Baby Ninth Amendments

How Americans Embraced Unenumerated Rights and Why It Matters

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Introduction

Take an average American. We will call her "Jane." Think about what she may have done yesterday.

Jane rose at a time best suited to her schedule for the day so she could walk her dog, get the kids breakfast and off to school, or get to work. Or maybe she was lucky enough to sleep in.

She ate a breakfast that conformed to her cravings, or health needs, or budget.

She got ready, choosing clothes best suited for her plans for that day.

Then Jane went to an office, or went in search of work, or went to school. Perhaps she took her child to school, which might be a school she chose for the child over other options.

When she returned home she pored over her stamp collection or tended to her garden, or attended to some DIY home repairs, or played with the dog in the yard. Perhaps that was followed by poker with some friends, having someone over to dinner, or playing a late-night basketball game at the local gym. Just before bed she might have meditated, in an effort to seek inner peace or control chronic pain.

Whatever Jane did yesterday, she chose to do it because she believed it was best for her and those in her life. She did these actions—and chose not to perform others—because she believed they would further her goals, give her pleasure, expand her income, help her children, or improve the world around her.

If someone forced her to make different choices, however, things might not have gone as well.

What if her state legislature passed a law that limited or even banned her choices? For example, what if the law mandated she wake up at six o'clock in the morning? Or required her to send her child to a certain school? Or forbade her from working her job unless she earned a degree she did not have and could not obtain anytime soon? Or forced her to sell her stamp collection? Or threatened her with punishment if she meditated? Or banned home gardens or residential poker games? Or required her to hire a government-licensed contractor for any home renovations? Or set a curfew?

Sound farfetched?

Many such restrictions are all too real.

Miami Shores, Florida, for example, prosecuted Hermine Ricketts and Tom Carroll for growing vegetables in their front yard. A city ordinance arbitrarily banned vegetable gardens in the front of one's home, which happened to be the only part of their property where vegetables could grow.

The Utah Board of Cosmetology told Jestina Clayton she could not braid hair for a living because state law required her to have a cosmetology license. This was true even though the state's cosmetology schools taught virtually no hair braiding and the state's licensing exam contained no questions about hair braiding. (Nationwide, many other occupational licensing laws require entrepreneurs to acquire qualifications with little relationship to the occupation they wish to pursue.)

Oregon's Society of Sisters, a nonprofit that ran a private school, saw the state legislature outright forbid their school and other private schools from operating, under a law that required children to attend public schools. And laws restricting diet, from restrictions on purchasing home-baked bread to bans on margarine, are unfortunately commonplace in modern times.

Furthermore, the experience of the recent COVID-19 pandemic has introduced everyone to the possibility of all kinds of restrictions, including on something as simple as leaving one's home, that Americans had not experienced (or perhaps even imagined) in modern times. Whether those restrictions are justified at certain moments under certain conditions is another story, but whether they might be imposed is now plain to see.

What recourse would Jane have if a law restricted a liberty she exercised yesterday and wanted to exercise again today? Well, she could go to her state capital and ask the legislature—which just passed the law—to repeal it. She would be faced with all the forces of the legislative process,

such as busy and indifferent legislators who are inclined to justify and defend their earlier actions, self-serving special interest groups who are more inclined to advance their own power and influence rather than their fellow citizens' freedom, and savvy lobbyists who are paid by and do the work of the highest bidder rather than concern themselves with constitutional principles. Getting a law enacted without a grassroots army of like-minded citizens who can scare legislators into thinking they will not be re-elected if they do not vote your way, Jane would quickly find, is a tough endeavor indeed.

