THE RIGHTS RETAINED BY THE PEOPLE
THE HISTORY AND MEANING OF THE NINTH AMENDMENT
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Introduction: Implementing the Ninth Amendment*

Randy E. Barnett

On the first day of his Supreme Court confirmation testimony, Robert Bork described teaching a constitutional theory seminar at Yale Law School in which he tried to justify what he called "a general right of freedom"1 from the various provisions of the Constitution. He recalled that Alexander Bickel, with whom he taught the course, "fought me every step of the way; said it was not possible. At the end of six or seven years, I decided he was right."2

The next day, Bork testified:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot 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 ink blot if you cannot read it.3

In taking these two positions, former Judge Bork was, unfortunately, well within the mainstream of constitutional thought. For two hundred years the Supreme Court of the United States has never seriously considered a general constitutional right to liberty; at the same time it has, with few exceptions, treated the ninth amendment as though it were an ink blot. I suggest that the failure to find a "general right of free-


2 Id.

3 Id. at 249.
"dom" in the Constitution is connected to a general inability to understand the ninth amendment's declaration that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."4

In this Introduction, I explain how the ninth amendment's protection of unenumerated rights "retained by the people" can be implemented in a practical fashion that is consistent with the views of its author, James Madison. Although additional work needs to be done on this proposal, enough support for it currently exists to render it attractive to those who value constitutionally limited government. I then respond to a number of ninth amendment skeptics who have sharply criticized the idea of implementing the ninth amendment. Any understanding of how the ninth amendment can work harmoniously with the rest of the Constitution, however, requires a brief examination of the origins of this intriguing and pregnant passage.

I. The Origins of the Ninth Amendment5

The origins of the ninth amendment can be traced to the debate surrounding the ratification of the Constitution. The Antifederalists, who opposed ratification, concentrated much of their attack on the absence of a bill of rights. Although many Antifederalists were probably more concerned with defeating the Constitution than with obtaining a bill of rights, they repeatedly pressed this charge because it struck a responsive cord with the people. The Federalists who supported ratification, such as Alexander Hamilton and James Wilson, gave two answers to this complaint.

First, they said that a bill of rights was unnecessary. Because the federal government was one of enumerated and limited powers, it would have no power to violate the rights of the people. "Why, for instance," asked Hamilton, "should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?"6 Second, they argued that a bill of rights would be dangerous. Enumerating any rights might suggest to later interpreters of the Constitution that the rights not specified had been surrendered. An enumeration of rights could thereby lead to an unwarranted expansion of federal power and a corresponding erosion of individual rights.

Neither argument against a bill of rights carried the day. Antifederalists responded tellingly by turning these Federalist arguments against the Constitution itself. They noted that the Constitution already enumerated some of the rights of the people—such as the protections against ex post facto laws and bills of attainder in Article I, Section 9, and the right to a jury trial in criminal cases in Article III, Section 2. If an incomplete enumeration was dangerous, as the Federalists had so strenuously argued, then the severely incomplete list of rights already in the Constitution was dangerous indeed. No further harm could be done by expanding the list.

When it became clear that the Constitution was headed for defeat, the Federalists turned the political tide by promising to support a bill of rights after ratification. Several state conventions accompanied their ratification of the Constitution with lengthy lists of rights and other provisions they wanted added at the first opportunity. By this maneuver, the proponents of the Constitution deprived the Antifederalists of their principal argument against ratification.

Getting Congress actually to consider a bill of rights, however, turned out to be no easy feat. The congressional record shows Representative James Madison repeatedly urging the House to take up the matter only to be told by various congressmen that enacting the first tax bill was far more important than enacting a bill of rights. Eventually, in a lengthy and revealing speech, Madison proposed a series of amendments to the Constitution. He explained that a bill of rights was needed, not only to quiet the fears and suspicions of those who still doubted the new Constitution and to induce those states who had not ratified the Constitution to do so, but also to better protect the liberties of the people. As Madison observed:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.7

4U.S. Const. amend. IX.

5Writings dealing extensively with the origins of the ninth amendment are included in Volume 1.


In his speech, Madison took up the Federalist argument he himself had made during the ratification debates that any effort to enumerate rights would be dangerous:

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

The passage Madison referred to was the precursor of the ninth amendment which read as follows:

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

Madison’s proposals were referred to a Select Committee of the House which was created to consider what amendments to the Constitution might be appropriate.

Although there is much that is controversial about the ninth amendment, the story of its enactment that I have just summarized is not. In light of this history, the original meaning of the ninth amendment is clear: When forming a government the people retained rights in addition to those listed in the Bill of Rights. But while the meaning of the ninth amendment may be clear, its implications for constitutional adjudication are not. Are the unenumerated rights judicially enforceable as the enumerated rights have come to be? If so, what exactly are these rights?

For most, the answer to the first of these questions hinges on our ability to answer the second. As Robert Bork observed: “Senator, if anybody shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.” Most would agree with Bork that, if the uncertainty surrounding their content can be resolved, unenumerated rights should be enforceable. Otherwise, although the Congress and the Executive could be prevented from violating enumerated rights, both could violate the unenumerated rights with impunity. Surely this would disparage, if not entirely deny, the unenumerated rights.

There is little, if any, question that the rights retained by the people refer, at least in part, to what are called “natural rights” — that is, the rights people have independent of those they are granted by a government and by which the justice of governmental action is to be judged. Despite their many differences, the framers of the Constitution shared a common belief that although the people may delegate certain powers to their agents in a government, they still retain their natural rights. When explaining to the House the nature of the various rights in his proposal, Madison stated that, “[i]n some instances they specify rights which are retained when particular powers are given up to be exercised by the Legislature.”

Madison’s notes for this part of his speech read: “Contents of Bill of Rights... 3. natural rights retained as speech [sic].”

That the term “retained” rights referred to natural rights is further reinforced by one provision of a recently discovered draft of a bill of rights written by Representative Roger Sherman, who served with Madison on the House Select Committee that drafted the Bill of Rights:

> The people have certain natural rights which are retained by them when they enter into Society, such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of...
grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.\textsuperscript{14}

This list, which was not intended to be exhaustive, includes some rights that were eventually enumerated in the Bill of Rights. Others, such as the rights to acquire property and pursue happiness and safety, were left unenumerated. The ninth amendment establishes that because some powers had been delegated to government and some rights had been singled out, no one should conclude that the other unenumerated retained rights were, in Madison's words, "assigned into the hands of the General Government, and were consequently insecure."\textsuperscript{15}

The problem with putting the ninth amendment into effect today is that many no longer appreciate the natural rights that the Constitution's framers took for granted. Yet if the framers had anticipated the modern philosophical skepticism about natural rights, they would never have settled for the few rights that were enumerated. Fortunately, there is a method of interpreting unenumerated rights that does not require us to agree on a comprehensive list of unenumerated rights. To appreciate this method, however, we must first consider why it is impossible to enumerate all the rights retained by the people.

\section*{II. Why the Rights Retained by the People Are Unenumerable}

To discern those unenumerated rights the framers had in mind, we might adopt what I have elsewhere called the "originalist method" of identifying unenumerated rights.\textsuperscript{16} As Robert Bork suggested, we might examine the written records of the period, including the numerous rights proposed by the ratification conventions,\textsuperscript{17} and the theoretical writings

\textsuperscript{14}Roger Sherman's \textit{Draft of the Bill of Rights} [hereinafter Sherman's \textit{Draft}], in R. Barnett, supra note 13, at 351, app. A (emphasis added). Along the same lines, Madison had proposed to Congress that the following be added as a prefix to the Constitution, "The Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally pursuing and obtaining happiness and safety." 1 Annals of Cong., supra note 7, at 451.

\textsuperscript{15}Id. at 456.


