself.¹⁶ Some, however, did include provisions that appear to have been modeled after the Tenth Amendment, which I have christened “Baby Tenth.”¹⁷ These Baby Tenth were later often paired with Baby Ninths and still reside in a number of state constitutions today.¹⁸

Then, in July 1819 the constitutional convention in the then-Territory of Alabama inserted a provision in its draft constitution that looked very much like a combination of a Baby Tenth and the Ninth

13. Sanders, *supra* note 3, at 397–98 (recounting the drafting and adoption of the Ninth Amendment).

14. *See id.* at 403–08 (detailing Alabama and Maine's adoption of Baby Ninths in 1819).

15. *See id.* at 402, 409–10 (providing an outline of state constitutional adoption in the years after the U.S. Constitution's adoption).

16. *See id.* at 400, 402–03, 409.

17. *Id.* at 400–03. The first was Pennsylvania's, which read: “To guard against transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.” 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3101 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS with the respective preceding volume number] (quoting PA. CONST. of 1790, art. IX, § 26).

18. *See, e.g.*, PA. CONST. art. I, § 25; TENN. CONST. art. XI, § 16.

Amendment itself.¹⁹ Just three months later the same thing happened in the then-District of Maine—the portion of Massachusetts that had decided to break with its southern brothers and form its own state.²⁰ Both of these new states were then admitted to the Union with constitutions containing Baby Ninths.²¹

After a number of states, for whatever reason, did not follow suit in putting versions of the Ninth Amendment in their own constitutions, a few more states did, and soon it became more common than not to include a Baby Ninth. Arkansas (1836), Rhode Island (1843), New Jersey (1844), Iowa (1846), California (1849), Maryland (1851), Ohio (1851), Minnesota (1857), Oregon (1857), and Kansas (1861) all placed Baby Ninths in their first or re-drafted foundational documents.²² As the Civil War brewed in early 1861, a full twelve states had Baby Ninths.²³

B. The Original Meaning of Baby Ninths

A Baby Ninth had to have meant something when it was adopted. Whatever this is, it is the provision's "original meaning."²⁴ That is, the meaning it would have been understood to have by the public at the time it was adopted. For jurists and scholars who believe courts should interpret constitutional text according to its original meaning, this is a very important question. And, given that Baby Ninths are modeled after the Ninth Amendment, one might think it is natural to turn to its meaning in helping to answer that question.

19. Sanders, *supra* note 3, at 404–05 (quoting the language of Alabama's combined Baby Ninth/Baby Tenth: "This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and, to guard against any encroachments on the rights herein retained, or any transgression of any of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void.").

20. *Id.* at 406–08.

21. Sanders, *supra* note 3, at 406, 408.

22. *Id.* at 410–17 (explaining the history of the first twelve states' adoption of Baby Ninths in their state constitutions).

23. In my last article, I incorrectly stated that only "eleven" states had Baby Ninths "on the eve of the Civil War." *Id.* at 433. This miscount was due to Kansas only being admitted into the Union on January 29, 1861, after the start of the year, but before the Civil War broke out at Fort Sumter on April 12, 1861. See FRANCIS H. HELLER, *THE KANSAS STATE CONSTITUTION 13* (2011) (discussing the admission of Kansas); JEFFREY ROGERS HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR 2–3* (1996) (describing the attack on Fort Sumter).

24. As in the prior article, I do not intend to dive into the debate on the merits of originalism or its various flavors. I restate that I am an "original public meaning originalist" who believes we should interpret constitutional text according to the original public meaning it had when adopted. See Sanders, *supra* note 3, at 393 n.19.

There is a vigorous debate on the original meaning of the Ninth Amendment. I summarized the various perspectives in the debate in my prior article.²⁵ My article stated that these perspectives roughly fall into five models: states law rights, residual rights, individual rights, collective rights, and federalism.²⁶

Whatever the tenets of these models vis-à-vis the Ninth Amendment itself, I explained that only the individual rights model makes sense in the context of Baby Ninth Amendments.²⁷ The others simply do not apply, and attempts to fit them into the state constitutional paradigm fall apart upon inspection. As we shall see below, that has not stopped some courts from imparting at least one of these paradigms—the collective rights model—on a few Baby Ninths, but those opinions, for the most part, themselves fall apart upon examination.²⁸

Thus, in my previous article I left the reader with this conclusion: Baby Ninth Amendments protect individual rights and those rights are judicially enforceable.²⁹

We now proceed with what happened to Baby Ninths after Confederates fired shots on Fort Sumter.

II. THE ADOPTION OF BABY NINTH AMENDMENTS SINCE 1860

In this Part, I briefly tell the story of which states adopted Baby Ninths since the beginning of the Civil War and when. I split it not into equal units of time, but different constitutional periods when different concerns animated the various constitutional conventions. Nevertheless,

25. *Id.* at 398–400.

26. *Id.* After my former article was published, I realized I inexcusably did not include a sixth originalist interpretation of the Ninth Amendment, that of Professor Michael McConnell. Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1 (2010). In a nutshell, McConnell argues that the Ninth Amendment does not turn unenumerated rights into *constitutional* rights, but instead reinforces a preexisting rule of statutory interpretation to construe statutes to not violate Lockean “retained” rights unless the interpretation is unambiguous. *Id.* at 20. I do not have the space here to give McConnell’s view the justice it deserves, but I generally am in agreement with the critique of Professor Gordon. Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 Ind. L. Rev. 421, 464–68 (2017). More specifically, even if McConnell’s analysis is correct for the Ninth Amendment itself, there is no evidence that such an understanding from 1791 carried over for the interpretation of any Baby Ninths adopted many decades after their mother.

27. Sanders, *supra* note 3, at 436–39.

28. See *infra* notes 244–54 and accompanying text. At most, these opinions demonstrate that in addition to protecting individual rights, Baby Ninths may protect a right to local self-government in the context of local governments vis-à-vis state governments.

29. Sanders, *supra* note 3, at 443.

one constant among them is that whatever else was buzzing around the nation at that moment, constitutional drafters kept protecting unenumerated rights. The further forward in time we go, the more Baby Ninth Amendments there are. By the end, when Illinois adopted a Baby Ninth in 1970, thirty states out of fifty had Baby Ninths in their constitutions. At 66 percent, that is the highest percentage in U.S. history.³⁰

A. *The Civil War*

Quite a number of state constitutions were adopted in 1861. The drafters of these constitutions had a lot of things on their minds, and Baby Ninth Amendments were fairly far down that list.

What was on their minds, of course, was secession and the protection of the institution of slavery. Of the eleven states that seceded from the Union in 1861, seven adopted new constitutions in that year.³¹ For the most part, those that already had Baby Ninths kept them, and those that lacked a provision did not add one. The exception was Georgia, which adopted the following language as article I, section 27 of its new constitution: “The enumeration of rights herein contained shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed.”³²

Georgia’s language was unique, as the reference to “inherent rights which they have hitherto enjoyed” is not found in any prior Baby Ninths.³³ In contrast to other Baby Ninths, on its face it only applies to rights that existed prior to the constitution’s adoption, and only rights which are “inherent.” Unfortunately, as is all-too-often the case, there is no record of any debate about it from the convention.³⁴

30. See *infra* notes 124–37 and accompanying text.

31. See *infra* notes 32, 35–40.

32. GA. CONST. of 1861, art. I, § 27, <http://vault.georgiaarchives.org/cdm/ref/collection/adhoc/id/374>.

33. See Sanders, *supra* note 3, at 403–17.

34. See generally JOURNAL OF THE PUBLIC AND SECRET PROCEEDINGS OF THE CONVENTION OF THE PEOPLE OF GEORGIA 287 (1861), <https://archive.org/details/journalofpublics00geor> (indicating final version of Baby Ninth but including no remarks from delegates on the provision in the Journal). See also Sanders, *supra* note 3, at 417–18 (discussing the general scarcity of legislative materials surrounding the adoption of Baby Ninths and other constitutional provisions).

As for the other seceding states, Alabama³⁵ and Arkansas³⁶ kept their Baby Ninths while Florida,³⁷ Louisiana,³⁸ South Carolina,³⁹ and Texas⁴⁰ did not adopt new ones.⁴¹ There is no record of any discussion in the Alabama and Arkansas conventions of their readopted provisions.⁴²

During the remainder of the war and in its immediate aftermath, a handful of non-Confederate states adopted new constitutions. As Confederate states were occupied by Union forces, some of those states held new constitutional conventions to reject their Confederate constitutions and recognize the supremacy of the Union and the abolishment of slavery.⁴³ In these various conventions, a few Baby Ninths appeared.

West Virginia, Maryland, and Nevada all adopted new constitutions during the war. The Virginia counties that rejected secession and formed

35. ALA. CONST. of 1861, art. I, § 30, <http://www.archives.state.al.us/timeline/1861/alcon4.html>. Alabama's combined Baby Ninth/Baby Tenth at the time read: "This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or to the following provisions, shall be void." *Id.* This was unchanged from Alabama's former constitution. ALA. CONST. of 1819, art. I, § 30, in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 98.

36. ARK. CONST. of 1861, art. II, § 24, <http://ahc.digital-ar.org/cdm/ref/collection/p16790coll1/id/18>. Arkansas's combined Baby Ninth/Baby Tenth at the time read: "This enumeration of rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate, and that all laws contrary thereto, or to the other provisions herein contained shall be void." *Id.* This language was virtually unchanged from Arkansas's former constitution. ARK. CONST. of 1836, art. II, § 24, in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 270–71.

37. FLA. CONST. of 1861, <http://fall.fsulawrc.com/crc/conhist/1861con.html>.

38. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF THE STATE OF LOUISIANA 295–330 (1861) (introducing the Louisiana Constitution as amended by State Convention of 1861).

39. S.C. CONST. of 1861, http://www.carolana.com/SC/Documents/SC_Constitution_1861.pdf.

40. TEX. CONST. of 1861, <https://tarltonapps.law.utexas.edu/constitutions/texas1861/a1>.

41. Florida and Texas also kept their Baby Tenth. *See* FLA. CONST. of 1861, art. I, § 27; TEX. CONST. of 1861, art. I, § 21.

42. *See generally* JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF ALABAMA (1861); JOURNAL OF BOTH SESSIONS OF THE CONVENTION OF THE STATE OF ARKANSAS (1861).

43. *See, e.g.*, ARK. CONST. of 1864, art. V (abolishing slavery in Arkansas), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 295–96.

the new state of West Virginia did not adopt a Baby Ninth,⁴⁴ but neighboring Maryland kept its Baby Ninth.⁴⁵ Out west, the new state of Nevada held two constitutional conventions: one in 1863 and then another in 1864 after the territory's voters rejected the first constitution.⁴⁶ The Silver State included a Baby Ninth in each: "This enumeration of rights shall not be construed to impair or deny others retained by the people."⁴⁷ Missouri held a convention in early 1865, drafting what would be adopted as a new constitution, but did not include a Baby Ninth.⁴⁸

Meanwhile, in 1864 both Arkansas and Louisiana adopted new constitutions. Arkansas once again kept its combined Baby Ninth/Baby Tenth without change,⁴⁹ and Louisiana once again did not include a Baby Ninth.⁵⁰ Once the war drew to a close in 1865 more formerly rebellious states held conventions. Alabama kept its combined Baby Ninth/Baby

44. W. VA. CONST. of 1863, in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 4013–33.

45. MD. CONST. of 1864, Declaration of Rights, art. 44 ("This enumeration of rights shall not be construed to impair or deny others retained by the people."), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1745.

46. MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION 10–11 (G. Alan Tarr ed., 2d ed. 2014).

47. NEV. CONST. of 1864, art. I, § 20, in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2404; REPORTS OF THE 1863 CONSTITUTIONAL CONVENTION OF THE TERRITORY OF NEVADA: AS WRITTEN FOR THE *TERRITORIAL ENTERPRISE* BY ANDREW J. MARSH & SAMUEL L. CLEMENS AND FOR THE *VIRGINIA DAILY UNION* BY AMOS BOWMAN 43 (William C. Miller et al. eds., Legislative Counsel Bureau, State of Nevada 1972) (reporting the introduction of the Baby Ninth language to the delegates at the 1863 constitutional convention). Yes, that's right, Samuel L. Clemens, a.k.a. Mark Twain, was a stenographer for the first convention. *Id.* at v.

48. MO. CONST. of 1865, in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2191–2219.

49. ARK. CONST. of 1864, art. II, § 24 ("This enumeration of rights shall not be construed to deny or disparage others retained by the people, and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 291.

50. LA. CONST. of 1864, in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1429–48.

Tenth without change,⁵¹ while Florida⁵² and South Carolina⁵³ drew up new constitutions that continued to not include a Baby Ninth. Georgia kept its new Baby Ninth from 1861, with minor changes in wording.⁵⁴

B. Reconstruction

Constitutional conventions did not slow down with the close of the war. They were only getting started. The long and jagged process of ex-Confederate states being readmitted into the Union led to a flurry of constitutional drafting, the most intensive at any time in our history since the founding era. This was because of the Reconstruction Congress's directive that states had to, among other things, draft constitutions protecting suffrage for black males and have those constitutions be ratified by a popular vote.⁵⁵ The constitutions the formerly Confederate states adopted in 1864 and 1865 were mostly considered to not qualify under these rules.⁵⁶ Thus, those states⁵⁷ went back to the drawing board to adopt the many constitutions ratified from 1867 to 1870.

51. ALA. CONST. of 1865, art. I, § 36 (“This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachment on the rights hereby retained, or any transgression of any of the high powers by this constitution delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate, and that all laws contrary thereto, or to the following provisions, shall be void.”), *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 119.

52. FLA. CONST. of 1865, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 685–704. Florida did continue to have a Baby Tenth, which read: “That, to guard against transgressions upon the rights of the people, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or to the following provisions, shall be void.” FLA. CONST. of 1865, art. I, § 26, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 687.

53. S.C. CONST. of 1865, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3269–81.

54. GA. CONST. of 1865, art. I, § 21, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 811. The new language was: “The enumeration of rights herein contained is a part of this constitution, but shall not be construed to deny to the people any inherent rights which they have hitherto enjoyed.” *Id. Compare id.*, with *supra* note 32 and accompanying text.

55. EDGAR J. MCMANUS & TARA HELFMAN, 1 LIBERTY AND UNION: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 310–11 (2014).

56. The one exception was Tennessee, which was rewarded for ratifying the Fourteenth Amendment. *Id.* at 310.

57. Although excepted from Congress's mandate, Tennessee adopted a new constitution in any case, in 1870. TENN. CONST. of 1870, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3448–73.

In those “Black and Tan” conventions the various states obeyed Congress’s orders and duly adopted new, compliant constitutions.⁵⁸ They also made, to varying degrees, other changes often made in constitutional conventions. Sometimes the changes were rather drastic, which is not surprising considering many of the delegates were Union loyalists and blacks.⁵⁹ This included the addition or deletion of Baby Ninths. Alabama kept a Baby Ninth but dropped the Baby Tenth language that had accompanied it since 1819.⁶⁰ Arkansas deleted its combined Baby Ninth/Baby Tenth.⁶¹ Florida added a Baby Ninth for the first time, and in the process deleted its Baby Tenth.⁶² Georgia dropped its Baby Ninth.⁶³ Louisiana, however, added one.⁶⁴ Both North⁶⁵ and South

58. See RICHARD L. HUME & JERRY B. GOUGH, *BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION 1–2* (2008).

59. *Id.* at 11.

60. ALA. CONST. of 1867, art. I, § 38 (“That this enumeration of certain rights shall not impair or deny others retained by the people.”), in 1 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 135.

61. ARK. CONST. of 1868, in 1 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 306–32.

62. FLA. CONST. of 1868, Declaration of Rights, § 24, <https://www.floridamemory.com/items/show/189095?id=4> (“This enunciation of rights shall not be construed to impair or deny others retained by the people.”). For whatever reason, Florida chose to use the word “enunciation” instead of “enumeration,” and continues to this day. FLA. CONST. art. I, § 1. The Thorpe compendium of constitutions, which I am using for most other nineteenth century constitutions herein, seems to be in error, as it does not include article I, section 24 in Florida’s Constitution of 1868, which is included in the version cited here. See 2 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 706 (lacking section 24 in the Florida constitution of 1868’s Declaration of Rights).

63. GA. CONST. of 1868, in 2 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 822–42.

64. LA. CONST. of 1868, tit. I, art. 14 (“The rights enumerated in this title shall not be construed to limit or abridge other rights of the people not herein expressed.”), in 3 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 1450. At one point in the convention an alternative formulation for the Baby Ninth was proposed, but not adopted: “All rights not enumerated in this title, and not in conflict with its meaning and design, shall in no wise be infringed or abridged.” OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA 127 (1867–1868).

65. N.C. CONST. of 1868, art. I, § 37 (“This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.”), in 5 *FEDERAL AND STATE CONSTITUTIONS*, *supra* note 17, at 2803. As can be seen from the second clause, this is a combined Baby Ninth/Baby Tenth. *Id.*

Carolina⁶⁶ also did so. Closing out ex-Confederate states, Mississippi⁶⁷ and Virginia⁶⁸ also included new Baby Ninths, but Texas⁶⁹ and Tennessee⁷⁰ did not.

The end result of these “Black and Tan” conventions, plus Tennessee, is the deletion of a Baby Ninth by two states,⁷¹ the adoption of new ones by six,⁷² the keeping of a pre-existing Baby Ninth by one,⁷³ and the continued absence of one in two states.⁷⁴ Unfortunately, again, I found no detailed records in the floor debates or journals from these conventions of why delegates adopted/dropped these provisions.

The surge in the use of Baby Ninths during Reconstruction—with six states adopting them for the first time—strongly indicates Baby Ninths were becoming a generally-accepted tool for constitutional protection. Admittedly, the fact that two states—Arkansas and Georgia—affirmatively took out Baby Ninths shows this was not universal.⁷⁵ But the trend is clear.

66. S.C. CONST. of 1868, art. I, § 41 (“The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.”), in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3285. Interestingly, the convention first proposed a combined Baby Ninth/Baby Tenth, like Alabama’s and Arkansas’s original constitutions, but it was modified, without comment, in the final version. See PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 86, 259, 357 (1868); *supra* notes 35 (Alabama’s Baby Ninth/Baby Tenth), 36 (Arkansas’s Baby Ninth/Baby Tenth).

67. MISS. CONST. of 1868, art. I, § 32 (“The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people.”), in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2071. Like South Carolina, see *supra* note 66, Mississippi—which before had a Baby Tenth, but not a Baby Ninth—considered a dual Baby Ninth/Baby Tenth but removed the language before the text was made final. See JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 1868, at 349, 611 (1871).

68. VA. CONST. of 1870, art. I, § 21 (“The rights enumerated in this bill of rights shall not be construed to limit other rights of the people not therein expressed.”), in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3875.

69. TEX. CONST. of 1868, in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3591–3619. Texas kept its Baby Tenth. TEX. CONST. of 1868, art. I, § 23, in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3593.

70. TENN. CONST. of 1870, in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3448–73. Tennessee kept its Baby Tenth. TENN. CONST. of 1870, art. XI, § 16, in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3469.

71. Arkansas and Georgia. See *supra* notes 61, 63 and accompanying text.

72. Florida, Louisiana, North Carolina, South Carolina, Mississippi, and Virginia. See *supra* notes 62, 64–68 and accompanying text.

73. Alabama. See *supra* note 60 and accompanying text.

74. Texas and Tennessee. See *supra* notes 69–70 and accompanying text. Of course, Tennessee’s convention was not technically a “Black and Tan” one. See *supra* notes 56–57.

75. However, it is significant to note, as explained below, that both of these states re-adopted Baby Ninths in the next decade. See *infra* notes 88, 90 and accompanying text.

Two other developments from the Reconstruction period should be noted. One was the admission into the Union of Nebraska, which included a Baby Ninth in its constitution.⁷⁶ The other was Maryland's retention of its Baby Ninth when it adopted a new constitution in 1867.⁷⁷ This means that by 1870, eighteen out of the thirty-seven states in the Union (including all ex-Confederate states), or just under half of all states, had Baby Ninths in their constitutions.

C. *The Gilded Age, 1870–1900*

The roughly three decades after Reconstruction saw both the addition of many western states into the Union—along with their constitutions—and an avid interest in adopting new constitutions by many established states. During this period, states adopted twenty-five constitutions.⁷⁸ Of those, fifteen included Baby Ninths. Nine of these Baby Ninths were new. As of 1900, twenty-six states out of the forty-five in the Union—a solid majority—had Baby Ninths.

Constitution drafting remained very popular in the 1870s. In that decade, a few states re-drafted their constitutions and did not adopt Baby Ninths. Illinois (1870),⁷⁹ West Virginia (1872),⁸⁰ Pennsylvania (1873),⁸¹ and Texas (1876)⁸² all adopted new constitutions without adding one. But these were in the minority. Colorado was admitted to the Union and

76. NEB. CONST. of 1866, art. I, § 20 (“This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.”), in 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2351.

77. MD. CONST., Declaration of Rights art. 45 (“This enumeration of Rights shall not be construed to impair or deny others retained by the People.”), in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1783.

78. Sturm, *supra* note 4, at 58 tbl.1. By “this period” I mean 1870 to 1900, and I do not include Tennessee’s 1870 constitution, as that was included in the Reconstruction discussion.

79. ILL. CONST. of 1870, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1013–52.

80. W. VA. CONST. of 1872, in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 4033–64.

81. PA. CONST. of 1873, in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3121–52. Pennsylvania kept its Baby Tenth. PA. CONST. of 1873, art. I, § 26 (“To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3123.