But Jane has also heard that in the United States there are certain things government cannot do, even if the legislature passes a law. Americans know that this is because of "the Constitution." But what many do not realize is that "the Constitution" does not just mean the U.S. Constitution; it also means *state* constitutions. These are designed to restrict the power of state and local governments just like the U.S. Constitution can contain government power at every level. As Oprah might have said: "*Every state gets a constitution!*"

So Jane flips through both the U.S. Constitution and her own state's constitution to see if they are of any help. Assume all the procedural requirements for legislation to be "a law" are in order: the bill restricting what Jane wants to do passed both houses of the legislature, started in the right house, was signed by the governor, etc. No help there. She then looks at what most Americans think about when they think of constitutions: the Bill of Rights. "Rights!" she says. "That law violates my rights! If my liberty is listed in the Bill of Rights then that law must be unconstitutional."

Let us summarize some of the rights that we supposed Jane might have exercised yesterday:

- The right to arise at the hour you wish.
- The right to eat what you think is best for you.
- The right to wear the clothes of your choice.
- The right to educate your child in the school of your choice.
- The right to earn a living.
- The right to collect stamps.
- The right to renovate your own home with your own hands.
- The right to have a dog.
- The right to play poker.
- The right to gather with friends after hours.
- The right to meditate on your own terms, without permission.

Some of these look pretty important. Education and working are high on that list. Some of them seem almost dumb: Do many folks care about stamp collecting anymore? But all of them are things that people do and are important to at least some of them. If the government banned those activities the people that do them would not be happy. Not just unhappy; they might be out of a job, out of an education, or out of a home.

So Jane reads through the bills of rights in the federal and her own state's constitutions to see what her rights are. Did her treasured liberty make the list?

Probably not. She sees all kinds of protections—speech, religion, searches, jury trial—in the federal Bill of Rights. She probably sees those and other ones in the state version: an "anti-monopoly" provision, perhaps, or protections on "freedom of conscience" that go beyond the First Amendment's protection of religious liberty. But she likely will not see anything protecting her own specific right. No state enumerates the right to get up at the time of your choosing. Or be out of your home after hours. Or improve your home with your own hands. Or eat what you think is best for you. Or collect stamps. A few explicitly protect the right to pursue an occupation, but not many.[1] And none explicitly protect one of the most central rights on our list: the right to send your child to the school of your choice. Somehow these important liberties, including the one she is fighting for, got left off.

"Wait," she replies. "I get that the rights listed in these bills of rights are important. We should protect freedom of speech, religion, and jury trials. But how about all the other liberties we need in life to pursue our happiness? What kind of a hatchet job did these constitutions' framers do if the government cannot ban a book but can require you to rise at 6 a.m.?" (And, for that matter, make you perform calisthenics in the public square, as there is no right to not do that either.) "They should have spent a little extra time listing them all!"

Depressed, she then notices near the end of each bill of rights something else. The federal version reads like this, and the state version is very similar: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"Wow!" she exclaims. "This recognizes there are 'other' rights, like the right I am concerned about. That seems to mean that even if a right was 'left out,' it still has equal value with those that actually are listed in the Constitution. So even though a bill of rights does not include a right to earn a living, or a right to educate your child, or a right to collect whatever stamps you wish, the right is still out there and cannot be 'denied or

disparaged' just because it did not make the first cut." Thus maybe she has a claim that her important liberty is being violated, after all. This last provision is kind of an "etcetera clause" for other rights. Right?

This book is the story of the answer to that question, or rather the answer to that question as it concerns state constitutions. Although many have argued (correctly, in the author's view) that the Ninth Amendment "means what it says" and protects rights not included in the Constitution, the federal courts have not agreed. Not only have the courts not agreed, but many scholars have argued that the Ninth Amendment actually does not do what it seems to do.[2] Although Jane would think it protects her rights, these scholars argue that it does something else that will not help her with whatever right she is worried about.