\textsuperscript{17}Eight of the state ratification conventions officially accompanied their ratification with scores of amendments or revisions to the Constitution. Some of these were eventually included in the Bill of Rights. Others were not. For these proposals see The Debates in Several State Conventions on the Adoption of the Federal Constitution 338 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter J. Elliot] (reprinted as appendix B in volume 1). See also Lutz, \textit{The States and the U.S. Bill of Rights}, 16 S. Ill. U.L.J. 251, 254-256 (1992) (comparing amendments proposed by state ratifying conventions with Madison's original proposed amendments).

\textsuperscript{18}See e.g. Wilson, \textit{Of the Natural Rights of Individuals}, in 2 \textit{The Works of James Wilson} 307 (J.D. Andrews ed., 1896). For a recent effort to enumerate the rights that the framers believed to be natural and inalienable, \textit{see} Rosen, \textit{Was the Flag Burning Amendment Unconstitutional?}, 100 Yale L.J. 1073, 1074-81 (1991).

\textsuperscript{19}2 J. Elliot, supra note 17, at 454 (remarks of James Wilson).

\textsuperscript{20}Id.

\textsuperscript{21}J. Elliot, supra note 17, at 436 (James Iredell, North Carolina Ratifying Convention, October 28, 1787). Wilson echoed the sentiment at the Pennsylvania Ratifying Convention: In all societies there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the
Rights are unenumerable because rights define a private domain within which persons have a right to do as they wish, provided their conduct does not encroach upon the rightful domains of others. As long as their actions remain within this rightful domain, other persons—including the government—should not interfere. Because people have a right to do whatever they please within the boundaries defined by natural rights, this means that the rights retained by the people are limited only by their imagination and could never be completely specified or enumerated.

In sum, as Madison stated, “the pre-existent rights of nature” are “essential to secure the liberty of the people.” And because liberty is open-ended, so are our rights.

This conception of rights is illustrated by a fascinating exchange that occurred during the debate in the House over the wording of what eventually became the first amendment. At one juncture in the debate, Representative Theodore Sedgwick criticized the House Select Committee’s inclusion of the right of assembly on the grounds that “it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae . . .” Representative Egbert Benson replied to Sedgwick that: “The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was that their being infringed by the Government.”

Sedgwick then responded that:

if the committee were governed by that general principle, they might have gone into very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.

Notice that Sedgwick was not denying that one had a right to wear one’s hat or go to bed when one pleased. To the contrary, he equated these inherent rights with the right of assembly which he characterized as “self-evident” and “unalienable.” Indeed, Representative John Page’s reply to Sedgwick made this explicit. “[L]et me observe to him,” said Page:

that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights.

Sedgwick’s point was that the Constitution should not be cluttered with a potentially endless list of trifling rights that “would never be called into question” and were not “intended to be infringed.” Sedgwick’s argument implicitly assumes that the “self-evident, unalienable,” and inherent liberty rights retained by the people are unenumerable because the human imagination is limitless. It includes the right to wear a hat, to get up when one pleases and go to bed when one pleases, to scratch one’s nose when it itches (and even when it doesn’t), and to take a sip of Diet Coke when one is thirsty.

But this returns us to the most controversial aspect of the ninth amendment: How can such unenumerable rights find legal protection without empowering judges simply to make up whatever rights may appeal to them? Raoul Berger, for one, has charged that any effort to protect the unenumerated rights referred to in the ninth amendment would provide “a bottomless well in which the judiciary can dip for the formation of undreamed of ‘rights’ in their limitless discretion . . .” In response to my suggestion that the rights retained by the people are limited only by their imagination, he asks caustically, “[h]ow does one effectuate an imaginary right?” The answer to this concern lies in something

262 Id. at 760 (statement of Rep. Page).
263 Id. at 759 (statement of Rep. Sedgwick).
264 Id. at 760 (statement of Rep. Sedgwick).
266 Berger, The Ninth Amendment: The Beckoning Mirage, 42 Rutgers L. Rev. 951 (1990) (reprinted as chapter 13 of this volume). Of course, I do not concede that, because our rights protect liberties that are limited only by our imagination, this makes these rights “imaginary.” Berger seems to think this play on words is a genuine argument.
like the "general right to liberty" that Robert Bork once searched for—only it is more accurate to call it a presumption of liberty.

III. Implementing the Ninth Amendment

A. The Presumption of Liberty

Implementing the ninth amendment challenges us to protect unenumerated rights without determining a final list of such rights and without lending credence to illegitimate claims of right. This challenge has proved too much for most judges and constitutional scholars. Even for those who have the will to implement the ninth amendment, there seems to be no practical way. But there is.

As long as they do not violate the rights of others (as defined by the common law of property, contract and tort), persons can be presumed to be "immune" from interference by government.32 Such a presumption means that citizens may challenge any government action that restricts their otherwise rightful conduct, and the burden is on the government to show that its action is within its proper powers or scope. At the national level, the government would bear the burden of showing that its acts were both "necessary and proper" to accomplish an enumerated function, rather than, as now, forcing the citizen to prove why it is he or she should be left alone. At the state level, the burden would fall upon state government to show that legislation infringing the liberty of its citizens was a necessary exercise of its "police power"—that is, the state's power to protect the rights of its citizens.33

32In response to this suggestion, Raoul Berger charges that, "Barnett would embark the courts on a calculus of morals; before arriving at 'rights' against the government, the courts would first have to settle the 'respective jurisdictional spheres.'" Berger, supra note 31, at 977. But courts have been performing precisely this function, however imperfectly, for centuries in developing the common law of property, contract, tort and other bodies of doctrine which distinguish rightful from wrongful conduct. That which exists is surely possible. As Berger concedes, because the defamation limitation on free speech was an "ancient common law principle," ... therefore it was not an unidentified right." Id. at 978.

A more serious difficulty arises when legislatures participate in the evolution of these common law rights as they have, for example, in the law of contract with the promulgation of the Uniform Commercial Code. Courts acting in their constitutional capacity must be able to distinguish somehow between legitimate codification and systemization on the one hand and unjust infringements of liberty on the other. This problem, however, though difficult and deserving of further attention, is pervasive in any system which both limits the powers of legislative bodies and permits legislative "regulation" of liberties. What is needed is a theory that distinguishes between genuine regulation of liberty and unjust infringements of liberties under the guise of so-called "regulation."

33Providing a workable definition of the unenumerated "police powers" of states is akin to the problem of defining legitimate regulation of liberty. Both distinctions are needed to fully understand how a presumption of liberty would operate. Neither effort, however, is as intractable as ninth amendment skeptics would have us believe.

Any society such as ours that purports to be based on a theory of limited government already assumes that legislation must be a proper exercise of government power. The presumption of liberty simply requires that when legislation or executive actions encroach upon the liberties of the people, they may be challenged on the grounds that they lack the requisite justification. And a neutral magistrate must decide the dispute. As Madison observed in The Federalist No. 10:

No man is allowed to be the judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with great reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? ... Justice ought to hold the balance between them.34

When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can ensure that the rights of citizens are protected and that justice holds the balance between the legislature or executive and the people.

Lest anyone think this point is obvious let me hasten to note that today the presumption used by the Supreme Court is precisely the reverse. According to what the Court calls the "presumption of constitutionality," legislation will be upheld if any "rational basis" for its passage can be imagined, unless it violates a "fundamental" right—and liberty has not been deemed by the Court to be a fundamental right. As the Court stated in United States v. Carolene Products Co:35 "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced with the Fourteenth ..."36 In other words, the enumerated rights may narrow the presum-

34The Federalist No. 10, at 107 (James Madison) (John Hamilton ed., 1873) (emphasis added). At the time he wrote this passage, Madison did not contemplate judicial review to establish this "justice," but by the time he proposed his amendments to the House, he had become more enamored with the idea.

35304 U.S. 144 (1938).

36Id. at 152 n.4. In this case, the Court also suggested that the presumption may be rebutted by showing that discrete and insular minorities are adversely affected or that the political process is being impeded.
tion of constitutionality, but one of the unenumerated rights retained by the people will have no such power-limiting effect.

