America's Love Affair with Unenumerated Rights

Roger Pilon

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On March 24 a year ago, Professor Josh Blackman delivered the Heritage Foundation's inaugural Edwin Meese III Originalism Lecture. During the Q&A I asked Josh how originalist judges, who purport to be nothing if not textualists, could call themselves originalists if they ignore certain constitutional texts in plain view. He understood, of course, that I was alluding to the Ninth Amendment, plus the Privileges or Immunities Clause of the Fourteenth Amendment. With *Dobbs v. Jackson* soon to be decided, and Justice Samuel Alito's draft opinion not yet leaked, Josh answered, in part, that if the Court were to overrule *Roe v. Wade*, as many expected, that might open up space for revisiting substantive due process and, more precisely, the judicial protection of unenumerated rights, which a natural reading of the Ninth Amendment would seem to require: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Three months later the Court did overrule *Roe*, and the regulation of abortion has been returned to the states where it had long been when the Court weighed in in 1973. Perhaps we can now have a more sober discussion about the meaning and force of the Ninth Amendment. To aid us, Anthony Sanders has written an important and timely guide to the amendment and, more fully, to similar amendments in state constitutions: *Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters*, a rich account of these "etcetera clauses," long included in many state constitutions and found today in the constitutions of two-thirds of the states.

Sanders is a senior attorney with the Institute for Justice, whose lawyers litigate a wide range of cases implicating unenumerated rights, especially against states whose regulations restrict economic liberty. He is also the director of IJ's Center for Judicial Engagement, the ideological origins of which run back more than half a century when very few of us in the larger conservative-libertarian movement began questioning ongoing conservative attacks on the Warren and Burger Court's "rights revolution." Not that those attacks were never warranted, to be clear. But many, offered in the name of "judicial restraint," seemed plainly inconsistent with a proper reading of a Constitution dedicated to liberty through limited government, to say nothing of a proper understanding of the role of judges under such a Constitution. Indeed, those conservative broadsides, we argued, were more consistent with the New Deal Court's majoritarian reading of the Constitution, which opened the door to public policies and programs that conservatives were otherwise railing against.

Perhaps the most learned proponent of judicial restraint in the 1960s was Yale's Alexander Bickel. Far from a man of the right, Bickel was a small "d" democrat who was concerned about

the legitimacy of judicial review itself. Thus his focus on the "countermajoritarian difficulty" and the judiciary's "passive virtues" (as if the Framers had not thought long and hard about the *majoritarian* difficulty). Bickel's Yale colleague Robert Bork, schooled in Chicago's law and economics tradition and destined to be the very embodiment of the conservative view, would credit Bickel "more than anyone else" with teaching him about the Constitution. In 1987, therefore, when the Senate Judiciary Committee was probing Bork about the Ninth Amendment during hearings for his nomination for the Supreme Court, it was no surprise that he would respond with something like his now famous inkblot answer: "If you had an amendment that says 'Congress shall make no' and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it."

The analogy was inapt. The Ninth Amendment is written in plain English. Despite what some scholars have argued, we know what it says and what it is supposed to do, for there is a record of the debates that led to its inclusion in the Bill of Rights. And we now have a book detailing the sixty-six occasions running over nearly two centuries on which Americans have drafted and ratified state constitutions that include "Baby Ninths" (so christened, Sanders notes, by Professor John Yoo in "Our Declaratory Ninth Amendment"). But even without those records, the similar wording of those many etcetera clauses, over and over, speaks volumes: those texts are not so opaque or abstruse that we cannot read and understand what they plainly say. We must assume, therefore, that they were not written and ratified to be ignored; yet that, precisely, is what federal and state judges have mostly done for most of our constitutional history.

Those are the issues and that is the disconnect that this book discusses. "The story is mostly historical, partly theoretical, but at bottom it is practical," Sanders writes. "It is a story of Americans recognizing the dangers that governments pose and expansively shackling those governments into the future." We have done that through constitutions that not only grant power but say also what governments "shall not" do. Their etcetera clauses state plainly that rights not enumerated in a constitution shall not be "denied, disparaged, or impaired." And because they are found in *written* constitutions, it falls to the judiciary to enforce them, just as is done with clauses protecting enumerated rights.

Sanders begins by reviewing relevant English constitutional and American colonial history, focusing finally on the Virginia Constitution of June 1776 and George Mason's Declaration of Rights, which included our first unenumerated rights clause—a provision that would soon influence other state constitutions and, not least, the Declaration of Independence. Through constitutional conventions that established the "higher law" of a constitution and the sovereignty of the people, this constitution drafting would continue in the states during the Revolutionary War and after. Thus, by 1787, as it became clear that we needed a more perfect union, the idea of an etcetera clause was not novel.

Against that background, Sanders turns to the framing of the Ninth Amendment. Proposals for a bill of rights that arose during the Constitutional Convention were voted down, but during the state ratifying conventions, it became clear that such a bill would be needed if the Constitution were to be ratified. Yet objections persisted. A bill of rights was unnecessary, said opponents, since the Constitution limits the federal government's powers through delegation and enumeration; thus, where there is no power there is a right, with the states or the people, as the Tenth Amendment would make clear. Moreover, a bill of rights would be dangerous, opponents

added, for it would be impossible to enumerate all of our rights; but by ordinary principles of legal construction, the failure to do so would be construed as implying that rights not so enumerated were not meant to be protected. The Ninth Amendment was written to avoid that inference, to make it clear that we retained the vast sea of rights that we never gave up when we created and empowered the federal government. Thus, together, the Ninth and Tenth Amendments recapitulate the natural rights philosophy that was first set forth in the Declaration of Independence, as Abraham Lincoln saw: rights first; government second, to secure those rights.