But what few people realize is that two-thirds of all state constitutions have the same kind of provision. Christened "Baby Ninth Amendments" by University of California-Berkeley law professor John Yoo, they are exactly that.[3] Although the term "Baby Ninth" is of recent vintage and has not been widely employed outside of a few scholarly legal articles, it is used in this book because just like the "baby FTC Acts" (state consumer protection laws in the mold of the Federal Trade Commission) the term encapsulates what these constitutional provisions are.[4] Even though most are not identical to the Ninth Amendment itself, they generally differ by just a word or two. For example, Nevada's "Baby Ninth" states, "This enumeration of rights shall not be construed to impair or deny others retained by the people."[5] The clause trades "impair" for the federal version's use of "disparage," but otherwise it is basically the same. All of these Baby Ninths were adopted after the Ninth Amendment itself. All of them come near the end, or at the end, of their state's bill of rights, like the Ninth. Each was plainly adopted with the Ninth Amendment itself in mind. The federal Constitution's Ninth is the mother of them all, and she has had quite a few babies.

What is different about the babies is, as we shall learn later in this book, that the arguments made by critics of the "it means what it says" view of the Ninth Amendment do not work when set upon the Baby Ninths. The various arrows launched at an expansive reading of the Ninth Amendment—that it is really about enumerated powers, or states' rights, or to ensure a balanced federal system, or only protects nonconstitutional rights—bounce off of Baby Ninths. The state constitutional versions truly mean that rights beyond those enumerated in a state constitution exist and should be protected at the same level as the enumerated ones. These nonlisted liberties are called "unenumerated" rights.

They are rights beyond those "enumerated" explicitly in the state's constitution. But even though not enumerated in the relevant constitution they are constitutional rights.

So, if Jane is in a state with a Baby Ninth, can she now march down to the courthouse and defend her unenumerated freedom?

She *should* be able to. But in her case she probably cannot. In most situations, when people in similar circumstances have tried to protect their rights that "got left out" of the state's bill of rights, their state's courts have come up with excuses why the Baby Ninth does not protect them. Not always, but most of the time courts have not come to the aid of people in her situation.

This book is here, however, to say there is hope.

The courts have generally not agreed, but Jane's fellow Americans who actually wrote our states' constitutions did. On sixty-six occasions in U.S. history, Americans have drafted a constitution that became the fundamental law of their state that included a Baby Ninth. Over and over again, the drafters, and the ratifiers, of those constitutions have agreed that the "other" rights not enumerated in a constitution should not be "denied or disparaged" or "impaired or denied," or what have you, just because those rights were not enumerated themselves. The right to go to work, choose one's child's school, tend one's garden, collect stamps, or associate with friends after hours is protected even though the constitution's framers did not list it explicitly.

But, wait, a critic may say: A constitution's drafters put rights in a bill of rights for a reason. After all, adding another right is just a line or two more. This Baby Ninth thing seems like a technical glitch. That a right is not "in" a constitution has to count for something. Why did they not just list those other "important" rights?

Because then a constitution would be the size of that thing we once called a phone book, and maybe larger. We have discussed just a few liberties here, but even those would add quite a bit to the size of a typical bill of rights. Imagine everything else people do that we think the government should not be able to arbitrarily infringe upon. From the very small (shoelaces or Velcro?) to the very large (buy a house or rent?), the infinite number of choices in life cannot be boiled down to a list that we can agree on and then apply to all future situations, secure that we have protected everything worth protecting.

America's Founding generation understood this well. Many opponents of adding a bill of rights to the original U.S. Constitution warned that if one were drafted and adopted it would imply (1) that those rights

that were not included were not protected, *and* (2) that a comprehensive list including all rights was impractical anyway because of the limitless number of liberties that we would want to protect. To quote just one Founder, future Supreme Court justice James Iredell, speaking at the North Carolina ratifying convention: "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[6] In other words, enumerate a right to wake up at 7 a.m. and you will leave out the right to wake up at 8 a.m. And even if you make rights a bit more general ("the right to get out of bed whenever you want") you will still leave out other important aspects of human activity. As we will learn, some argue that James Madison came up with a work-around to this problem. The Ninth Amendment recognizes this inherent limitation in enumerating all rights, and bars that enumeration from "deny[ing] or disparag[ing] others."