While the presumption of liberty is not the only way to implement the ninth amendment, it provides a practical and powerful method of protecting unenumerated rights. As lawyers well know, the outcome of legal disputes is often determined by the burden of proof. For example, the first amendment has been held to impose a serious burden on the government to justify any of its actions that restrict the natural right of free speech. In countless cases, this “presumption of free speech” has effectively protected this retained, but enumerated, natural right. The ninth amendment simply extends the same protective presumption to all other rightful exercises of liberty.

Although originally the ninth amendment, like the rest of the Bill of Rights, was most likely intended by the framers to be enforced only against the federal government, this was not because it was thought that the people had surrendered all their rights to state governments—a suggestion belied by the swift incorporation into most state constitutions of provisions identical to the ninth amendment. Indeed, many rights—such as the right of conscience or the right to acquire property—were thought to be unalienable, which means that the people could not surrender them to any government even if they wanted to. Rather, the Congress and the federal courts originally lacked *jurisdiction* to protect the retained “privileges or immunities” of citizens from abuses by their states. As we all know, this arrangement was fundamentally changed by the enactment of the fourteenth amendment after the civil war. Today, if a state government infringes upon a right the people retained against their respective states, there is no jurisdictional barrier preventing federal protection of this right.

**B. Applying the Presumption of Liberty Today**

To see how a presumption of liberty might operate today, it is best to begin with an example that avoids current divisive controversies. In this spirit, consider Congress’ power under Article I, Section 8 to “establish post offices.” Having exercised this establishment power, Congress is free under the necessary and proper clause to regulate the operation of its post offices in any manner it sees fit. The presumption of liberty would not ordinarily apply to the internal regulation of governmental offices. What happens, however, when Congress, allegedly pursuant to its postal powers, goes beyond its power to administer its own offices and claims the further power to establish a postal *monopoly*, as it has? The Constitution is silent on the issue of a postal monopoly. Is this a proper exercise of the power to make all laws that shall be necessary and proper to effectuate the postal power?

According to the now prevailing presumption of constitutionality, Congress would be free to establish a monopoly unless either potential competitors or consumers of postal services could prove that this claimed government power violates a fundamental right. For example, competitors might assert a fundamental “right to carry first class mail,” while recipients of mail could claim they had a fundamental “right to send first class mail” by any means they chose. Because these claims of right sound trivial rather than fundamental they are easy to disparage—almost as easy to disparage as the trifling right to wear a hat or go to bed when one pleases. Consequently, courts have neither barred the Congress from establishing its monopoly nor inquired very seriously as to whether such laws are truly necessary or proper. With judges lacking a proper view of the ninth amendment, today the outcome of such a lawsuit would be virtually pre-determined: the government wins and the citizen loses.

A presumption of liberty, however, would shift the burden of proof from the citizen to the government. Instead of imposing the burden on the citizen to establish the violation of a “fundamental” right, a burden would be imposed on the government, in this case upon Congress, to show a compelling reason why it is both necessary and proper to grant its own post office a legal monopoly, thereby infringing the liberties of the people. In enacting a Constitution of limited and enumerated powers, the people retained their unenumerated right to establish their own private post offices if they so chose. They neither expressly nor impliedly assigned this power to the general government. The ninth amendment is an ever-present reminder that the mere fact that such a right is left out of the Bill of Rights ought not to suggest otherwise.

In a speech before the second House of Representatives, the ninth amendment’s author, James Madison himself, used it in a strikingly similar fashion to object to the pending bill to establish a single national bank

37The “originalist” and “constructivist” methods are two others. See Barnett, *Madison’s Ninth*, supra note 16, at 35-39. Chief Justice Burger, speaking for a plurality of the Supreme Court, employed a combination of these two approaches to protect unenumerated rights and justified this effort by citing the ninth amendment in Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555 (1980) (reprinted as appendix C of this volume).

38The Articles of Confederation did expressly confer such a power on Congress. See Articles of Confederation, art. IX.
on the grounds that the bill was unconstitutional. Though widely overlooked, Madison's usage also helps clarify the relationship between the ninth amendment's protection of the rights retained by the people and the tenth amendment's injunction that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Madison examined the Constitution at length to see if the power to create such a bank could be found among any of those delegated to the government and he concluded that "It is not possible to discover in [the Constitution] the power to incorporate a Bank." He then considered whether the proposed bank might be justified under the necessary and proper clause as a means of executing the borrowing power. Whatever meaning this clause may have," Madison began, "none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.

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39 The only reference to this speech I have found in the entire corpus of ninth amendment scholarship appears in Van Loan, Natural Rights and the Ninth Amendment, 2 B.U. L. Rev. 1 (1968) (reprinted in volume 1). There, Van Loan responds to the suggestion that "Madison, as a member of the Select Committee, altered his original form of the ninth amendment because he had no intention of limiting the powers of the federal government and wanted to avoid the possibility that the ninth would be given such a construction," as follows: But Madison's arguments against the constitutionality of Hamilton's national bank bill apparently refute this suggestion. Madison argued in Congress that passage of the bank bill would be the exercise of a power not delegated to the federal government. As evidence that the federal government was restricted to delegated powers and that even the necessary and proper clause was not unlimited, he pointed to, among other things, the ninth amendment. Id. at 15. To my knowledge, no ninth amendment skeptic has ever replied to this argument. But see Maffee, The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People, 16 S. Ill. U. L.J. 257, 295 (1992) (reprinted as chapter 15 of this volume) ("I will develop a more complete analysis of the significance of the argument over the first national bank to understanding the constitutional philosophy of the founders, and the original meaning of the Ninth Amendment, in a subsequent treatment.").

40 U.S. Const. amend. X.

411 Annals of Cong., supra note 7, at 1896 (statement of Rep. Madison). Because this much-neglected speech by Madison is the only known instance of the ninth amendment's author employing it in a constitutional argument, it is reprinted in its entirety in appendix A of this volume.

42 See U.S. Const. art. I, § 8 ("The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers.").

43 See U.S. Const. art. I, § 8 ("The Congress shall have Power... To borrow Money on the credit of the United States.").

44 Annals of Cong., supra note 7, at 1898.

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In evaluating whether the necessary and proper clause justified the claimed power to create a national bank, Madison contrasted the requirement of necessity with that of mere convenience or expediency. "But the proposed bank," he said:

could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; may greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenues.

Notice that Madison was not simply making what would now be called a "policy" choice. Earlier in his address to the House, Madison did address the policy issues raised by the proposal when he "began with a general review of the advantages and disadvantages of Banks." However, "[I]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it." Rather, in the passage I quoted, Madison is making the constitutional argument that these other means of accomplishing an enumerated object or end are superior precisely because they do not entail the violation of the rights retained by the people and are therefore to be preferred in principle. In particular, these measure do not involve the grant of a monopoly, "which," in Madison's words, "affects the equal rights of every citizen." In other words, there is a difference in principle between these alternative means; just as there is a difference in principle, not merely policy, between drafting citizens and paying volunteers as the means of exercising the congressional power to "raise and support Armies." Although Article I, Section 8 delegates this power to Congress, when it chooses a means of accomplishing this end that intrudes upon the liberties of the people, as a military draft does, then it must justify this rights infringement by showing that its acts are genuinely necessary and proper. This burden of justification requires the government to show that it can-

45 Id. at 1901 (remarks of Rep. Madison).
46 Id. at 1894.
47 Id. at 1896.
48 Id. at 1900 (emphasis added).
power claimed was highly remote from any enumerated power. "Mark the reasoning on which the validity of the bill depends," he observes: To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means. If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy. The latitude of interpretation required by the bill is condemned by the rule furnished by the Constitution itself.