82. TEX. CONST. of 1876, in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3621–63. Texas kept its Baby Tenth. TEX. CONST. of 1876, art. I, § 29 (“To guard against transgressions of the high powers herein delegated, we declare that everything in this ‘Bill of Rights’ is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.”), in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3623.

included a Baby Ninth in its bill of rights.⁸³ The states of Alabama (1875),⁸⁴ Nebraska (1875),⁸⁵ California (1879),⁸⁶ and Louisiana (1879)⁸⁷ adopted new constitutions while keeping Baby Ninths. And Arkansas (1874),⁸⁸ Missouri (1875),⁸⁹ Georgia (1877)⁹⁰ adopted new Baby Ninths. In fact, in the case of Arkansas and Georgia they *re*-adopted Baby Ninths, as their Reconstruction conventions had dropped prior versions.⁹¹

The next decade witnessed the admission into the Union of a number of states after the razor-thin election of 1888.⁹² A full six states were admitted in 1889.⁹³ Four of them, Idaho,⁹⁴ Montana,⁹⁵ Washington

83. COLO. CONST. of 1876, art. II, § 28, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 478.

84. ALA. CONST. of 1875, art. I, § 39 (“That this enumeration of certain rights shall not impair or deny others retained by the people.”), *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 157.

85. NEB. CONST. of 1875, art. I, § 26 (“This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.”), *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2363.

86. CAL. CONST. of 1879, art. I, § 23 (“This enumeration of rights shall not be construed to impair or deny others retained by the people.”), *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 415.

87. LA. CONST. of 1879, Bill of Rights, art. 13 (“This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed.”) *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1472.

88. ARK. CONST. of 1874, art. II, § 29, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 336. The provision was the same combined Baby Ninth/Baby Tenth from versions before Reconstruction. *Compare id.*, with *supra* note 49.

89. MO. CONST. of 1875, art. II, § 32 (“The enumeration in this Constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.”), *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2232.

90. GA. CONST. of 1877, art. I, § v, ¶ II (“The enumeration of rights herein contained as a part of this Constitution, shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”), *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 845.

91. *See supra* notes 61, 63 and accompanying text.

92. HEATHER COX RICHARDSON, *TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY* 123–25 (2014).

93. *Id.* at 125.

94. IDAHO CONST. of 1889, art. I, § 21 (“This enumeration of rights shall not be construed to impair or deny other rights retained by the people.”), *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 920.

95. MONT. CONST. of 1889, art. III, § 30 (“The enumeration in this Constitution of certain rights, shall not be construed to deny, impair or disparage others retained by the people.”), *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2304.

State,⁹⁶ and Wyoming,⁹⁷ placed Baby Ninths in their new constitutions. Only North Dakota⁹⁸ and South Dakota⁹⁹ did not. Also, in 1886, Florida adopted a new constitution and kept its Baby Ninth.¹⁰⁰

Constitutions kept being written in the last decade of the century. In the 1890s, Mississippi¹⁰¹ and Louisiana¹⁰² kept their Baby Ninths, and the new state of Utah adopted one.¹⁰³ Kentucky¹⁰⁴ and Delaware¹⁰⁵ adopted new constitutions and did not add Baby Ninths, but each kept its preexisting Baby Tenth. And in 1895, South Carolina somewhat mysteriously dropped its Baby Ninth,¹⁰⁶ even though it was included in

96. WASH. CONST. of 1889, art. I, § 30 (“The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.”), *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3975.

97. WYO. CONST. of 1889, art. I, § 36 (“The enumeration of this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”), *in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 4120.

98. N.D. CONST. of 1889, *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2854–96. North Dakota did adopt a Baby Tenth. N.D. CONST. of 1889, art. I, § 24 (“To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”), *in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2856.

99. S.D. CONST. of 1889, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3357–3408.

100. FLA. CONST. of 1885, Declaration of Rights, § 24 (“This enunciation of rights shall not be construed to impair or deny others retained by the people.”), *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 734.

101. MISS. CONST. of 1890, art. III, § 32 (“The enumeration of rights in this constitution shall not be construed to deny or impair others retained by, and inherent in, the people.”), *in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 2093.

102. LA. CONST. of 1898, Bill of Rights, art. 15 (“This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed.”), *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1523.

103. UTAH CONST. of 1895, art. I, § 25 (“This enumeration of rights shall not be construed to impair or deny others retained by the people.”), *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3704.

104. KY. CONST. of 1890, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1316–58. Kentucky’s Baby Tenth read: “To guard against transgression of the high powers which we have delegated, we declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.” KY. CONST. of 1890, Bill of Rights, § 26, *in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 1318.

105. DEL. CONST. of 1897, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 600–36. Delaware’s Baby Tenth reads: “We declare that every thing in this article is reserved out of the general powers of government hereinafter mentioned.” DEL. CONST. of 1897, art. I (concluding sentence), *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 602.

106. S.C. CONST. of 1895, *in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3307–54.

committee drafts of the eventual declaration of rights during the convention.¹⁰⁷

D. The Twentieth Century

The Gilded Age's enthusiasm for writing new constitutions kept going for a couple decades into the twentieth century, but then finally petered out as states for the most part grew comfortable with their constitutions and Americans hit the challenges of depression and war. However, after World War II, constitution drafting had a bit of a renaissance, and this brought with it a continued enthusiasm for the adoption of Baby Ninths.

In the years before World War I, the states of Oklahoma,¹⁰⁸ Arizona,¹⁰⁹ and New Mexico¹¹⁰ were admitted to the Union.¹¹¹ All adopted Baby Ninths.¹¹² Meanwhile, Alabama,¹¹³ Virginia,¹¹⁴ and Louisiana¹¹⁵ all kept Baby Ninths in their constitutions. Only Michigan adopted a new constitution in this period and did not include a Baby Ninth in it.¹¹⁶

107. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 137, 145, 275 (Columbia, S.C., Charles A. Calvo, Jr., 1895) (demonstrating two versions of a Baby Ninth/Baby Tenth were considered and one was included in a final report).

108. OKLA. CONST. art. II, § 33 ("The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."), in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 4271, 4276.

109. ARIZ. CONST. art. II, § 33 ("The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people."), in THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA 57 (Charles Kettleborough ed., 1918) [hereinafter THE STATE CONSTITUTIONS].

110. N.M. CONST. art. II, § 23 ("The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."), in THE STATE CONSTITUTIONS, *supra* note 109, at 939.

111. Luis R. Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. INT'L L. 315, 323 n.49 (1981).

112. See *supra* notes 108–11.

113. ALA. CONST. art. I, § 36 ("That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."), in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 185.

114. VA. CONST. of 1902, art. I, § 17 ("The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed."), in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 17, at 3906.

115. LA. CONST. of 1913, Bill of Rights, art. 15 ("This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed."), in THE STATE CONSTITUTIONS, *supra* note 109, at 502.

116. MICH. CONST. of 1908, in THE STATE CONSTITUTIONS, *supra* note 109, at 685–709.

Louisiana held yet another constitutional convention in 1921, keeping its Baby Ninth.¹¹⁷ But after that, no state adopted a new constitution until 1945.¹¹⁸ That was the longest “drought” in constitutional adoption in American history before the current one, which has not seen a new constitution since Rhode Island’s in 1986.¹¹⁹ In fact, the 1930s—which, given the Great Depression might have been thought to contain the seeds of tumultuous constitutional change at the state level—was the only decade before the 1990s to not witness any new state constitutions.¹²⁰

When Americans turned their attention away from depression and war, however, they found that there was some constitution writing to be done. Georgia adopted a new constitution in 1945, keeping its Baby Ninth.¹²¹ Missouri adopted its own new constitution in the same year, dropping the Baby Ninth it had added in 1875.¹²² New Jersey, however, kept its Baby Ninth in its new constitution of 1947.¹²³

Baby Ninths only got more popular in the second half of the century. The two new states of this period, Alaska¹²⁴ and Hawaii,¹²⁵ each put a Baby Ninth in their constitutions. Then, in the 1960s and ‘70s a number of states rewrote their constitutions. When Michigan did so in 1963, it adopted a Baby Ninth for the first time.¹²⁶ Connecticut did not add one

117. LA. CONST. of 1921, art. I, § 15 (“This enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed.”).

118. Sturm, *supra* note 4, at 58 tbl.1.

119. *See id.* (detailing when each new state constitution before 1983 was adopted); Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757, 768 (2017) (stating the last new state constitution was Rhode Island’s 1986 constitution).

120. Sturm, *supra* note 4, at 58 tbl.1, 71.

121. GA. CONST. of 1945, art. I, § V, ¶ II (“The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”), http://georgiainfo.galileo.usg.edu/topics/government/related_article/constitutions/georgia-constitution-of-1945-as-ratified-without-subsequent-amendments.

122. *See* MO. CONST. The debate from that constitution on dropping the Baby Ninth is interesting and discussed below; *infra* notes 147–50 and accompanying text.

123. N.J. CONST. art. I, § 21 (“This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.”).

124. ALASKA CONST. art. I, § 21 (“The enumeration of rights in this constitution shall not impair or deny others retained by the people.”).

125. HAW. CONST. art. I, § 20 (“The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.”).

126. MICH. CONST. art. I, § 23 (“The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

in 1965,¹²⁷ but Florida kept its in 1968.¹²⁸ Pennsylvania also adopted a new constitution in 1968, not adding a Baby Ninth, but keeping its Baby Tenth.¹²⁹ Then, in the early 1970s three states adopted new constitutions. Illinois added a Baby Ninth,¹³⁰ while North Carolina¹³¹ and Virginia¹³² kept theirs. Montana did the same in 1972,¹³³ as did Louisiana in 1974,¹³⁴ Georgia in 1976¹³⁵ and again in 1983,¹³⁶ and Rhode Island in 1986, the last state as of this writing to adopt a new constitution.¹³⁷

This leaves us today with thirty-three states out of fifty with a Baby Ninth. At 66 percent, that is the highest percentage of states in the Union having a Baby Ninth in history.

III. INTERPRETATIONS OF BABY NINTHS

A. *What Delegates Said About Their Baby Ninths*

As I explained in my prior article, delegates to state constitutional conventions, at least according to the transcripts and records of the

127. See CONN. CONST.

128. FLA. CONST. art. I, § 1 (“All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.”). Intriguingly, this latest version of the Florida Constitution placed the Baby Ninth at the beginning of the state Declaration of Rights, along with the statement about political power being inherent in the people, instead of the end.

129. PENN. CONST.; *id.* art. I, § 25.

130. ILL. CONST. art. I, § 24 (“The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.”).

131. N.C. CONST. art. I, § 36 (“The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.”).

132. VA. CONST. art. I, § 17 (“The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed.”).

133. MONT. CONST. art. II, § 34 (“The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”).

134. LA. CONST. art. I, § 24 (“The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.”).

135. GA. CONST. of 1976 art. I, § 1, para. XXV (“The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”), http://georgiainfo.galileo.usg.edu/topics/government/related_article/constitutions/georgia-constitution-of-1976-as-ratified-without-subsequent-amendments.

136. GA. CONST. art. I, § 1, para. XXIX (“Enumeration of rights not denial of others. The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”).