Now, whether you agree that that was Madison's intention or not (the author does, but many smart people disagree), the Ninth Amendment's language found its way into state constitutions over time. And not just once or twice, but over and over, and *over* again. The further our nation developed, the more popular these Baby Ninths became. Madison's (witting or unwitting) invention of protecting an infinite number of rights by saying we do not have to list them all has made its way into two-thirds of all state constitutions. And in all but a couple of instances, when states have adopted constitutions including Baby Ninths they have kept those Baby Ninths in later, newer constitutions.

Thus, Baby Ninth Amendments are not just out there in constitutional text. They are popular. Constitutional drafters recognize the inherent limitation of enumerating rights, and how that is a problem. Constitutional drafters recognize that governments come up with all kinds of harebrained schemes that might violate an activity no one previously thought worth enumerating as protected. And they have figured out a way to nevertheless protect us against those schemes.

Indeed, not only do constitutional drafters recognize this problem, but so do judges themselves. Almost no one actually believes that neither the U.S. Constitution or state constitutions protect *any* unenumerated rights. Time after time the U.S. Supreme Court, and state courts, have protected unenumerated rights of all kinds including (to make a short and incomplete list) rear one's children, associate with others, pursue the occupation of one's calling, engage in intimate activity, and go hunting.[7] Sometimes the courts come out and say a right is protected, and sometimes a restriction on an activity that is not enumerated as a consti-

tutional right is found to be unconstitutional because the government cannot justify its restriction. Either way, the result is a protection of a right not found in a constitution.

But courts have rarely "found" these rights in Baby Ninths, let alone in the Ninth Amendment itself. Instead, they generally have "found" them in due process clauses or in the "penumbras" and "emanations" of enumerated rights such as the First Amendment's Free Speech Clause. They have often done this while a lonely Baby Ninth Amendment sits elsewhere in the state's bill of rights, waiting for someone to come along and interpret it. Thus a central message of this book is that instead of exercising the gymnastics sometimes necessary to protect unenumerated rights with parts of constitutions that seem ill-disposed to protect them, judges can simply apply the words of a state's Baby Ninth, which are well-disposed to protect unenumerated rights.

Therefore, if Jane is lucky enough to live in a state with a Baby Ninth Amendment, yet unlucky enough to face a law denying an unenumerated liberty, she *should* be able to use its language to protect her. This would protect her choice to arise at the hour she wishes, educate her children how she sees best, pursue her occupation, associate with her friends after hours, and collect stamps in the manner she is accustomed to.

But the fact remains that the courts have, by and large, not allowed this to happen. Why have courts failed to protect our rights with Baby Ninths? And why the disconnect between what courts do and what seems to have been the straightforward purpose of the Baby Ninths' drafters?

As in other areas of constitutional law, it appears that courts have ignored Baby Ninths or watered them down to triviality because they just do not like them. Judges get what a serious implementation of a Baby Ninth would do—protect a lot of liberties not included in the state's constitution—and balk at making that a reality.

This is not their choice to make. People often decry judges seizing power: "Government by Judiciary" in one professor's phrase.[8] What you hear less about is judges abdicating their responsibility to apply constitutional commands. In ignoring Baby Ninth Amendments, judges have abdicated a responsibility that the people have placed in their hands. An individual judge may love Baby Ninths, or may hate them and think them foolhardy. But that does not mean she can ignore them any more than she can ignore any other provision of governing law.

The following pages tell the story of how the framers of dozens of constitutions took Madison's words from the Ninth Amendment and put them into the foundational law of most of our states. Throughout almost

every period of U.S. history, in every geographic region, and increasing in popularity as judicial fads and movements ebbed and flowed, Americans learned to embrace Baby Ninths and accept them as a standard way to protect their liberties. Despite this, judges generally have given them next to no recognition. There are exceptions, however, and seeing those exceptions will illustrate how Baby Ninths can protect our liberties when they are actually interpreted and followed.