As one authority for this "rule" of interpretation, Madison cited the ninth amendment:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the ninth amendment] and 12th [the tenth amendment], the former, as guards against a latitude of interpretation; the latter, as excluding every source or power not within the Constitution itself.

Thus, Madison viewed the ninth and tenth amendments as playing distinct roles. Madison viewed the tenth amendment as authority for the rule that the congress could only exercise a delegated power. For example, in the illustrations I have used, Congress could not establish a post office or raise and support armies without a delegation of power to pursue these ends. In contrast, Madison viewed the ninth amendment as providing authority for a rule against the loose construction of these powers—especially the necessary and proper clause—when legislation


51Id. at 1901. The numbering of the amendments changed because the first two amendments proposed by Congress were not ratified by the states. So what came to be called the first amendment was originally proposed to be the third amendment. At the time Madison spoke, however, this outcome was not yet known. One of these two moribund proposals—which regulated congressional pay increases—recently became the twenty-seventh amendment.

affects the rights retained by the people. As Madison concluded in his bank speech: "In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation. . . ."

In my examples, because a postal monopoly and a military draft infringe upon the rightful liberties of the people, these are suspect means for pursuing delegated ends. Those claiming that legislation restricting the rightful liberties of the people falls under a delegated power have the burden of showing that it is a genuinely necessary and proper exercise of such a power. As I have argued elsewhere, constitutional rights—including unenumerated rights—operate both as "means-constraints" and as "end-constraints."

Once the ninth amendment is viewed as establishing a presumption of liberty, thereby placing a burden of justification on the government, every action of government that infringes upon the rightful liberties of the people can be called into question. Is it really necessary that persons—particularly poor persons—obtain licenses requiring extensive testing in such subjects as chemistry before they may work as beauticians? Is it really necessary that government limit the number of taxicabs it licenses so that the price of taxicab medallions in some cities reaches $100,000 or even higher? Or are all these and other similar measures really ways by which a privileged few seek to eliminate lower-priced competition? Is it really necessary to criminalize the sale and use of intoxicating substances, or is a "drug-free" society better achieved in ways that do not infringe upon the liberties of the people—perhaps by the sort of education and social pressure that is currently being used so effectively to combat the use of nicotine in cigarettes and the abuse of alcohol. Even the current government restrictions that limit the practice of law to those who have attended three years of law school would not be beyond challenge and scrutiny.

By offering these examples, I am not claiming that the ninth amendment dictates any particular constitutional results. I am not claiming that the ninth amendment necessarily renders the postal monopoly, the military draft, occupational licensing, or drug prohibition unconstitutional simply because each infringes the retained rights that secure the liberties of the people. Neither these nor any other ninth amendment claim can be

52Id. at 1901.

decided in the abstract—by which I mean without taking into account the specifics of particular legislation and the factual context in which it is applied. What the ninth amendment requires, however, is that when liberty-restricting legislation is challenged by a citizen, such claims be evaluated by a neutral magistrate. Adopting the presumption of liberty would make this requirement effective.

Moreover, this is not to say that the government would never be able to meet its burden. I fully expect that if a presumption of liberty is established, the courts would find that government has met its burden far more often that they should. We must never forget that the Supreme Court once upheld the government's power to imprison American citizens of Japanese descent in prison camps because of the threat to national security these citizens allegedly posed.54 Judicial review is not a panacea for protecting liberty.

Nor does the presumption of liberty establish a license to do whatever one wishes. Liberal political theorist John Locke put the matter as follows:

But though this be a State of Liberty, yet it is not a State of Licence... The State of Nature has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.55

As I mentioned earlier, justice, which is to say rights, defines the boundaries within which one may do as one wishes. According to this conception of liberty, one cannot permissibly infringe upon the rightful domains of others. According to Locke, in the state of nature, "all Men may be restrained from invading other Rights, and from doing hurt to one another."56 The common law of property, contracts, and torts has traditionally defined the extent and nature of these boundaries. Tortious conduct is not a "rightful" exercise of one's liberty; one has no constitutional right to commit trespass upon the land of another. Provided that one is acting rightfully in this sense, however, a presumption of liberty would require government to justify any interference with such conduct.

Finally, a presumption of liberty does not authorize judges to usurp either legislative or executive functions. Protecting the rights of individu-

56Id. at 289.

als and associations to act or refrain from acting in ways that do not violate the common-law rights of others, neither empowers judges to create new "positive rights" nor authorizes them to enact taxes to pay for such rights. Judges may only strike down offending legislation—and judicial negation is not legislation. Assuming they have the political will, the other branches of government have more than enough power to defend themselves from judicial encroachment.

III. Replying to the Ninth Amendment Skeptics

How does the presumption of liberty described here effect the various criticisms advanced against implementing the ninth amendment? In this part, I consider the arguments of three prominent ninth amendment skeptics: Robert Bork, Thomas McAffee and Raoul Berger. I label these writers ninth amendment skeptics because, despite their differences, all agree that the ninth amendment has no place in constitutional adjudication.

A. Robert Bork's Concern for the Rule of Law

The liberal conception of the rule of law dictates that the requirements of justice take an articulate and understandable form.57 The very concept of an unenumerated right presents rule of law problems. Quite obviously, the unenumerated rights referred to by the ninth and fourteenth amendments have no form at all—they are unwritten. Without some authoritative way to give them a sufficiently determinate content, judicial enforcement of these rights would seem to violate the rule of law.

This becomes especially important when the separation of powers is considered. According to the theory of separation of powers, courts are only authorized to enforce the Constitution and the rights it protects, not to legislate. When faced with textual provisions as completely open-ended as these, any judicial interpretation of unenumerated rights hardly seems an interpretation at all, for there is simply nothing to interpret. Enforcing unenumerated rights in the absence of a text would seem instead to be a purely legislative act.

57To examine the essential social functions performed by the liberal conception of the rule of law would take us far afield. I begin this endeavor in Barnett, Foreword: Can Justice and the Rule of Law be Reconciled?, 11 Harv. J. L. & Pub. Pol'y 597 (1988). Suffice it to say that the rule of law performs the function of communicating the requirements of justice in an understandable form both to those who are subject to these requirements and to those charged with enforcing them. The knowledge made possible by adhering to the rule of law enables persons to avoid committing injustices against each other. It also addresses both the problems of enforcement error and enforcement abuse by those administering a legal system.
To put the problem in H.L.A. Hart's terms, every case or controversy arising under the ninth amendment lies in the "open texture" of this provision; therefore, the ninth amendment renders rule-bound decisions impossible. When confronted with a case lying within the open texture of language, the only option is to exercise judicial discretion, and this sort of discretion conflicts with the rule of law.

The apparent conflict between the ninth amendment and the rule of law has most likely been one reason for its judicial neglect ever since its enactment. Recently, however, this rule of law difficulty with unenumerated rights has received special attention in the writings of Robert Bork.

As Bork has explained:

In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Adhering to this philosophy, says Bork, is "essential if courts are to govern according to the rule of law rather than whims of politics and personal preference." To illustrate this, Bork offers an analogy:

[Suppose that the United States, like the United Kingdom, had no written constitution, and, therefore, no law to apply to strike down acts of the legislature. The U.S. judge, like the U.K. judge, could never properly invalidate a statute or an official action as unconstitutional. The very concept of unconstitutionality would be meaningless. The absence of a constitutional provision means the absence of a power of judicial review. But when a U.S. judge is given a set of constitutional provisions, then, as to anything not covered by those provisions, he is in the same position as the U.K. judge. He has no law to apply and is, quite properly, powerless. In the absence of law, a judge is a functionary without a function.]

As Bork repeatedly argues, "[D]emocratic choice must be accepted by the judge where the Constitution is silent."