137. R.I. CONST. art. I, § 24 (“The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people. The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States.”); Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757, 768 (2017) (stating Rhode Island’s 1986 constitution is the nation’s most recent).

conventions, are frustratingly silent on all manner of subjects.¹³⁸ On Baby Ninths they are particularly so. Of the many constitutional conventions that produced Baby Ninths before the Civil War, only four recorded substantive remarks about Baby Ninths.¹³⁹ For the period examined in this Article, the story is much the same. Only in the records of the conventions of Missouri (both 1875 and 1945), Virginia (1902), New Jersey (1947), Hawaii (1950), Michigan (1963), Illinois (1970), and Montana (1972), have I found anything substantive about what the delegates thought of their various Baby Ninths, and even then the comments were generally very short. All-in-all, however, these comments demonstrate what the comments made before the Civil War demonstrated: that delegates believed Baby Ninths protected citizens' unenumerated rights, and that—for the most part, but not exclusively—they believed those rights were individual rights.¹⁴⁰

A couple conventions thought a Baby Ninth hardly needed explanation at all because the provision's meaning was obvious. In the Hawaii convention of 1950, the Committee of the Whole reported the following about the proposed Baby Ninth: "Your Committee recommends the adoption of this section, which is self-explanatory."¹⁴¹

The Montana convention of 1972 was not too much more detailed, when one delegate stated:

Mr. Chairman. I move that when this committee does arise and report, after having under consideration [the Baby Ninth], that it recommend the same be adopted. Mr. Chairman, this provision is the same as the one we had in our last—in our present Bill of Rights, Section 30, and it's also contained in the federal Bill of Rights. I think that it is completely self-explanatory. There are

138. Sanders, *supra* note 3, at 418.

139. *Id.*

140. I should make clear that as an original public meaning originalist, I do not believe delegates' statements are dispositive of original meaning. *See supra* note 24. However, the statements assist us in understanding how the wider public understood the language the delegates' selected. *See* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 339 (2011) ("Original public meaning originalism does not dismiss the personal intentions of the framers of a given text (to the extent they can be determined), but considers such views as having weight only to the degree that they reflect or illuminate the likely public understanding of the text.").

141. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 304 (1960).

rights which are not enumerated which the people of Montana should not be denied. Thank you.¹⁴²

To this Montana delegate, and the committee in Hawaii, Baby Ninths mean what they say: there are rights beyond those in the Bill of Rights, and they should not be denied just because they are not enumerated in the constitution. That is essentially what Professor Randy Barnett has argued about the Ninth Amendment itself.¹⁴³ There is no hidden “Straussian” meaning to be discerned; they mean what they say.

A few other discussions of Baby Ninths added a bit more than these “self-explanatory” comments but arrived at the same conclusion on the provisions’ meaning. In Missouri’s 1875 convention, a delegate stated that it “declares that while we have set out and enumerated certain specified rights as belonging to the people, the fact that we have declared that they possess those rights is not construed to mean that they do not possess other rights also retained by the people.”¹⁴⁴

A slightly different view of Baby Ninths is not that their meaning is obvious, but that they are superfluous because a Bill of Rights would not be read to deny unenumerated rights in the first place. In my prior article, I called this the “minority view” of Baby Ninths during the antebellum period.¹⁴⁵ Under this view, a Baby Ninth is unneeded because, in effect, a Baby Ninth is already an “unwritten” part of the state’s constitution.

This view was given in the 1902 Virginia constitutional convention by a drafter of a committee report. After quoting the proposed Baby Ninth’s language, which was from the state’s prior constitution, he said:

I do not think [the “rights enumerated”] would probably be construed in that way. I think the section is possibly one which the Bill of Rights would have been as strong without, but we found it there and we deemed it best to follow as far as possible the landmarks where they did not interfere with our ideas of what really was the true theory of our State government.¹⁴⁶

142. 6 MONTANA CONSTITUTIONAL CONVENTION OF 1971–1972, VERBATIM TRANSCRIPT MARCH 9, 1972 TO MARCH 16, 1972, at 1832 (1981).

143. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).

144. 4 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 309 (Isidor Loeb & Floyd C. Shoemaker eds., 1938).

145. See Sanders, *supra* note 3, at 433.

146. 1 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA 105 (1906).

Thus, the delegate thought the Baby Ninth was not needed as a “savings clause,” but included it anyway out of a Burkean sense of tradition.

Missouri removed its Baby Ninth seventy years after adopting it. The reason given was similar to that voiced in Virginia in 1902. After it was left out of an initial draft, one delegate recommended reinserting the former Baby Ninth. He said that under the provision:

[T]his previous enumeration of private rights are not necessarily all the rights to which the citizen is entitled to have protection in. We don't know what question of rights may arise sometime. Just because it has been left out of the Bill of Rights that doesn't mean that he is still entitled to that protection.¹⁴⁷

To this explanation, one Missouri delegate answered, “[w]ell, isn't that law anyway?”¹⁴⁸ By this, he and other objecting delegates meant that they considered unenumerated rights to be protected whether or not the Baby Ninth's “shot gun” language was included.¹⁴⁹ Thus, this view was similar to the “minority view” from before the Civil War: Baby Ninths were not necessary because unenumerated rights were already constitutionally protected.¹⁵⁰

But this view continued to be in the “minority.” New Jersey's 1947 convention referred to the Baby Ninth on a couple occasions to allay fears that the inclusion of some rights would defeat others. One delegate stated:

[T]here has been some fear that the enumeration of the two rights, the militia and the public schools, would impair the usefulness of the amendment which I have submitted. But we take care of that in paragraph 20: “This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.” The enumeration—just by mentioning

147. 7 DEBATES OF THE 1943–1944 CONSTITUTIONAL CONVENTION OF MISSOURI 1927 (1945).

148. *Id.*

149. *See, e.g., id.* at 1929 (“You haven't protected anything so that the provision is simply a shot gun provision without effect or meaning.”).

150. *See Sanders, supra* note 3, at 433 (calling this the “minority view” of Baby Ninths).

the militia and the public schools—does not impair other rights, as practically all members of the legal profession know.¹⁵¹

Thus, the delegate here argued that just because the right to be free from discrimination in the militia and public schools is protected does not mean other rights, whatever they are, that are not mentioned are not also protected.¹⁵²

New Jersey's 1947 convention also gave a hint at a different reading of its Baby Ninth. At one point, a New Jersey delegate was engaged in an effort to remove a reference to the right to collective bargaining, and defended his effort by arguing that because of the Baby Ninth, the fact that the reference to collective bargaining was not in the constitution would not mean the right was not protected.¹⁵³ Collective bargaining, of course, is not an individual right, but a collective and positive right¹⁵⁴ held by workers and against employers. Thus, this is a hint, however slight, that some people in 1947 may have perceived the Baby Ninth as protecting not just individual rights, but some kind of collective right as well.

Michigan did not adopt a Baby Ninth until its 1963 constitutional convention.¹⁵⁵ Its delegates had a few things to say about it, and in a new way not seen earlier in other conventions. First, the relevant committee's comment on the proposal was as follows:

151. 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 640 (1947). The reference to the militia and public schools is because the delegate was proposing a section protecting against discrimination within either institution. *Id.*; see also N.J. CONST. art. I, § 5 ("No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."). Thus the "rights" referred to are rights against discrimination, not positive rights to a militia or public schools. *Id.*

152. See N.J. CONST. art. I, § 5; 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, *supra* note 151, at 640.

153. 1 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, *supra* note 151, at 327–30.

154. In this article, I do not address whether Baby Ninths protect some positive individual rights in addition to negative individual rights. As I discussed in my previous article, defenders of an individual rights reading of the Ninth Amendment itself disagree on this topic. Sanders, *supra* note 3, at 399; compare Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 21 (2006) (Ninth Amendment does not protect positive rights), with DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* 146–53 (2007) (Ninth Amendment protects the right to an education).

155. See Sanders, *supra* note 3, at 410. However, it did include a Baby Tenth much earlier. See MICH. CONST. of 1908, art. II, § 1.

This language is taken from the ninth amendment to the Constitution of the United States. The committee believes that its incorporation in the Michigan constitution will set up a sound state parallel. The language recognizes that no bill of rights can ever enumerate or guarantee all the rights of the people and that liberty under law is an ever growing and ever changing conception of a living society developing in a system of ordered liberty.¹⁵⁶

Later on, one of the delegates said in support:

I think most of you will recognize—if you don't recognize, you should—that this is taken from the federal constitution. The enumeration of these rights shall not be construed to disparage others retained by the people. This is for perhaps 2 reasons. First, we cannot anticipate in any declaration or bill of rights all of the things which perhaps should be said. Second, we do not intend that the statements that we have made here as to the rights of our people shall be limited by the fact that we did not state something which has always been considered such a right.¹⁵⁷

These comments make two important points. First, they echo Madison's original statement in support of the Ninth Amendment, which I have demonstrated applies with at least equal, if not greater, force to Baby Ninths: that rights, by their nature, are not capable of being comprehensively enumerated, and therefore an "etcetera clause" is a way of protecting those rights not included.¹⁵⁸ Second, these comments raise another idea: the rights the Baby Ninth protects are not necessarily the same at any one time. Because "liberty under law is an ever growing and ever changing conception of a living society" new rights may arise in the future, or at least be *recognized* in the future, that are not protected today.¹⁵⁹

Whether these comments imply something like a "living constitutionalism" understanding of Michigan's Baby Ninth is unclear. Just because new rights arise in the future does not necessarily entail that the *meaning* of the Baby Ninth changes. Rather, the world changes and therefore the Baby Ninth applies to additional things. But this is a slightly different understanding from earlier explanations of Baby

156. FRED I. CHASE, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION OF 1961, OFFICIAL RECORD 470 (Austin C. Knapp & Lynn M Nethaway eds., 1962).

157. *Id.* at 569.

158. Sanders, *supra* note 3, at 430, 433 n.219.

159. CHASE, *supra* note 156, at 470.

Ninths, which seem to assume the rights that are protected are rights that were protected at the time the relevant constitution was adopted.¹⁶⁰

The state convention with some of the most commentary on a Baby Ninth is from the state that most recently adopted a new Baby Ninth: Illinois. In that state's 1970 constitutional convention, the Committee on Bill of Rights stated the following on what the provision's purpose was:

This provision gives explicit recognition to the principle that the Bill of Rights is not an exhaustive catalog of a citizen's rights and immunities in respect to government action. The language is the same as the Ninth Amendment to the United States Constitution, except that "people" has been replaced by "individual citizens of this State."¹⁶¹

The drafters of the provision also stated "[t]his new section acknowledges that the people have many rights that are not mentioned in this constitution. It states that these rights are not denied even though they are not enumerated."¹⁶²

Both of these statements are fairly standard for the commentary we have seen on Baby Ninths so far. Essentially, they assert that "it means what it says." But the primary endorser of the provision, Delegate Pechous, had a more idiosyncratic view that is worth quoting at length:

Mr. President, Chairman Gertz, and fellow delegates, it is my pleasure to present what I consider the least controversial section of the bill of rights. . . .

. . . . This particular language was extracted by myself from the State of Washington Constitution, and it's identical also to the Ninth Amendment to the United States Constitution except for the following: Instead of the reference to the "retained by the people" in the Ninth Amendment, this particular section retains the rights to "the individual citizens of this state." And there is not a great deal of law in this particular section

160. This was explicitly the case with Georgia's Baby Ninth. *See supra* note 32 and accompanying text.

161. 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, at 66 (1972).