Baby Ninth Amendments traces Americans' continuing efforts to secure constitutionally protected liberty, and it sheds needed light on the failure of judges in that process, especially those who take constitutional theory and text seriously.

But despite their agreement about how the Ninth Amendment came about, scholars have differed about its meaning. Sanders sets forth six "models" of varying credibility plus two non-originalist models. Later he will critique each, concluding that, for Baby Ninths, only the individual rights model makes sense. But even if clear about their meaning, we need to understand their effect through judicial enforcement. Sanders addresses that with a brief early history of judicial review. He concludes that if a state were to adopt such a clause in its constitution, it would be with the idea that the provision would be judicially enforceable through court challenges to any legislation or governmental actions inconsistent with it, an understanding that lays the foundation for the coming Baby Ninths.

Sanders turns next to the growth of Baby Ninths, first before and then after the Civil War, examining them through the lens of constitutional conventions as states were admitted into the Union, one by one. "These discussions tell us that the framers saw Baby Ninths as protecting individual rights," Sanders writes. Indeed, objections to Baby Ninths "were not that these provisions would protect 'too many' rights, but that they were not needed because unenumerated rights were protected *anyway*" (original emphasis). And the drafting of Baby Ninths continued well into the twentieth century as states wrote and rewrote their constitutions. Today, thirty-three state constitutions have Baby Ninths, the highest ratio in US history.

Turning to the judiciary, Sanders finds that very few courts during the antebellum period discussed Baby Ninths, but those that did saw them mostly as protecting individual rights. After the Civil War, however, "judicial juices really started to flow," at times becoming hostile to Baby Ninths. Unfortunately, Sanders does not explore possible reasons for that change. Although the book's focus is on state Baby Ninths, it might have profited from a discussion of the debates in Congress and the states that led to the Civil War Amendments, for those might have shed light not only on the Ninth Amendment but on judicial attitudes toward Baby Ninths after the war.

The disconnect between the framers of Baby Ninths and the judges charged with enforcing them is Sanders' next subject. There is much less case law than one would expect, he discovers, and "pure" Baby Ninth cases are rare, but not unheard of. Far more often, faced with unenumerated rights claims, judges retreat instead to their "comfort zones," relying on less-suited due process and equal protection clauses. Here is where a discussion of the federal Privileges or Immunities Clause, the *Slaughterhouse Cases*, and their aftermath might have helped to explain these developments.

"The main failure of judges (and lawyers) in enforcing Baby Ninths," Sanders writes, "is not that they do not take Baby Ninths seriously when they interpret them (although that is often true). It is that Baby Ninths are not interpreted *at all* when unenumerated rights are at issue" (original emphasis). And when Baby Ninths are invoked, the level of judicial "scrutiny" applied often determines the outcome, just as it does when "nonfundamental" rights are at issue under substantive due process. Here too, a fuller critique of scrutiny theory itself would have helped.

His historical overview completed, Sanders returns to the theory he had earlier outlined and to the eight models scholars have offered to explain the Ninth Amendment. He finds all are wanting except for the judicially enforceable individual rights model, which alone is consistent with the original public meaning of the amendment's text and with the debates that surrounded its adoption. Thus, for example, he dismisses the idea that the Ninth Amendment should be read as "a rule of construction where rights 'retained by the people' are not 'constitutional rights' such as those in the first eight amendments to the Constitution, but are nevertheless rights that the Ninth Amendment reminds us to respect," unless a statute says otherwise explicitly. Yet as a textual matter, he continues, "Baby Ninths do not state anything about a canon of construction regarding ambiguity." Moreover, "there is no evidence that anyone connected to a Baby Ninth has ever espoused such a view." Nor is there anything in the history of courts finding unenumerated rights—under whatever clause—to suggest that these "other rights" are any different in kind from enumerated rights, except in being unenumerated. They saw unenumerated rights as on the same level as enumerated rights. There is no ground, therefore, for judges treating them differently than enumerated rights. Neither may be denied, disparaged, or impaired.

With those points secured, Sanders turns finally to the question that has ever perplexed advocates for the judicial protection of unenumerated rights, "What Individual Rights Do Baby Ninths Protect?" On that question, courts have been all over the place, he notes. No surprise there: they have no theory of the matter—or better, the theory they have is seriously mistaken. Your servant has spent a lifetime on this question (see here for the barest of outlines), enough time to know that it cannot be answered properly in the space of a review. Suffice it to say that in *Dobbs*, Justice Alito made the right first move when he said that abortion is different from other recently decided unenumerated rights cases: recognizing the right to sell and use contraceptives, marry someone of a different race or of the same sex, earn an honest living, and the like. But from there he did not go to the first principles that are essential for answering the question systematically. *Glucksberg*'s "deeply rooted in our history" guide, which dominates such cases today, will not do, not least because it is both over- and underinclusive and, more important, circular.

At bottom, in the post-New Deal era, the unenumerated rights issue has been mis-framed. It is not for a court or a plaintiff to "find" a right "in" a constitution. It is for the government to justify its action. That is implicit in *Dobbs*. Sanders makes it explicitly, but it will take more to flesh that out than will be found here. Still, this is an important book that moves us in the right direction. It traces Americans' continuing efforts to secure constitutionally protected liberty, and it sheds needed light on the failure of judges in that process, especially those who take constitutional theory and text seriously.

Roger Pilon is a senior fellow in constitutional studies at the Cato Institute and the founding director emeritus of Cato's Robert A. Levy Center for Constitutional Studies. He is presently at work on a book entitled The Moral Case for America: Rights, Powers, and the Constitution.