For one who takes this view of the judiciary and the rule of law, the ninth amendment poses a dilemma. On the one hand, the Constitution is not exactly silent; its text certainly includes this provision. On the other hand, because the ninth amendment is so open-textured, its framers failed to provide judges with "their" morality; thus it appears to provide "no law" to the judge. In the absence of such authoritative guidance, judges would be free to allow their own desires free rein. Consequently, unless we can somehow discover the framers' original intent—that is, what specific rights they had in mind when drafting the ninth amendment—the rule of law seems to require that judges ignore this enacted passage of the Constitution.

This is precisely Bork's conclusion. In his Senate confirmation hearings, Bork analogized the ninth amendment to an "ink blot" that you "cannot read." In this manner, Bork uses the rule of law to justify ignoring the unenumerated rights that are the subject of the ninth amendment. Notice that Bork equates interpreting a passage with no clear meaning with a judge having no constitution (like the U.K. judge described above). Where the text of the Constitution is insufficiently rule-like, Bork concludes that there is simply no law to apply, and consequently the Constitution is deemed to be "silent," notwithstanding what it expressly says. As Bork concludes: "If the meaning of the Constitution
reject the idea of an "independent right of freedom, which is to say a general constitutional right to be free of legal coercion," on the grounds that such a right is "a manifest impossibility in any imaginable society." As he explained in his confirmation hearing:

Well, the difficulty, I think, Senator, is that if I decide that I am going to protect liberty, just in general, not without any specific provision of the Constitution, then I have no—obviously, I cannot say everybody is free to do whatever they want to do, and no statute may exist because it interferes with liberty; we cannot have anarchy. So then I have to define what liberties—I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have.75

If, however, this general right to liberty is considered not as absolute but rather as a justificatory presumption that shifts the burden to the government to show that interference with liberty is "necessary" and its motives "proper," then one need not specify "what liberties people ought to have and what liberties they ought not to have." Instead, any rightful exercise of liberty would be protected by placing the burden on the government to establish the necessity and propriety of its conduct. This is just what government must establish when its actions infringe upon the liberty of speech.

There is, then, nothing remotely impossible about protecting such a right. Indeed, the allocation of such burdens of proof is a traditional function of the rule of law. Nonetheless, in The Tempting of America, Bork considers and rejects a similar proposal advance by Bernard Siegan.76

His first objection is the familiar one that the many liberties protected by such a presumption are "not mentioned in constitutional materials."77 As he puts it: "There being nothing in the Constitution about maximum hours laws, minimum wage laws, contraception, or abortion, the Court should have said simply that and left the legislative decision where it was."78 We have already seen, however, that Bork's argument for ignoring unenumerated rights depends upon the claim that the framers' failure to enumerate specific rights makes the judicial enforcement of rights not enumerated violative of the rule of law. If, however, there is a way of giving these provisions content that is consistent with the rule of law, then this objection must fail.

Second, and more interestingly, Bork considers the presumptive nature of the right to liberty. Although he again rejects the concept on the grounds of feasibility, he no longer argues, as he once did, that such a right is an "impossibility in any imaginable society." Siegan cites Aaron Director's claim that "[l]aissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error."80 Bork replies that the "next question, however, is who is to apply the presumption of error, players in the political process or judges. My answer is the former; Siegan's is the latter."81

Bork defends his preference on the ground that the task facing a judiciary seeking to evaluate the necessity and propriety of governmental conduct would be "stupendous".82

The court could not carry out the task assigned unless it had worked out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must give answers to all questions social, economic, sexual, familial, political, moral, etc. It must be so detailed and well articulated, with all major and minor premises constructed and put in place, that it enables judges to decide infinite numbers of concrete disputes. . . . No theory of the legitimate and important objec-

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72 Bork, Neutral Principles, supra note 72, at 9.
73 Id.
74 Nomination Hearings, supra note 1, at 715. Bork then continued: 
Now that is exactly the effort I engaged in for about 6 or 7 years in that course on constitutional theory that I taught with Alex Bickel. And I became convinced that it was an utterly subjective enterprise and that I was running my values into what I was coming up with. I do not know—each of us may have a different idea about what liberty requires.
75 See B. Siegan, Economic Liberties and the Constitution (1980). Siegan proposes the following standard of review: 
"[T]he government would have the burden of persuading a court utilizing an intermediate standard of scrutiny, first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to achievement of these objectives, that is, . . . the fit between means and ends must be close; and third, that a similar result cannot be obtained by less drastic means.
76 R. Bork, supra note 61, at 225.
77 Id.
78 Siegan, supra note 76, at 154 (citing Director, The Parity of the Economic Market Place, 7 J. L. & Econ. 1, 2 (1964)).
79 B. Siegan, supra note 76, at 154 (citing Director, The Parity of the Economic Market Place, 7 J. L. & Econ. 1, 2 (1964)).
80 Id. at 226.
tives of government that possesses all of these characteristics is even conceivable. No single philosopher has accomplished it, and nine Justices could not work it out and agree on it. Yet, upon the premise that a judge may not override democratic choice without an authority other than his own will, each of these qualities is essential.83

The problem with Bork’s reply is revealed in his last sentence, in which he assumes what a presumption of liberty calls into question—namely, that the legitimacy of democratic choice places the burden on the court to justify any interference with legislative will when protecting unenumerated rights. He repeatedly asks how the court is “to demonstrate”84 or “to prove”85 that it is right and the legislature is wrong. However, we are speaking now of adjudication with parties on both sides of a case or controversy. In this context, placing the burden on “the court” is no different than placing the burden on the citizen to justify his or her exercise of liberty.

Although this position is entirely consistent with Bork’s view that the “elected legislator or executive may act where not forbidden,” it does no more than reassert the presumption of constitutionality, rather than defend it. The presumption of liberty places the burden on the government to justify its interference with the liberties of the people. Therefore, the burden falls to the legislature or executive, not the court, to develop the theories required to justify its actions. One need not be too cynical to suspect that, when the justificatory shoe is placed on the other foot, this burden will no longer remain as insurmountable as Bork asserts.

In his response to Siegan, Bork not only misses the basic thrust of the presumption of liberty, he also misses the point of the theory of delegated powers that underlies the entire Constitution and that is explicitly acknowledged in the tenth amendment. If the government cannot articulate a coherent and legitimate justification for its actions, if it cannot show how its actions are substantially related to these objectives and that it cannot achieve its objectives by means that do not infringe upon liberty,86 then it deserves to lose, and the citizen deserves to win. Accord-

83Id.
84Id. at 227.
85Id.
86The text paraphrases the type of scrutiny recommended by Bernard Siegan. See supra note 76, at 324. By offering this formulation, I do not mean to endorse it, though I think it is promising.

ing to the presumption of liberty, it is the legislature’s burden to justify its conduct, not the citizen’s or the court’s.87

Moreover, what Bork claims is an impossible function for judges is precisely how the first amendment protection of speech is interpreted. Indeed, it is how Bork himself protected the freedom of speech as a federal appeals court judge.88 Courts have not interpreted the first amendment to mean that government actions may never in any manner affect speech, but that when they do, the government is under a heavy burden to justify its conduct. This is a burden that the executive and legislative branches have sometimes met and sometimes failed to meet. The presumption of liberty simply extends the protection afforded to the enumerated right of free speech, and other enumerated rights, to the unenumerated freedoms retained by the people.

One source of Bork’s difficulty here is his acceptance of Herbert Wechsler’s view of legislation: “No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that . . . is intrinsic to judicial action . . . ”89 In Bork’s words “no legislation rests on a principle that is capable of being applied generally.”90 But a presumption of liberty contests this interpretive assumption—an assumption that is, by the way, both extra-textual and questionable on originalist grounds. While the legislature may be under no general obligation to state a principled basis for its legislative acts, when these acts infringe upon the rightful liberties of the people and are challenged, they must be defended in a principled manner or be nullified as unlawful. It is not enough for a legislature to say, “We just wanted to do

87Although the delegated powers provisions of the Constitution do not define the limits of state governmental powers, neither do state governments have plenary powers to do anything they will. Rather, when their actions infringe upon the unenumerated rights protected by the fourteenth amendment, state government officials must show that they are properly exercising their so-called police powers. Any such justification requires a theory of the extra-textual doctrine of state powers that is not inconsistent with the textual protections afforded by the ninth and fourteenth amendments. For one such theory, see R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).
88See Lebron v. Washington Metro. Area Transit Auth., 741 F.2d 893 (D.C. Cir. 1984). As Bork himself has argued: “We are . . . forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building.” Bork, Neutral Principles, supra note 72, at 22–23.
90R. Bork, supra note 61, at 80.
this." Bork fails to appreciate that the rule of law requires a legislature, no less than a court, to act lawfully as opposed to willfully.