162. 1 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, at 700 (1972).

The concept of the Ninth Amendment language and what I would hope that this particular language would do for the state of Illinois would be that it would have no negative implication, and it could only have a possible positive implication in the future. And I think—at least I tried to sell the committee on the idea—that when we consider the concept of dual sovereignty where an individual citizen is both a citizen of the United States and he is also a citizen of the state of Illinois and considering the relationship of the state sovereign to the federal sovereign, I think that this particular language could establish—or re-establish—some concept of state sovereignty that has been eroded by federal action in the past.

It is the—as the report says, this particular language gives explicit recognition to the principle that though a number of rights are enumerated and set out in the bill of rights that by no means is that to be construed as an exhaustive catalog or a maximum of the rights involved. Any rights that are not individually set out are still retained by the individual citizens of this state, so in the future, for instance, any question that might arise as to whether a particular matter is—falls within the state jurisdiction or if it is a federal question under the United States Constitution and governed by the supremacy clause, this particular section would set some guideline for retaining a right to the people of the state of Illinois—that is, the individual citizen—even though it is not set out and enumerated at some other point in the constitution.

The law that I have—I have one case on the application of the Ninth Amendment, and that is *Griswald* [sic] *v. the State of Kentucky—Connecticut*, pardon me. It is a 1965 United States Supreme Court case wherein the person, *Griswald* [sic], was arrested for disseminating birth control information to married couples, and it was asserted in the argument before the Supreme Court that even though there is no explicit recognition of the right of privacy in a marital state, that is a right so fundamental and so basic to a free society and free individuals that it is inherent and recognized in the Ninth Amendment which says

that even though the right is not set out that it is, in fact, retained. So that was the biggest case on the federal level.¹⁶³

What Delegate Pechous was discussing here is a bit mysterious. He seemed to be arguing that the Baby Ninth would protect the state, or at least its individual citizens, from the federal government. That is simply not true given the U.S. Constitution's Supremacy Clause.¹⁶⁴ This is a pretty basic tenet of constitutional law that he seemed to be missing—state constitutions do not change federal preemption depending on how they are written. He did not seem to be making a collective rights argument, as he acknowledged that the text of the Baby Ninth applies only to “the individual citizen.”¹⁶⁵ Thus, this argument is a bit befuddling.¹⁶⁶

It should be noted that he did accurately summarize the discussion of the Ninth Amendment in *Griswold*—although he failed to say that it was only Justice Goldberg's three-justice concurrence¹⁶⁷—and therefore seemed to believe that the Baby Ninth language applies to individual rights.

So, what to make of Pechous's speech? No one else spoke about the Illinois Baby Ninth, so this and the committee report is all we have to go on regarding what the delegates thought about it.¹⁶⁸ Although the particulars of some of what Pechous said are unsupportable, perhaps the charitable interpretation is that he saw the Baby Ninth as protecting both individual and collective rights, of some sort or another. How the collective rights would work is unclear, although, as explained below, some courts over the years have tried to give Baby Ninths a collective rights meaning.¹⁶⁹ But his invocation of *Griswold* indicates he

163. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, at 1613–14 (1972).

164. U.S. CONST. art. VI, cl. 2.

165. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1969–1970, *supra* note 163, at 1614.

166. Delegate Pechous also gave a brief discussion of a state case from Arkansas, *Wade v. Horner*. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, *supra* note 163, at 1614 (1972). However, *Wade* did not actually concern the Arkansas Baby Ninth, at least to any level of specificity. *Wade v. Horner*, 170 S.W. 1005, 1005–06 (Ark. 1914) (not naming or examining Arkansas's Baby Ninth). Instead, there the court upheld a Jim Crow liquor licensing scheme in the face of a challenge under unspecified sections of the state and federal constitutions. *Id.* at 1006. The charitable explanation for Delegate Pechous's invocation of the case is that he misidentified what constitutional provisions it concerned.

167. *Griswold v. Connecticut*, 381 U.S. 479, 491–93 (1965) (Goldberg, J., concurring).

168. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1969–1970, *supra* note 163, at 1614 (1972).

169. *See supra*, Part III.B.

was generally on board with the “standard” interpretation of Baby Ninths: they mean what they say.

B. Judicial Interpretations of Baby Ninths

Unlike in the antebellum period, when there were only a handful cases interpreting Baby Ninths in any meaningful way,¹⁷⁰ the period since 1860 has seen a fair amount of jurisprudence on Baby Ninths. I say “fair amount” because for provisions that are in two-thirds of all state constitutions, and whose language potentially protects all kinds of regulated behavior, there is not nearly as much caselaw as one would expect. But, there is enough that quite a bit more space than available here could be written about those cases. In this section, I merely want to outline the various approaches courts have taken to Baby Ninths and demonstrate that there is a good amount more disagreement on what Baby Ninths mean, and how seriously they should be taken, than at the state conventions.

By-and-large, courts interpreting Baby Ninths have taken two approaches. One is to, in one way or another, read them as clauses protecting unenumerated individual rights.¹⁷¹ Under this umbrella, questions such as what those rights are, how numerous they are, and what burden is placed on the government when it wants to infringe on those rights, receive various answers. But overall, when courts have seriously investigated what Baby Ninths mean they have basically answered what is being advocated here: they protect unenumerated individual rights. The rub, however, is that the level of protection has often been rather nominal. Thus, courts often find Baby Ninths protect individual rights, but not all that much.¹⁷²

The other approach is that Baby Ninths protect collective rights, that is, essentially, the right of the people to collectively govern themselves. As I have explained, at the state level this is a nonsensical position to make, because “the people,” through the legislature, would have that power if the Baby Ninth were not included in the first place. Yet, this view has cropped up at times in various state courts. It has sometimes been in the context of local government versus state government, and in that case, there is a little more justification for it. Later we will take a brief look as to why that might be.¹⁷³

170. Sanders, *supra* note 3, at 429–32.

171. See, e.g., State ex rel. Burlington & M.R.R. Co. v. County of Wapello, 13 Iowa 388, 412 (1862).

172. See *infra* notes 176–243 and accompanying text.

173. See *infra* notes 244–54 and accompanying text.

What follows is a brief survey of some of these interpretations of Baby Ninths. The interpretations vary in a number of ways, geographically and also temporally. It will not be surprising that most of the Baby Ninth cases protecting property rights, for example, are from prior to the New Deal. Nor should it be surprising that most cases protecting what are today called “personal liberties” are from the last few decades. The interpretations of Baby Ninths have ebbed and flowed just as the interpretations of other constitutional provisions—including due process clauses, privileges or immunities clauses, and Lockean Natural Rights Guarantees¹⁷⁴—have ebbed and flowed.¹⁷⁵ What *should* be different about Baby Ninths, because of the obviously different meaning their words hold, does not always translate into judges interpreting them differently from these other clauses.

1. Individual rights judicial interpretations of Baby Ninths

- a. *A case study in 1860s Iowa*

Some of the earliest post-1860 cases on Baby Ninths come out of Iowa. In a series of opinions from 1862 through 1870 the justices of its Supreme Court jostled on how to interpret the state’s Baby Ninth. They eventually concluded that the Baby Ninth offers very little protection, but along the way demonstrated two polar-opposite views on what Baby Ninths mean. Examining these cases in some detail will give us a preview of how courts interpreted Baby Ninths in later eras.

The first, *State ex rel. Burlington & M.R.R. Co. v. County of Wapello*,¹⁷⁶ is one of the fullest examinations of a Baby Ninth in any judicial opinion. The case concerned a challenge to a state law requiring counties to purchase railway stock.¹⁷⁷ In concluding that the law was unconstitutional because it forced taxpayers to become stock owners

174. For the history of these fascinating constitutional provisions, see Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299 (2015).

175. Another point I should make is that many Baby Ninth cases not only follow the larger judicial milieu on what rights receive stronger protections than others and what level of scrutiny applies, but also often include other constitutional provisions in their analysis. A common tactic is a “grab bag” of sorts where the court cites the Baby Ninth—as well as due process, and other clauses of both the state constitution and the U.S. Constitution—then determines if the right in question is protected by them. “Pure” Baby Ninth cases are more rare, but by no means unheard of. In highlighting merely a few cases in the following, most will be cases that specifically addressed the Baby Ninth itself, at least as part of an alternative holding.

176. 13 Iowa 388 (1862).

177. *Id.* at 389–90.

against their will, it primarily relied on what it called the “saving clause” of the Iowa Constitution, i.e., the Baby Ninth.¹⁷⁸ The court raised the common idea that state legislatures have all powers not denied to them in a state constitution.¹⁷⁹ But it expressly said that the Iowa Constitution was different because of the Baby Ninth:

The Constitution of Iowa seems to have been written upon entirely a different theory, and utters quite another language, the words of which must furnish the only criterion by which we are to determine the rightful exercise of a given power. . . .

The object of this saving clause, we suppose, was to guard not only against the above construction given to bills of right, not containing any such reservation, but to bring these unenumerated rights retained by the people, founded equally, it may be, upon natural justice and common reason, as those that are specified within the censorship of courts of justice, when even they shall be assailed.¹⁸⁰

The most striking thing about this language is not just that it interprets the Baby Ninth as protecting unenumerated rights, but that it finds the Baby Ninth to put unenumerated rights on equal footing with the rest of the state constitution. That is, of course, what the language of any Baby Ninth seems to say. But this opinion takes that at face value. We will see this is by no means always the case.

The Iowa court returned to its Baby Ninth in *Hanson v. Vernon*.¹⁸¹ There, following the *County of Wapello* case, the majority relied upon a number of provisions in striking down a similar railway-stock law, and only included a passing reference to the Baby Ninth.¹⁸² But, it is an interchange in a concurrence and the dissent where things get interesting for our purposes.

First, in his concurrence, Justice Beck saw the Baby Ninth as so important that he termed it “an *unwritten Constitution*.”¹⁸³ His sweeping defense of Baby Ninths is worth quoting at length:

178. *Id.* at 412.

179. *Id.*

180. *Id.*

181. 27 Iowa 28 (1869), *overruled by* *Stewart v. Bd. of Supervisors*, 30 Iowa 9 (1870), and *Bonnifield v. Bidwell*, 32 Iowa 149 (1871).

182. *Id.* at 42.

183. *Id.* at 73 (Beck, J., concurring).