This story is mostly historical, partly theoretical, but at bottom it is practical. It is a story of how Americans grew into not just unenumerated rights, but the realization that states and the people have unenumerated *powers* and that unenumerated rights are a way to protect against those powers. It is a story of a consensus that defies left and right, economic and personal, North and South, Black and white. It is a story of Americans recognizing the dangers that governments pose and expansively shackling those governments into the future. Consider that although most Americans say that what the Constitution and the Bill of Rights do is protect our rights, the text of those documents protect our rights by saying what government *cannot* do, through familiar turns of phrase such as "Congress shall not." In the Ninth Amendment itself it states, "The enumeration in the Constitution, of certain rights, *shall not* be construed to deny or disparage others retained by the people." In other words, in protecting our rights we often say what the government cannot do to us, not what we ourselves can do. Americans repeatedly agree to give the government *some* power, but not *all* power, and we will take care of the rest on our own, thank you very much.

In chapter 1 we will begin with the invention of state constitutions during the American Revolution, and then move on a few years to the framing of the Ninth Amendment itself. We will also take a look at what the Ninth Amendment might have meant at the time. To do this we will inquire into the Ninth's "original meaning," a term we will spend a little bit of time defining. We will look at the various approaches on what that meaning is and how various scholars disagree. Then we will look at the early years of the Republic and how constitutional drafters understood the relation of the states to the new federal government. This will include the birth of older siblings, of sorts, of the Baby Ninths: the Baby Tenths.

Then, in 1819, two states come on the scene: Alabama and Maine. Perhaps no two states were less alike in 1819, other than that they both were about to be admitted to the Union. But they turned out to have one thing in common: They adopted the first Baby Ninths. And then for several years they stood alone, raising the question of whether the graft-

ing of the Ninth Amendment into state constitutions was some kind of historical oddity.

But that was not the case. In chapter 2 we will learn that in the years before the Civil War, Baby Ninths increased in popularity. And during and after the Civil War itself that popularity expanded, North and South, East and West. In chapter 3, as we rush into the Gilded Age and the twentieth century, we will learn that Baby Ninths were almost everywhere. Although the practice was not quite universal, if your territory was being admitted as a state during this period you generally put a Baby Ninth in its new constitution. It was the "American" thing to do. And so that trend continued in the twentieth century. When that century was concluded, two-thirds of all states had adopted these provisions. While tracing which states adopted Baby Ninths and when, we will also look at what the constitutional drafters themselves had to say. And, on the whole, they saw Baby Ninths as they read: they protect rights not enumerated in the state constitution at the same level as those rights that are enumerated.

But, after our sweep of history, in chapter 4 we will also look at what judges have had to say about Baby Ninths. And there the story is not so positive. Although a few courts at various times have interpreted them to provide real protections to real people, most of the time judges have either ignored Baby Ninths or rendered them paper tigers.

Next, in chapter 5, we will put the courts aside and make our independent assessment of what Baby Ninths mean and what they protect. To do this, we will re-examine what the Ninth Amendment itself actually means, applying the various approaches we looked at in chapter 1 to the Baby Ninths themselves. And we will come to the conclusion that only one view—that the Ninth Amendment protects individual rights—makes sense for Baby Ninths, whatever one's view on the Ninth Amendment itself might be.

That, however, leaves a further question: *what* individual rights? How do we know which rights Baby Ninths protect and which they do not? That thorny issue we will tackle in chapter 6. Here we will do a deep dive into how to apply Baby Ninths to real situations and how the word "retained" tells us much about what kinds of individual rights Baby Ninths (mostly) protect. In the end, we will be left with an optimistic message for our friend Jane: If the state violates a treasured liberty of hers, Jane might be protected even if that right is not "in" the state constitution. If her state has a Baby Ninth, it might protect the right anyway. And her state's judges have a duty to protect it. Baby Ninths do not allow Jane to do *anything* (they do not outlaw government, after all), but they

do protect a lot of human flourishing where the state simply does not belong. That is why we have these things called "rights" in the first place.