By putting on those who infringe upon the liberties of the people the onus of explaining why their enactments are lawful—in the sense that they are justified on general principles—the presumption of liberty serves the rule of law far better than the presumption of constitutionality. For we must never forget that the rule of law is meant to protect the people from the government, not to protect the government from the people.

Beneath this debate about unenumerated rights and the rule of law lies another that concerns the source of constitutional legitimacy. Is the Constitution binding solely because it is the product of the exercise of legislative or executive actions of the government established by the Constitution are binding "in conscience" on individuals and associations. Unless we have reason to think that legislative or executive actions are consistent with the rights retained by the people, there is no prima facie moral duty to obey their dictates.92

91Corwin, supra note 71, at 152-53 (emphasis in original).

When legislation is produced by constitutional processes that lack any impartial review to determine whether the legislation has this rights-respecting quality, then the people have no assurance of legitimacy. In the absence of such assurance, nothing but force or power exists to enlist obedience. As Bork acknowledges: "Power alone is not sufficient to produce legitimate authority."93 What he fails to see is that, without the scrutiny provided by a presumption of liberty, the fact that legislation is enacted suggests little, if anything, about its substantive legitimacy. Citizens have no reason to think it represents anything other than an exercise of naked legislative power—whether in service of a majority or a minority faction.94

With the protection of the background rights retained by the people—both enumerated and unenumerated—providing the basis of constitutional legitimacy, the Borkian picture of the Constitution as "islands [of rights] surrounded by a sea of government powers"95 is reversed. In its place is the original picture of the Constitution, "wherein government powers are limited and specified and rendered as islands surrounded by a sea of individual rights."96 Ultimately, it is for us to decide which picture is correct.

B. Thomas McAffee's "Residual Rights" Theory of the Ninth Amendment

Thomas McAffee denies that the rights retained by the people "are to be defined independently of, and may serve to limit the scope of, powers granted to the national government by the Constitution."97 Instead, he maintains that "the other rights retained by the people are defined residually from the powers granted to the national government."98 In his view, the ninth amendment was originally intended solely to prevent later interpreters of the Constitution from exploiting the incompleteness of the enumeration of rights to expand federal powers.

93R. Bork, supra note 61, at 176.
94See The Federalist No. 10, supra note 6, at 78 (emphasis added):
By a faction I understand a number of citizens, whether amounting to a majority of minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.
96Id.
98Id. at 1221 (emphasis added).
beyond those delegated by the Constitution.\textsuperscript{99} He specifically denies that it was intended to better protect individual rights by justifying a more strict construction of the enumerated powers than might be warranted under the delegated-powers provisions standing alone. In McAfee's words:

The Ninth Amendment reads entirely as a "hold harmless" provision: it thus says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers; it indicates only that no inference about those powers should be drawn from the mere fact that rights are enumerated in the Bill of Rights.\textsuperscript{100}

In defense of this thesis, McAfee presents a detailed and closely-reasoned analysis of evidence concerning the original meaning of the framers. Yet although McAfee's sources show beyond peradventure that the framers of the Constitution intended the structure of separate and enumerated powers to be the primary means of protecting the rights retained by the people,\textsuperscript{101} his evidence falls short of demonstrating that these were the exclusive means to this end. Despite heroic efforts, he fails to show, in particular, that the framers specifically excluded the possibility that unenumerated rights could be identified and protected independently of structural protections provided by the separation and enumeration of powers.

Perhaps the most telling evidence to the contrary is James Madison's own use of the ninth amendment in his speech concerning the national bank in his speech to Congress, made while the ninth amendment was still pending ratification by the states. Madison was in no manner responding to an argument for expanded federal powers based on the incomplete enumeration of rights. Rather, Madison used the ninth amendment entirely outside the only context in which, according to McAfee, the ninth amendment was meant to be relevant.\textsuperscript{103} If McAfee's theory about original understanding was correct, Madison simply would never have thought to make the constitutional argument he did.

Although Madison stressed the fact that an enumerated power to charter a national bank could be found nowhere in the Constitution, in contrast to McAfee's thesis, Madison also used the ninth amendment precisely and explicitly as authority for more strictly construing enumerated powers. In particular, he used the ninth amendment to attempt to cabin the necessary and proper clause—that is, to restrict the means by which delegated powers can be exercised.\textsuperscript{104}

Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.

Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers.\textsuperscript{105}

He specifically argued that the bank bill required a "latitude of interpretation" of the enumerated powers that was belied by the ninth amendment. According to the official reports quoted above,\textsuperscript{106} Madison

\textsuperscript{99}As McAfee explains: "On the residual rights reading, the ninth amendment serves the unique function of safeguarding the system of enumerated powers against a particular threat arguably presented by the enumeration of limitations on national power." Id. at 1306-07.

\textsuperscript{100}Id. at 1300 n.325 (emphasis added).

\textsuperscript{101}Before McAfee wrote, I analogized the framers' efforts to those of ship designers who devote virtually all their time to the structure that will keep the ship afloat and give little if any thought to the lifeboats. The separation and enumeration of powers provided the structure that was to keep the government from violating rights, and the Bill of Rights was added as a backup system. Unenumerated rights protected by the ninth amendment were akin to life preservers on the lifeboats—a backup to the backup system. See Barnett, Madison's Ninth, supra note 16, at 25-29 (judicial review of unenumerated rights is a "rights-preserver."). It is little wonder, then, that the framers paid scant attention to the issue of protecting unenumerated rights. But the repeated assertions of Federalists that the enumeration of powers renders a bill of rights unnecessary should be as heavily discounted as those of ship designers claims to have produced an unsinkable ship. See Mayer, supra note 11, at 319.

\textsuperscript{102}See supra notes 39-52 and accompanying text.

\textsuperscript{103}See Barnett, Madison's Ninth, supra note 16, at 14-19. There I defended the "power-constraint" conception of constitutional rights in which rights constrain the exercise of constitutionally delegated powers. The alternative "rights-powers" conception views rights solely as what is left over after the powers have been delegated and thus "residual rights" (to employ McAfee's terminology) can and must be defined exclusively by reference to the enumerated powers.

\textsuperscript{104}See supra note 7, at 1898 (statement of Rep. Madison).

\textsuperscript{105}See supra note 51 and accompanying text.
Madison contended that a bill of rights was one way to police abuses of this lawmaking discretion.\textsuperscript{110}

In his most recent contribution to the debate, McAfee argues that the ninth amendment refers, not to a repository of inalienable natural rights (which would support a presumption of liberty), but solely to whatever rights are "reserved" after powers are enumerated.\textsuperscript{111} He renews his earlier criticism of my connecting the "other[]" rights "retained by the people" mentioned in the ninth amendment to Roger Sherman's proposed second amendment which stated that "the people have certain natural rights which are retained by them when they enter into society,..." McAfee argues that

\textsuperscript{110}Although he does not discuss this use by Madison of the ninth amendment, McAfee is nothing if not resourceful in interpreting unfriendly evidence. I can imagine two responses that McAfee might make to my interpretation of Madison's speech concerning a national bank. First, because Madison did not specify the rights of the people that would be violated, perhaps he was defining the infringement of these rights solely by the fact that the power claimed is beyond those delegated by the Constitution. According to this account, Madison was simply referring to the rights "reserved" by the delegation of powers and not to any "affirmative" rights retained by the people. But this response would have Madison engaged in a meaningless rhetorical flourish when making this part of his argument. Moreover, it does not explain Madison's consideration of the alternative means of exercising the borrowing powers. This construction would have Madison at this juncture making a policy argument in the guise of a constitutional claim, rather than, as I contend, to be making a principled distinction between means that violate the equal rights of the people, and those that do not. Nor does it explain Madison's use of the ninth amendment as authority for his conclusion that "if the power were in the Constitution, the immediate exercise of it cannot be essential." 1 Annals of Cong. supra note 7, at 1902 (statement of Rep. Madison). In my view, we need not specify the rights retained by the people for these rights to do independent work in constraining the exercise of government powers. We need only shift the burden of justification to those advocating the legitimacy of power. Madison's argument comports with this proposal.