It cannot be maintained that the Constitution confers upon the State government absolute and unlimited legislative power, authorizing all laws affecting the rights and property of the people, not expressly prohibited by that instrument. The people, in the formation of the Constitution, wisely reserved to themselves all rights unimpaired over which power is not delegated to the State government. Section 25 of the bill of rights provides that the enumeration of rights contained in the Constitution shall not be construed to impair or deny others retained by the people. There is, as it were, back of the written Constitution, an *unwritten Constitution*, if I may use the expression, which guarantees and well protects all the absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the Constitution, nor preserved by express provisions thereof, notwithstanding they exist and are possessed by the people, free from governmental interference. The rights of property, and rights arising under the domestic relations of husband and wife, parent and child, &c., may not be preserved by express constitutional provisions, yet they exist in all their perfection, and no legislative enactment impairing them can be sustained.¹⁸⁴

Second, the dissenting justice, Justice Cole, had a very different take on the Baby Ninth. Among other things, the phrase “unwritten constitution” was not to his liking. His opinion is worth quoting at length as well, because it touches upon a deep objection to Baby Ninths that recurs up to the present day:

For myself, I think that this section of the Constitution does not provide or establish any additional or further limitation upon the legislative power. And, indeed, I think that if this section had been omitted entirely from the Constitution the fact it declares would have had just as potential an existence as it now has. In other words, that by a uniform rule of interpreting constitutions, they are construed as not denying or impairing rights retained by the people other than those enumerated in them.

But I deny, most confidently, that, under this provision, whether expressed or implied, courts of law may rightfully declare an act of the legislature unconstitutional and void, as being in conflict with it. To so hold, is to place the legislative department at the

184. *Id.*

feet of the judicial, and to render the immediate representatives of the people powerless to protect them in their rights, or from the encroachments of judicial power. If the views of the majority are sound, then it is certainly true, that our Constitution does not define the powers of the respective departments of our government, but leaves them to the necessarily uncertain, and everchanging measurement of *judicial discretion*. And this, I think, fairly illustrates the two fundamental errors of the majority: First, in supposing that there is an unwritten Constitution by which courts may measure the legislative power; and second, in supposing that the courts are the only protectors, though not in any just sense the representatives, of the people; that the people must look to the courts and not to the legislature to relieve them from actual or supposed unwise legislation. It is well settled that a statute cannot be declared void on the ground of its violating fundamental principles of republican government, when it does not come in conflict with written constitutional provisions.¹⁸⁵

The disagreement between these men comes down to a stark contrast: Justice Beck says the Baby Ninth is meaningful and requires judicial protection of rights, while Justice Cole says the Baby Ninth is superfluous and does not require judicial protection of rights because otherwise it would upend republican government. Justice Cole's conclusion is very similar to Justice Scalia's remarks on the Ninth Amendment in *Troxel v. Granville*, where he concluded that the amendment did indeed refer to unenumerated rights, but that he, as a judge, was powerless to protect them.¹⁸⁶ Essentially, Justice Cole seems to understand what the Baby Ninth is trying to do—that is, what the delegates to the constitutional convention were trying to do in drafting it—and it scared the dickens out of him.

The holdings of *Hanson* and *County of Wapello* were not to last long. With new justices on the court, it reversed *Hanson* the very next year,

185. *Id.* at 84–85 (Cole, J., dissenting) (citing *People v. Mahony*, 13 Mich. 481 (1865); *People v. Gallagher*, 4 Mich. 244 (1856)).

186. *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“In my view, a right of parents to direct the upbringing of their children is . . . among the ‘othe[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’ . . . [H]owever . . . the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”).

and held a modified, but similar, law constitutional.¹⁸⁷ There the court heavily relied on a “proto-Thayerian”¹⁸⁸ emphasis on upholding a law’s constitutionality unless it is a “*plain, clear and palpable* violation of the *written* constitution.”¹⁸⁹ But even that was not enough to distinguish *Hanson*. So, it also reinterpreted the Baby Ninth to give it a collective rights meaning.¹⁹⁰ It inquired what rights were “retained by the people,” as the Baby Ninth says.¹⁹¹ And it concluded that those were *legislative* rights, which, through certain provisions in the constitution, the people have, collectively, delegated, in toto, to the general assembly.¹⁹² Thus, the right that the Baby Ninth protects is the right to legislate.

As I have written before, this interpretation of a Baby Ninth makes no sense, and truly does render it worthless.¹⁹³ Among other reasons, the legislature *already* has legislative power without the Baby Ninth obliquely protecting that power. But, this interpretation got the job done for the court majority in 1870 Iowa.¹⁹⁴

Justice Beck, who was still on the court, dissented and pointed out that this reading of the Baby Ninth “totally destroys its force and effect.”¹⁹⁵ He explained that the Iowa Bill of Rights “secures private as well as political rights, and that section 25 plainly implies that the people retain others beside those enumerated.”¹⁹⁶ Thus, Justice Beck saw room in the Baby Ninth for both personal rights—such as property rights—and certain political rights, such as, presumably, a right to vote. However, he insisted that those political rights cannot deny the personal rights, which the “right” to legislate can, of course, do.

After these early cases, reliance on Iowa’s Baby Ninth largely dropped out of its jurisprudence. But the extreme, collective rights view has not held. Instead, the state supreme court’s most recent articulation is that the Baby Ninth does protect unenumerated rights and that they are judicially enforceable, but those rights are only violated if the government action is “unreasonable.”¹⁹⁷ This waters down its protection to a level far below other rights, even other unenumerated rights

187. *Stewart v. Bd. of Supervisors*, 30 Iowa 9, 10–12 (1870).

188. Here I allude to the work of James Bradley Thayer and the doctrine of judicial restraint. See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148–56 (1893).

189. *Stewart*, 30 Iowa at 9.

190. *Id.* at 17–19.

191. *Id.* at 18.

192. *Id.* at 17–18.

193. See Sanders, *supra* note 3, at 436–37.

194. *Stewart*, 30 Iowa at 17–19.

195. *Stewart*, 30 Iowa at 44 (Beck, J., dissenting).

196. *Id.*

197. *Atwood v. Vilsack*, 725 N.W.2d 641, 652 (Iowa 2006).

protected by due process (such as parental rights), that receive a higher level of scrutiny.¹⁹⁸ Thus, Iowa's Baby Ninth is recognized as protecting unenumerated individual rights, but not in any meaningful way.

b. Early uses of Baby Ninths to protect property rights and economic liberties

A scattering of cases from the late nineteenth and early twentieth centuries relied on Baby Ninths to protect property rights and economic liberties, or at least recognized that the Baby Ninth protected them in principle, if not in the case at hand. These decisions came amidst a much larger corpus of jurisprudence that concerned similar issues but under other constitutional provisions, including due process clauses and contract clauses. Therefore, the cases discussed below are not evidence that Baby Ninths were broadly used to protect economic liberties and property rights during this time. But they do show that state courts sometimes turned to Baby Ninths instead of the more commonly known devices.

Coster v. Tide Water Co. was a New Jersey lower court case reviewing a law that required property owners to allow improvements on their land by a politically connected developer.¹⁹⁹ The court enjoined the proceeding under various constitutional provisions, including the Baby Ninth. It grouped the Baby Ninth with the Lockean Natural Rights Guarantee Clause and stated that the two in tandem “show[] that the right of private property was made sacred by the constitution, to be invaded by no one, not even the legislative power, except where such control was expressly given by that instrument.”²⁰⁰

With a similar use of the Washington State Baby Ninth, its supreme court later held a restriction on mortgage foreclosure to be unconstitutional. In emphasizing rights pre-exist the state and its constitution, it stated that “[a]s if to emphasize this principle, our constitution (section 30, art. 1) declares that ‘the enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.’”²⁰¹ A few years later the same court upheld an inheritance tax, but along the way recognized the Baby Ninth “is apparently the expression that the declaration of certain fundamental

198. See, e.g., *Santi v. Santi*, 633 N.W.2d 312, 314 (Iowa 2001) (finding grandparent visitation statute unconstitutional under article I, section 8 and 9 of the Iowa Constitution, and applying strict scrutiny analysis).

199. *Coster v. Tide Water Co.*, 18 N.J. Eq. 54, 55–60 (Ch. 1866), *aff'd*, 18 N.J. Eq. 518 (1866).

200. *Id.* at 64.

201. *Dennis v. Moses*, 52 P. 333, 339 (Wash. 1898).

rights belonging to all individuals and made in the bill of rights shall not be construed to mean the abandonment of others not expressed, which inherently exist in all civilized and free states.”²⁰² Among those rights were “[t]he right to hold property by use and acquire by labor or occupancy.”²⁰³

These uses of Baby Ninths to recognize protection of unenumerated individual rights continued in *State v. Williams*, where the North Carolina Supreme Court found a prohibition on importing liquor into a dry county for the possessor’s private use to be unconstitutional.²⁰⁴ The court relied on the Baby Ninth for the proposition that the “government should not by construction, implication, or otherwise deprive them of unenumerated, but ‘inalienable, rights.’”²⁰⁵ Likewise, the Supreme Court of Oregon later invalidated a zoning ordinance that forbade the local Catholic Archdiocese from opening a school.²⁰⁶ The court found the right to own property “an inherent right” and protected by the state’s Baby Ninth, because in crafting the provision, the constitution’s drafters “covered the matter of inherent rights of the individual.”²⁰⁷

A notable tying of a Baby Ninth to the wider jurisprudence of unenumerated rights came in *City of Mobile v. Rouse*,²⁰⁸ where the Alabama Supreme Court struck down a price-fixing law for barbers. The court cited Alabama’s Baby Ninth and linked it to a famous passage from the educational choice and substantive due process case, *Meyer v. Nebraska*, stating liberty includes “the right of the individual to contract, to engage in any of the common occupations of life,” and to pursue a number of personal rights as well.²⁰⁹ The use of *Meyer* is a bit surprising given that the U.S. Supreme Court’s ruling was based on the Due Process Clause of the Fourteenth Amendment; on the contrary, while the Alabama court did not rely on a due process clause in the state’s constitution, but on the Baby Ninth. This demonstrates an openness—never fully realized in Alabama or anywhere else—to use Baby Ninths to be the primary guardian of “core” unenumerated rights, such as those spelled out in *Meyer*.

202. *State v. Clark*, 71 P. 20, 21, 23 (Wash. 1902).

203. *Id.* at 21.

204. 61 S.E. 61, 67 (N.C. 1908).

205. *Id.* at 63.

206. *Roman Catholic Archbishop of Diocese of Or. v. Baker*, 15 P.2d 391, 396 (Or. 1932) (en banc).

207. *Id.* at 395.

208. 173 So. 266, 268 (Ala. 1937).

209. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

One of the last cases involving economic liberty or property rights from this period is the 1944 opinion *Thiede v. Town of Scandia Valley*.²¹⁰ *Thiede* provides one of the most poetic invocations of a Baby Ninth. In a case which the court itself declared “reads like a sequel to Steinbeck’s ‘The Grapes of Wrath,’” it found the forcible removal of a family from their home to violate Magna Carta’s protection of the homestead, which was in turn protected by Minnesota’s Baby Ninth.²¹¹

After the close of the New Deal and World War II, cases tying Baby Ninths to economic liberties and property rights became more and more infrequent. A handful of later cases cite to a Baby Ninth in addition to other provisions when striking down an economic regulation,²¹² and there is at least one exception to this trend: where the Michigan Supreme Court struck down an exclusionary zoning rule as violating the Baby Ninth’s protection of low-cost housing.²¹³ But for the most part, Baby Ninths have not been used since the New Deal era to strike down economic regulations or property restrictions.²¹⁴ Where Baby Ninths have been somewhat used, however, are in the areas of non-economic personal rights and criminal procedure, which we turn to now.

c. Non-economic liberties and criminal procedure

Baby Ninths speak broadly of “other” rights “retained by the people,” not simply economic, personal, or procedural rights. So it should be of no surprise that substantive and procedural, economic and non-economic, liberties have been protected through Baby Ninths. The following gives a very brief overview of how courts have recognized non-economic personal rights, and also rights of criminal procedure.

i. Non-economic liberties

One non-economic right continually recognized in American jurisprudence is the right of parents to direct the upbringing of their

210. 14 N.W.2d 400 (Minn. 1944).