In the final chapter we will take a step back and ask a different question: What do the facts that Baby Ninths exist in the first place and are in so many state constitutions tell us? Spoiler alert: that unenumerated rights are popular. In the author's view this is actually the biggest takeaway from this book. More than mechanisms for protecting unenumerated rights, Baby Ninths are evidence of the acceptance of unenumerated rights. Far from shunning them as devices of an imperial judiciary, the American people embrace unenumerated rights when they have a chance to write them into constitutions. Baby Ninths are evidence that judicial engagement—where courts use constitutions to prevent the enforcement of duly enacted laws—is something Americans want. It is just that judges are not so into the idea. But, as we will conclude, that is not a judge's decision to make.

Before we leave this introduction, though, we should address an issue that will arise later, so it is best to talk about it before we dive into the story. Some readers may be asking: Who benefits from unenumerated rights? Are they just an undemocratic mask for the powerful retaining their power?

In fact, unenumerated rights benefit everyone *except*, in some situations, those with political power. As we will discuss in the final chapter, Americans enshrine the protection of unenumerated rights in our constitutions because those with political power invariably will seek to abuse that power. Baby Ninths should be interpreted, as argued in chapters 5 and 6, to only protect your right to be free from the power of others, not so you can assert your power over others. Thus Jane's right to garden or right to earn a living does not mean she can receive a special favor from the state legislature or city hall. But it does mean that an abusive government, or government official, cannot deny her right without a good reason or single her out for abuse.

The powerful have access to special favors, or at a minimum the power to keep abusive officials out of their hair. They do this through various levers of influence, such as hiring lobbyists, providing or withholding endorsements, winning government contracts, forming trade associations, and other examples of flexing the heft of what we often call "special interest groups." Yes, those with power can also go to court and have laws declared unconstitutional because they violate unenumerated

rights. But only in some rare cases, and even then it is a lot easier to simply hire a lobbyist. For the powerless, on the other hand, they often have "only one place of redress"[9]: the courts.

And the powerful do not just go to the legislature, to city hall, the governor's mansion, or the sheriff's office to assert their rights to be left alone. They also go and ask the government to violate other people's rights to give them special favors. And those special favors frequently deny the powerless their own rights to be left alone. Unenumerated rights are a mechanism that can correct some of the unjustness of this imbalance. But that can only happen if courts take unenumerated rights seriously.

Before we close this introduction, let's look at a couple of examples that illustrate how this dynamic bears out. And as a bonus, both examples are delicious.

That is because both involve food trucks. Recent years have seen all kinds of interest in food trucks. Reality TV shows and social media have been full of snazzy vans with all kinds of cuisine announcing their locations in tweets and attracting attention from celebrity chefs. Most food trucks, of course, are run by the non-rich-and-famous, people just trying to earn a living from selling a few lunches in a city's downtown, in the parking lot of a brewery, or outside a factory when a shift ends. Overlooked by the Hollywood attention, however, is that established restaurants feel threatened by the trucks' low overheads and popularity. Simply to protect their own revenue, their lobbies have pushed city ordinances restricting where food trucks can operate. Instead of trying to outcompete this new business model, many restaurants have tried to shut it down.

Which brings us to sunny Fort Pierce, Florida. There, restaurant owners did not like it that food trucks were parking downtown and offering food to hungry workers. Instead of trying to match prices or offer better meals than these upstart competitors, they went to city hall and convinced the city council to pass a proximity ban, forbidding food trucks from selling food within five hundred feet of any "brick and mortar" business that also sells food.[10] The law was not a regulation of city streets, but rather a blanket restriction; it did not matter if the food truck operated from a private parking lot with the permission of the lot's owner.[11] And the proximity ban did not apply to other brick and mortar restaurants. Instead, it was simply a ploy for restaurants to keep out new competition with an enthusiastic customer base.