Second, McAfee may respond that Madison was not protecting "affirmative rights" at all but was simply using the ninth amendment to bolster the enumerated-powers scheme. Without question, the protection of the enumerated-powers structure of the Constitution was the main thrust of Madison's constitutional objection and was repeatedly mentioned by him. However, this answer would not save McAfee's thesis that a rights analysis is irrelevant to the construction of enumerated powers. For this thesis to survive, it is not enough to argue that when the retained rights are being used to limit delegated powers, this is merely an expression of the limited-powers scheme. While preserving the form of McAfee's "residual rights" thesis, this would reverse the interpretive methodology he favors. Instead of using the concept of delegated powers to define the concept of reserved rights, as he would have it, reserved rights would be used to help define the delegated powers. Thus, this response would support my view of the ninth amendment---one McAfee explicitly rejects, see McAfee, supra note 97, at 1291--92---that the concept of constitutional rights, including unenumerated ones, provides a conceptual means in addition to the concept of delegated powers by which the legitimacy of claimed government powers can be critically assessed. In his speech concerning a national bank, Madison appears to have used the ninth amendment in just this way.

\textsuperscript{111}See McAfee, supra note 39. For thoughtful replies, see Hamburger, supra note 11; Heyman, supra note 11; Mayer, supra note 11.
McAffee concludes that “the provision in question was based on Madison’s draft of a proposal for language to be inserted into the preamble of the Constitution…”—a proposal that was rejected by the Congress.

While we can never know with certainty how exactly Sherman’s “natural rights…retained” by the people was connected to Madison’s rights “retained by the people,” this attempt by McAffee to deny any connection clearly fails. For as he acknowledges in a different context, both North Carolina and Virginia proposed to Congress language virtually identical to Sherman’s and these proposals preceded Madison’s speech. It is obvious that Sherman’s draft includes verbatim portions

A portion of Madison’s proposed prefix is indeed similar to part of Sherman’s second amendment: “That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and being protected in property, and generally of pursuing and obtaining happiness and safety.” 1 Annals of Cong., supra note 7, at 451. This similarity, which is hardly surprising given the widespread consensus about such rights, in no way suggests that Madison’s precursor to the ninth amendment is unrelated to the rights mentioned in this prefix. This is especially true if McAffee is correct that such preambulary language was considered not to be legally binding. McAffee is assuming what must be shown: that the rights mentioned in this prefix were not also included among the rights retained by the people that Madison sought to protect in his precursor to the ninth amendment.

McAffee speculates that “[i]t is thus in all likelihood no coincidence that Madison included this language of principle in a proposed prefix to the Constitution, given his probable awareness that preambles are not considered part of the binding law of the Constitution.” McAffee, supra note 39, at 303–04. In a footnote he emphasizes the frequency with which words like “ought”, “should”, and the like were commonly used. Yet, in contrast, Sherman’s second amendment also includes the language of binding law that was absent in Madison’s proposal: “Of these rights they shall not be deprived by the Government of the United States.” Sherman’s Draft, in R. Barnett, supra note 13, at 351 app. A (emphasis added). Madison used the same prohibitory word “shall” repeatedly throughout the rest of his proposals which McAffee agrees were meant to be and which in fact came to be legally binding.

Given the ingenious lengths that ninth amendment skeptics have gone to deny or explain away the powerful evidence that has been uncovered to date, it is unclear just what evidence would satisfy them.

McAffee, supra note 39, at 301 (“Several state ratifying conventions had professed similar amendments…”).

The Virginia and North Carolina proposals read: “1st. That there are certain natural rights, which men, when they form a social compact, cannot divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.”
Steven Heyman notes in his reply to McAffee, Madison’s notes for his amendments speech refer to “natural rights retained as speech [sic].”

McAffee’s positivist reading of the ninth amendment is also undermined by the debate between representatives Sedgwick and Page discussed above. Sedgwick argued that the right of peaceable assembly was “a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae.” According to the positivist reading of the Constitution, in making this argument Sedgwick would have known that the government was free to infringe this right unless and until the Constitution was amended. Page replied to Sedgwick’s admissions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. A positivist reading of this reply is that “such stretches of authority” would be perfectly permissible in the absence of such insertions in the declaration of rights.

To the contrary, Madison described the amendments serving “either as actual limitations of such powers, or as inserted merely for greater caution.” Ninth amendment skeptics fail to acknowledge

If, as McAffee suggests, Sherman’s draft was merely his suggestion as to how Madison’s amendments could be appended at the end of the text, (see McAffee, supra note 39, at 300) why drop Madison’s reference to “particular rights” and substitute “delegated powers”?

Finally, compare Sherman’s proposal to the words of the tenth amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (U.S. Const. amend X.). Language that is virtually identical with Madison’s original proposal that, “[t]he powers not delegated by the constitution, nor prohibited by it to the States, are reserved to the states respectively.” 1 Annals of Cong., supra note 7, at 453 (statement of Rep. Madison).

McAffee never denies that this proposal by Madison is the precursor to the tenth amendment. Indeed, he insists upon it. See McAffee, supra note 97, at 1300 n.326 (“The Virginia state proposal that became the ninth amendment goes no further than the precursors to the tenth amendment in Madison’s proposal for a bill of rights.”). Yet, despite the fact that Sherman’s proposal includes an almost verbatim rendition of both the actual tenth amendment and Madison’s precursor to it, we are nonetheless urged to conclude that this “powers not delegated” passage—and not the “natural rights... retained” passage—is the part of Sherman’s proposal that connects to the ninth amendment.

These two alternative functions of constitutional rights. Some rights—such as the grant of a right to a jury trial in civil cases—serve to limit government power more than otherwise would be the case. Others—such as the natural rights specified in the first amendment—would be enforceable in any event and were inserted for greater caution. Page’s response to Sedgwick that, notwithstanding that the right of assembly is “self-evident” and “inalienable” it ought to be “inserted” into the declaration of rights is in this spirit of caution. But this means that these rights would have been equally enforceable had they not been “inserted for greater caution.” So the omission of a man’s inherent, inalienable “right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he though proper...” from the text, does not mean that these rights are assigned into the hands of the general government and thus are rendered unenforceable. Ninth amendment skeptics have always seemed to think that when a provision is “inserted merely for greater caution,” this means it has no function apart from serving as a warning, rather than it serving as a redundant or secondary line of defense when other primary constraints on government power fail.