211. *Id.* at 402, 405–06.

212. *See, e.g.,* *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 396 P.2d 683, 683–84 (Nev. 1964) (declaring fair trade law unconstitutional).

213. *Nickola v. Township of Grand Blanc*, 232 N.W.2d 604, 604, 610 (Mich. 1975) (striking down exclusion of mobile-home parks because rule denied low-cost shelter which “may be among the unenumerated rights” referenced by the Baby Ninth).

214. As I have shown elsewhere, this is *not* more generally true about state constitutions, but courts have primarily used substantive due process for that work. *See* Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 475–76 (2005).

children.²¹⁵ Although generally found to reside in other constitutional provisions, a handful of courts have protected this right via a Baby Ninth. For example, the Idaho Supreme Court recognized such a right when it concluded that “the rights accorded to parenthood before the constitution was adopted” were rights “retained by the people.”²¹⁶ The Utah Supreme Court did likewise.²¹⁷ Furthermore, Minnesota’s intermediate appellate court found a related right, to establish a home—and therefore not be moved out of one’s home, and against one’s will, by a conservator—to be protected by the state’s Baby Ninth.²¹⁸

The most controversial post-New Deal unenumerated right—the right to privacy, in all of its manifestations—has also appeared in Baby Ninth cases. Mississippi recognized a right to privacy under its Baby Ninth in a 1985 case concerning forced blood transfusions. The court ruled that the woman in the case could not be forced to receive a blood transfusion due to her Jehovah’s Witness faith on state constitutional religious freedom grounds, but also because it would violate her right to privacy protected by the Baby Ninth.²¹⁹ The Mississippi court went on to extend the right to privacy to protect abortion in 1998.²²⁰ Also, Arkansas’s Supreme Court—a year before *Lawrence v. Texas*²²¹—ruled that the state’s ban on homosexual sodomy violated the right to privacy protected by its Baby Ninth.²²²

Other rights that courts have protected via Baby Ninths are the right to wear one’s hair long²²³ and the right to travel.²²⁴ The protection of all of these rights is entirely in accord with the concerns of some Founders that no bill of rights can list all the rights of man.²²⁵

215. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 77 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

216. *Electors of Big Butte Area v. State Bd. of Educ.*, 308 P.2d 225, 231 (Idaho 1957).

217. *In re J. P.*, 648 P.2d 1364, 1372–73 (Utah 1982) (citing Baby Ninth and the Ninth Amendment in finding a constitutional right to rear one’s own children).

218. *In re Medworth*, 562 N.W.2d 522, 523–24 (Minn. Ct. App. 1997).

219. *In re Brown*, 478 So. 2d 1033, 1035–36, 1040 (Miss. 1985) (“This right of privacy, whether perceived as emanating from the common law or natural law, is given constitutional status by Article 3, § 32 of the Mississippi Constitution of 1890.”).

220. *Pro-Choice Miss. v. Fordice*, 95-CA-00960-SCT (¶ 30) (Miss. 1998), 716 So.2d 645, 654 (en banc) (recognizing a right to obtain an abortion under the Baby Ninth, but concluding the challenged restrictions constitutional).

221. 539 U.S. 558, 578 (2003) (invalidating law criminalizing homosexual sodomy).

222. *Jegley v. Picado*, 80 S.W.3d 332, 347, 350 (Ark. 2002).

223. *Murphy v. Pocatello Sch. Dist. No. 25*, 480 P.2d 878, 884 (Idaho 1971).

224. *In re White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979) (declaring area-specific probation restriction unconstitutional).

225. 1 ANNALS OF CONG. 759, 760 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick) (arguing that one can always name additional rights to those that might be enumerated).

ii. Criminal procedure

There are not many cases applying Baby Ninths to criminal procedure, but a few do stand out. In *Buford v. State*, the Supreme Court of Mississippi addressed a number of issues in an appeal of a conviction for illegal liquor sales.²²⁶ One argument the defendant made was that he was not given a separate jury trial on each charge made against him. The court ruled that the state's Baby Ninth did not protect such a right, but tied the Baby Ninth to common law protections in deciphering its scope: "at common law there was no immunity from a trial for more than one offense at the same time which the Legislature could not by a statute abridge, and consequently such immunity or right is not within the reservation of rights contemplated by section 32 of the Constitution."²²⁷ A few years later the court struck down a statute that repealed an insanity defense. The majority found the repeal unconstitutional under the state's due process clause,²²⁸ but a three-justice concurrence also extended their reasoning to the Baby Ninth, stating that the provision prevents all three branches of government from denying or impairing "other rights inherent in, and retained by the people."²²⁹

Later, the Supreme Court of New Jersey found a broad right against double jeopardy in the state constitution, relying both upon the Baby Ninth and the Lockean Natural Rights Guarantee.²³⁰ The New Jersey Constitution only explicitly stated that no person shall be tried again after an acquittal. However, reasoned the court, while citing Magna Carta, the language of these unenumerated rights clauses incorporated the ancient understanding that no man shall be put in jeopardy twice.²³¹ This then, extended to the case at hand where the defendant had been previously convicted of a lesser charge, protects him from a subsequent prosecution on a greater charge.²³²

The Alaska Supreme Court used the state's Baby Ninth for a very straightforward invocation of the right to represent oneself *pro se* in 1974.²³³ Looking to the Treaty of Cession, where Russia ceded Alaska to the U.S., and the Judiciary Act of 1789, the court found the right to self-representation to be "so long established and of such fundamental importance [that it] must be held to have been so retained" under the

226. 111 So. 850, 850 (Miss. 1927).

227. *Id.* at 851, 852, 853.

228. *Sinclair v. State*, 132 So. 581, 581–82 (Miss. 1932) (per curiam).

229. *Id.* at 591 (Griffith, J., concurring).

230. *State v. Labato*, 80 A.2d 617, 619–20 (N.J. 1951).

231. *Id.*

232. *Id.* at 622.

233. *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974).

Baby Ninth.²³⁴ The court cautioned that not “all statutory rights in existence at the time that Alaska was admitted to the Union” count as protected rights under the Baby Ninth, but that it was true in this case.²³⁵

d. Scrutiny of Baby Ninths

The above sections demonstrate that courts have found Baby Ninths to protect individual rights. However, the cases where the court ruled against the government have been the exception. In most cases, even when Baby Ninths are found to protect individual rights, that does not mean that the protection is meaningful.

As with any rights protected in a constitution, just because a Baby Ninth protects an individual right does not mean that any law affecting that right will be unconstitutional. Courts apply certain thresholds and burdens to enumerated rights such as free speech, religious freedom, and equal protection—generally called “scrutiny” in modern jurisprudence²³⁶—and the same is true of Baby Ninths.

That is unsurprising. Yet, despite what seems like pretty clear language in Baby Ninths themselves—“impair, deny or disparage”—that scrutiny has generally been less probing than that applied to enumerated rights. In other words, rights protected by Baby Ninths are “denied and disparaged” because they are not enumerated. A few examples will illustrate this.

Perhaps the most brazen example is a 2002 opinion by Louisiana’s intermediate appellate court. The court concluded that the government had not violated the state constitution by withholding certain documents.²³⁷ Along the way it noted that not all rights are equally important, and turned to the Baby Ninth to justify this conclusion: “Although recognizing innominate rights other than the enumerated constitutional rights, this provision implicitly accords those rights not specifically recognized by the Constitution less gravity than the enumerated rights.”²³⁸ This is very hard to square with the Louisiana Baby Ninth’s statement that the enumerated rights “shall not deny or disparage” those innominate rights.²³⁹ How this implicitly accords those rights “less gravity” is not developed any further by the

234. *Id.*

235. *Id.*

236. *See generally* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

237. *St. Mary Anesthesia Assocs., Inc. v. Hosp. Serv. Dist. No. 2*, 2001-2852 (La. App. 1 Cir. 12/20/02); 836 So. 2d 379, 382.

238. *Id.* at 386 n.9.

239. LA. CONST. art. I, § 24 (“The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.”).

opinion. The only logical way, it would seem, is that if (today's) unenumerated rights already were less important before the constitution was written, and those rights that were more important all just so happened to be enumerated, then the Baby Ninth could simply be a reminder not to “deny or disparage” the unenumerated rights any *more* than they already are. But this seems very far-fetched when set against the common sense reading of protecting other rights at an equal level to the enumerated rights, a reading that numerous drafters and even judges outline above.

In applying scrutiny to Baby Ninths, courts will often turn to the same “rational basis” protection often seen in other areas of law, such as non-fundamental rights protected by substantive due process.²⁴⁰ Thus, in a Minnesota case, the court assumed that the state's Baby Ninth protected a right to bear arms, but that the right “is not absolute” and therefore the state “may reasonably exercise its police power” in regulating the carrying of weapons.²⁴¹ It then went on to find—as generally happens when a “reasonable” standard is applied—that the denial of a conceal carry permit was constitutional.²⁴² The court did not discuss, or even cite to any authority, on why this standard applied simply because the right at issue is not “absolute.” Even free speech is not an absolute right, but that does not mean a version of the rational basis test applies to restrictions on it.

This same slight-of-hand move, where a rational basis standard is applied despite “deny or disparage” language, appears in many other Baby Ninth cases.²⁴³

2. *Collective rights interpretations of Baby Ninths*

Despite the straightforward individual rights meaning of Baby Ninths, some courts have done their best to turn them into mere guarantors of the collective right of the people to govern themselves, or at least have added something like that on top of the protection of

240. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (applying rational basis scrutiny to uphold a state statute under the Due Process Clause of the Fourteenth Amendment).

241. *In re Atkinson*, 291 N.W.2d 396, 398–99 (Minn. 1980) (en banc).

242. *Id.* at 400–01.

243. See *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 343–44 (Ala. 2010) (reasonableness standard applied to challenge under Baby Ninth to sale of sexual devices); *Atwood v. Vilsack*, 725 N.W.2d 641, 651–52 (Iowa 2006) (reasonableness standard applied to right to bail in civil commitment proceedings); *Otero v. Zouhar*, 1984-NMCA-054, ¶ 43, 102 N.M. 493, 697 P.2d 493 (ruling that rights Baby Ninth protects are “subject to reasonable regulation”), *overruled on other grounds by* 1985-NMSC-021, 102 N.M. 482, 697 P.2d 482.

individual rights. Although not nearly as numerous as individual rights holdings, there are enough to raise questions about how judges are arriving at a collective rights understanding given the mismatch between the provisions' text and structure and collective rights themselves. We can divide them into two categories: one that essentially reads Baby Ninth as giving state legislatures more power, and one that only concerns local self-government in struggles with state government.