That did not sit well with Benigno "Benny" Diaz. He ran a food

truck, the Taco Trap, and wanted to drive into the city and serve the residents of and visitors to Fort Pierce. But the expansive restriction kept him out of the city's downtown. As he put it, there are six to seven restaurants on every block; staying five hundred feet away from all of them effectively meant the city was closed to his tiny business.[12] As an outsider with no clout at city hall he would have been hard-pressed to change the law, given that established insiders already successfully pushed for its adoption.

The law also did not sit well, it turned out, with the Florida Constitution. Benny joined with another food truck owner and sued in state court, arguing the law violated the state constitution's protection of the right to earn a living. And, as we will learn, although the odds are very strongly set against a lawsuit like that (and part of the point of this book is to make the odds much better), they won, with the court preliminarily enjoining the enforcement of the law.[13] The court found that the only possible reason for the law was to protect other businesses, and that that is not a legitimate use of state power. Later the city repealed the law rather than risk continuing to contest the lawsuit and lose.[14]

Diaz's victory, again, is a rare success story for unenumerated rights and state constitutions. A more typical one, involving the exact same issue of restaurants and food trucks, befell Laura Pekarik, owner of a Chicago food truck. As *Washington Post* columnist George Will described her in 2019, "Pekarik, a feisty 33-year-old single mother and embodiment of America's entrepreneurial itch, grew up in Chicago's suburbs and at age 24 began baking for the fun of it. Eventually, she invested her entire savings ($12,000) in a lime-green truck, called Cupcakes for Courage, from which she began selling."[15] The name of her food truck arose out of a time a few years earlier when she quit her former job and cared for her sister after she was diagnosed with non-Hodgkin lymphoma.[16] The time off was filled with the fun baking Will described. After starting her food truck business she committed to donating 10 percent of proceeds to charity. Much of it goes, as you might imagine, to cancer research.

Who did Laura and other small food truck entrepreneurs threaten? Chicago's long-established and politically savvy restaurant industry, apparently. In 2012, a city alderman who was the former head of the Illinois Restaurant Association pushed through a restriction on food trucks similar to Fort Pierce's, forbidding sales within two hundred feet of a "brick and mortar" business.[17] Given urban density, this effectively outlawed Cupcakes for Courage in large chunks of the city, including the lucrative Loop at the heart of Chicago's downtown.

With powerful interests like those at work on the city council, Laura's only hope was in court. And she made it all the way to the Illinois Supreme Court, arguing that the two-hundred-foot rule violated the Illinois Constitution. The court, however, did not think the constitution protected her against the restaurant lobby. Applying an extremely weak standard of review, it stated that it was fine for the city to prevent this charity-supporting single mother from competing against wealthy Loop restaurants. After all, it explained without embarrassment, the city was only trying "to balance the interests of food trucks with the need to promote neighborhood stability."[18] A more cynical observer might remark, "that's the Chicago way."

In one case, a state constitution's protection of unenumerated rights ensured a Hispanic man could keep earning a living. But in another, the state constitution failed, and a single mom striving to ensure that others do not have to go through the disease that almost killed her sister found no redress after a powerful lobby pushed her out of their supposed turf. And both of them had to overcome the incredible odds that are stacked against unenumerated rights in most cases. This book's mission is to demonstrate that those odds should be remarkably lower.

Although Baby Ninths were not raised in either case, both of these food truck's respective states have them in their constitutions. In Florida, Illinois, and many other states people like Benny and Laura should have courts ready to enforce Baby Ninths against the powerful who unjustly try and take their rights away. That is the promise of unenumerated rights and state constitutions. Now let us see where that promise comes from.