One of each kind of opinion came out of Oklahoma in the 1920s and '30s. In *Ex parte Sales*, a corporation challenged a transportation licensing statute, raising a Baby Ninth claim.²⁴⁴ The court turned the Baby Ninth inside-out in justifying the law's constitutionality with the following reasoning:

There is nothing in the act in question which tends to deny, impair, or disparage any right retained under the Constitution by the people. The term "people," as used above, means the "public," and one of the rights thus specifically and securely reserved to the public is its right to regulate "public service corporations." The act in question seeks to do no more than to exercise this right.²⁴⁵

Of course, if this were true there would be no need for the Baby Ninth, as "the public," through the legislature, would already have the power to pass public service corporation legislation. This seemingly obvious problem was not addressed in the opinion, however.²⁴⁶

A few years later, in a local government case, the Supreme Court of Oklahoma again looked at its Baby Ninth in *Thomas v. Reid*.²⁴⁷ There, the city council attempted to sell the city's power company and submitted the sale to a vote of its citizens. A majority voted in favor, but less than the 60% required by a state statute.²⁴⁸ The constitutionality of the statute was then successfully challenged, on the ground that a majority, not a super-majority, is all that can constitutionally be required of a city by the state.²⁴⁹ The court ruled on a hodgepodge of provisions, many concerning home rule of cities, but at one point after quoting various other courts

244. 233 P. 186, 187 (Okla. 1924).

245. *Id.*

246. *See id.* A similar collective rights opinion is *State v. McCarroll*, 70 So. 448, 455 (La. 1915), where the court boldly read the Baby Ninth out of the constitution by giving it a collectivist reading: "This article is meaningless, as the people of this state retain all rights the exercise of which is not prohibited by the Constitution of the state or of the United States."

247. 285 P. 92, 97 (Okla. 1930).

248. *Id.* at 93.

249. *Id.* at 96-97.

waxing on the right to local self-government the opinion cited Oklahoma's Baby Ninth, stating that because of it, it is not "necessary for us to point to any particular constitutional provision that is violated."²⁵⁰

In addition to Oklahoma, the Supreme Court of Iowa has found a right to local self-government in its Baby Ninth,²⁵¹ as did Nebraska's.²⁵² Both of these cases concerned structural fights between local, and state government on the appointment of officials, not local governments' powers to regulate individual citizens.

A Baby Ninth right to local self-government is more defensible than a Baby Ninth right for the state legislature to govern, as, after all, protecting local self-governments from overbearing state legislatures is a "right" that is sometimes placed in state constitutions, such as with home rule protections. But it still is problematic as a right protected by Baby Ninths. As I have argued before, a state bill of rights—including the rights in a Baby Ninth—that included a right to local self-government would fully protect an individual against the state government but would not protect as strongly against local governments because those local governments would have the right to self-government. This would include a right to enact laws that might otherwise violate the state bill of rights if they were passed by the state legislature.

But I will grant that perhaps this is different for conflicts between states, and municipalities that do not affect individual rights, such as the sale of the power company in *Thomas*. In that case, perhaps there may be a small area of room for collective political rights alongside individual rights in interpreting Baby Ninths, but only where there is no conflict between those collective rights and individual rights.

But only perhaps. The other problem with a local right to self-government is that states are traditionally seen as sovereign because they represent the delegated sovereignty of the people in that state.²⁵³ This is the basis for the Baby Tenth, where the people delegate their powers to the state government but retain rights for themselves.²⁵⁴ But a unit of local government cannot claim the same "sovereignty" in

250. *Id.* at 97.

251. *State ex rel. White v. Barker*, 89 N.W. 204, 207 (Iowa 1902) (recognizing right in dicta in case concerning appointment of local officials). And, as we saw above, the Supreme Court of Iowa also, in an earlier case, found a right of the people to legislate at the state level. *See supra* notes 189–92, and accompanying text.

252. *State ex rel. Smyth v. Moores*, 76 N.W. 175, 179–80 (Neb. 1898) (gubernatorial appointment of local board members found unconstitutional).

253. Sanders, *supra* note 3, at 437 (discussing the theory of popular sovereignty).

254. *Id.* at 434–36 (explaining how Baby Tenth recognize the people's delegation of power, but retention of some rights as not within that power).

that sense. Otherwise we would not just have “dual sovereignty” between the state and federal governments, but a bewildering level of “sovereignties” among all the, often overlapping, levels of local government, including cities, counties, water districts, etc. Thus, it seems a bit odd that a non-sovereign city could tell its sovereign state—that is, the people of the state as a whole, delegated to its legislature—that it has a constitutional right to some level of local governance.

In any case, I leave open the possibility of some kind of collective self-governance being protected by a Baby Ninth, but conclude that it would be very narrow, and on rather shaky grounds.

IV. WHY DO WE HAVE SO MANY BABY NINTHS, AND WHY DON'T JUDGES ENFORCE THEM?

What I have outlined above is a long period where Americans have embraced, or at least accepted and explicitly not rejected, unenumerated rights. Yet, during the same period judges have been reluctant to give full effect to what Americans have wanted. I want to finish by asking—but not answering—why do we have so many Baby Ninths, and why don't judges enforce them?

During a one hundred sixty-year period, from 1819 to 1970, Americans added Baby Ninth Amendments to the constitutions of two-thirds of all states, with a couple more states joining the party for a time. They added or kept Baby Ninths in new constitutions sixty-six times. From the statements made at constitutional conventions, and the text of Baby Ninths themselves, there is no reason to think that the original meaning of these provisions is anything other than that they protect individual rights (and perhaps a limited collective right to local self-government), and that those rights are judicially enforceable.

We know the reason for Baby Ninths—constitutions cannot enumerate all rights that need to be protected, so drafters include a safety, “etcetera,” clause.²⁵⁵ But why have Americans been so motivated to do this time and time again, from all different ideologies, in all different time periods, in all different geographic areas of the country, from Maine to California, and Alaska to Florida? In trying to answer this question, I merely provide some speculation drawn from my review of the history presented in this and my prior article. But while it is speculation, I think it is on solid ground.

I think that a Baby Ninth represents a “veil of ignorance” moment. This refers to political philosopher John Rawl's proposition that

255. *Id.* at 398–400, 436–39.

lawmakers should craft policy as if they did not know what economic or social station in life they would have before living under that policy.²⁵⁶ Constitutional drafters, and those ratifying a proposed constitution, do not know what rights the government may violate once the constitution is enacted. Of course, they have a good guess at some, which is why many are often enumerated. But they know that legislators are crafty men and women capable of all manner of mischief. Thus, a conservative constitutional delegate who fears that future legislatures might confiscate property, and a left-liberal delegate who fears that those same legislatures might restrict family planning, are aligned in wanting broad protection of unenumerated rights. Each knows that future judges might find laws each delegate likes to be unconstitutional. But they are willing to trade that against the *greater* risk that rights they hold dear would be imperiled, and without judicial protection. This explains so many delegates of so many different ideological backgrounds including Baby Ninths in so many states.

But the courts have not gone along with this veil of ignorance bargain. Instead, they have largely done exactly the opposite, and failed to protect *any* rights. Now, as detailed above, some courts, on a few occasions, have given Baby Ninths their due. These examples show that Baby Ninths can function according to their plain text, individuals can be protected, and the Heavens do not fall. But most courts have not agreed. And, even when courts interpret Baby Ninths to protect individual rights, they generally have done so along with other provisions arguably less-suited to the task, such as due process clauses. Very, very seldom have courts used Baby Ninths as the obvious central players in protecting unenumerated, individual, rights.

If only one state had once adopted a Baby Ninth, and then its judiciary had failed to enforce its language, that failure could be chalked-up to a misunderstanding or a local idiosyncrasy. But thirty-three times? There is something more going on here.

I believe an obvious answer accounts for this behavior. Judges often do not like the power constitutional drafters and the citizenry—the people who draft and adopt the foundational documents judges are supposed to enforce—place in their hands. The words of Iowa’s Justice Cole are important to listen to here. He read Justice Beck’s straightforward reading of Iowa’s Baby Ninth—that it in a sense creates an “unwritten constitution”—and shuddered.²⁵⁷ Rather than comply with Iowa’s framers, and interpret what “other” rights were retained by the people, he tossed the Baby Ninth, and those rights, aside.

256. JOHN RAWLS, *A THEORY OF JUSTICE* 11–13 (1971).

257. See *supra* note 185, and accompanying text.

This is already, of course, what the U.S. Supreme Court has done with the Ninth Amendment, essentially rendering it meaningless.²⁵⁸ But apologists for not using the Ninth Amendment to enforce individual rights argue that it does not actually mean what it says.²⁵⁹ As we have seen, that simply does not work when it comes to Baby Ninths: even if you accept this view of the Ninth Amendment, Baby Ninths *do* mean what they say. Behind each Baby Ninth are the citizens who came together and purposely wanted to give judges the power to enforce unenumerated rights, whether as part of a veil of ignorance bargain or for other reasons. And yet, for the most part, state judiciaries simply refuse to wield this constitutional power.

Why judges refuse to exercise this power is a political—and perhaps even psychological—inquiry, the full answer to which is beyond this Article. Whatever the reason, under the constitutions those judges have sworn to uphold they *should* wield this power the people have entrusted to them. Instead, they simply do not enforce the constitution because they do not like what it says. This is hardly constitutional of them, written or otherwise. Judges put in this position could learn from Justice Scalia, when he was faced with the First Amendment, and a statute criminalizing flag burning. Although, he personally thought the law was a good idea, he voted to find the law unconstitutional because that was his reading of the First Amendment.²⁶⁰

The same should be true of state judges who personally wish they were not entrusted with the same power to strike down laws that violate unenumerated rights that they are also entrusted for enumerated rights. They may not want to do that, but the Baby Ninth in their state's constitution requires them to do so. Ignoring that duty and ignoring their Baby Ninth is . . . unconstitutional.

CONCLUSION

Two-thirds of all American states have adopted language similar to the U.S. Constitution's Ninth Amendment in their fundamental laws of the land. In the context of a state, this language means that unenumerated rights are protected at the same level as the rights enumerated in their constitutions. This may seem like a pretty

258. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95–96 (1947).

259. See Sanders, *supra* note 3, at 398–400 (describing arguments that the Ninth Amendment does not directly protect individual rights that are judicially enforceable).

260. See Saikrishna Bangalore Prakash, Response, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 28–29 (2016) (recounting Justice Scalia's remarks on his view of his vote in *Texas v. Johnson*, 491 U.S. 397 (1989)).

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controversial position to modern constitutional law jurists and scholars. But it is exactly what Americans have done repeatedly, and increasingly, throughout our history. In short, it is what Americans want.

Americans like their rights. And perhaps because we like our rights more than we like our government, we, time and again, have put Baby Ninths in our constitutions to protect those rights, even though we do not spell all those rights out. In order for those protections to have full effect, however, it falls to judges to enforce them. There lies a disconnect between the people's desire to have judges do just that, and judges' wish to obey. The promise of Baby Ninths will not be fulfilled until state judges engage with their own constitutions and enforce these "other" rights "retained by the people."