With this analysis in mind we can fruitfully revisit the only other reference that Madison is known to have made to the ninth amendment. In a letter to George Washington, Madison responded to a criticism of the ninth amendment that had been made by Edmund Randolph, Governor of Virginia. Madison related Randolph’s objection (which he had learned of from Hardin Burnley) to Washington as follows:

“[Randolph’s] principal objection was pointed against the word retained in the eleventh proposed amendment, and his argument if I understood it was applied in this manner, that as the rights declared in the first ten of the proposed amendments were not all that a free peo
ple would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia, that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible [sic] to no definitive certainty.\textsuperscript{129}

Madison's now much-noted response was as follows:

The difficulty stated atst. the amendments is really unlucky, and the more to be regretted as it springs from [Randolph,] a friend to the Constitution. It is a still greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured ["whether" stricken out] by declaring that they shall ["be not be abridged violated" stricken out], or that the former shall be not be extended. If no line can be drawn, a declaration in either form would amount to nothing.\textsuperscript{130}

Ninth amendment skeptics have read this passage to mean that the rights retained by the people are the logical obverse of the delegated powers—what I call the "rights-powers conception" of unenumerated rights—so that if a delegated power is found to exist, this automatically means that no right remains by which such power could be challenged.\textsuperscript{131}

I have argued that Madison was identifying two complementary strategies for accomplishing the single objective of protecting the rights retained by the people: enumerate powers and protect rights.\textsuperscript{132} That is, rights can be protected from improper extensions of government power by enumerating those powers, by protecting rights, or both. This

\textsuperscript{129}Id. at 1188 (letter from Madison to President Washington, Dec. 5, 1789).

\textsuperscript{130}Id. at 1189-90.

\textsuperscript{131}See e.g. Berger, supra note 31, at 966 ("Self-evidently, a specific grant of power overrides an unenumerated right. How can an undescribed right present an obstacle to the exercise of a granted power?"). See also supra note 108.

\textsuperscript{132}I analyzed this passage as follows: Madison was distinguishing two conceptual strategies for accomplishing a single objective. An expressed declaration of "rights retained ... that shall not be abridged" has the same object in view as an expression that "powers granted ... shall not be extended." The object of both strategies is that "the rights retained ... be secured." Given this object, if one provision has teeth, so must the other. In stark contrast, the rights-powers conception specifies that the rights retained by the people automatically diminish as the powers of government expand—a construction that contradicts both the stated purpose for declaring the existence of individual rights and the very point that Madison was making in his letter.


interpretation of Madison's argument is bolstered by Burnley's response to Randolph's objection.

But others among whom I am one see not the force of the distinction, for by preventing an extension of power in that body from which danger is apprehended safety will be insured if its powers are not too extensive already, & so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.\textsuperscript{133}

Burnley even more clearly than Madison is assessing competing strategies. According to Burnley, "by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain." That is, Burnley advocates protecting rights as a means of preventing an improper extension of power—exactly how Madison used the ninth amendment in his bank speech. The other method of insuring safety is "by preventing an extension of power." Moreover, in his letter advocating the strategy of "protecting the rights of the people," Burnley was not referring to the enumerated rights, but was defending the ninth amendment from Randolph's criticism. The ninth amendment provides no such protection if the unenumerated retained rights have a constitutional status inferior to those which were enumerated.

McAffee rejects this analysis. He argues that, if there were two distinguishable strategies and Madison preferred one to the other, how could Madison dismiss Randolph's distinction as "altogether fanciful"? Why would he not instead defend the superiority of his chosen method rather than assert there was no difference between the two?\textsuperscript{134} But I never suggested that Madison favored only one method of protecting the rights retained by the people, nor would such a suggestion be likely given Madison's commitment to the structural constraints imposed on government by the original Constitution. Indeed, in his bank speech delivered within fourteen months of his letter to Washington, Madison argues both that the power to incorporate the bank is not in the enumeration and also that, if there, the exercise of the power is not essential.\textsuperscript{135}

\textsuperscript{129}B. Schwartz, supra note 128, at 1188.

\textsuperscript{130}See supra note 97, at 1292.

\textsuperscript{131}McAffee charges that I fail "to explain why the combination of the enumerated rights and the ninth amendment are not properly viewed as an attempt to have it both ways: 'rights' as specific limitations on the scope of government powers and as the fruit of structural protection." McAffee, supra note 97, at 1297 n.310. To the contrary, I freely accept the notion that the Constitution included multiple bases for limiting federal powers and
Madison specifically argues that the bill "involves a monopoly, which affects the equal rights of every citizen."\(^{136}\) Several ratification conventions had proposed to Congress amendments barring the granting of a monopoly.\(^{137}\) That these restrictions were omitted from the Bill of Rights does not prevent Madison from arguing that monopolies violate "equal rights of every citizen." What can these rights that are violated by monopolies be but natural rights that are retained by them? There were no such positive law rights in the Constitution or the pending Bill of Rights.

In sum, Madison's actual use of the ninth amendment in his bank speech resolves the ambiguity in his letter to Washington that has been exploited by ninth amendment skeptics. And it flatly contradicts McAffee's elaborately defended "residual rights" thesis that the ninth amendment "says nothing about how to construe the powers of Congress or how broadly to read the doctrine of implied powers."\(^{138}\)

We are left to choose whom to believe about the ninth amendment, McAffee or Madison.

C. The Indefatigable Raoul Berger

A third fervid ninth amendment skeptic is Raoul Berger.\(^{139}\) Berger's writings largely combine the rule of law concerns about judicial protecting rights. What McAffee fails to explain is why the unenumerated rights protected by the ninth amendment are confined merely to being "the fruit of structural protection," and do not provide their own "limitations in the scope of power" as Madison argued in his speech.

Berger's two other objections to my account. First, he argues that "Barnett's interpretation does not explain why Madison argued that it did not matter which way rights were protected, while Barnett elsewhere claims that Madison had by this time rejected the Federalist residual conception of rights."\(^{130}\) My original contention was not that Madison "rejected" what McAffee calls the residual conception of rights, but that he came to reject the view that the strategy of enumerating powers should be the exclusive method of protecting rights. If so, then Madison would be expected to defend the strategy of protecting retained rights as functionally "the same thing."

Second, why did Madison assert that "a line can be drawn between the powers granted and the rights retained"?\(^{131}\) Id. But the principal issue dividing McAffee and me is, assuming a line exists between rights and powers, how in practice such a line is to be drawn. McAffee adamantly insists that it can only be drawn by looking to the enumerated powers provisions. I maintain that it can be drawn \(e\)ither by doing this, or alternatively by looking to the rights retained by the people. I leave it to the reader to conclude which of these two theories is closer to the spirit of Madison's (and Burnley's) letter.

Berger is adamant that the phrase "assigned into the hands of the General Government" means that courts have no power to protect unenumerated rights. "[T]he protection the framers sought," says Berger, "was against the 'General Government,' including the judiciary."\(^{142}\)

To the extent that Berger means that the federal judiciary was not originally empowered to protect both the enumerated and unenumerated rights retained by the people from infringements by state govern-
accorded the enumerated rights until the ratification of the fourteenth amendment. To the extent, however, that Berger means that the judiciary originally lacked power to protect the unenumerated rights from encroachment by Congress, I strongly disagree.143 The framers clearly saw the problem of legislative power as distinct from that of the judicial “power” to adjudicate cases and controversies arising between citizens and government. Elsewhere in the same speech, Madison refers to “rights which are retained when particular powers are given up to be exercised by the Legislature.”144

Berger refuses to acknowledge that to deny judicial review of congressional or executive infringements of enumerated or unenumerated rights is to assign these rights into the hands of the general government. The judicial “power” to strike down federal legislation is not on a par with a delegated power to enact legislation, a view that Berger says he shares. “Judicial enforcement, in my judgment,” says Berger, “is limited to its traditional ‘negative’ role of policing constitutional boundaries, i.e. halting legislative or executive invasion of the ‘retained’ rights area.”145 Whereas, the enumerated powers of Article I operate against the states and the people, the judicial power of negation operates against the other branches.

144Berger refers to “Barnett’s own testimony” in support of this view which he quotes twice as follows: “the courts have not been empowered to enforce the retained rights.” See Berger, supra note 31, at 969 & 970 (quoting from Barnett, Reconcepting, supra note 16, at 15 n. 54). In a footnote, Berger challenges me to “reconcile this statement with: ‘An analysis that supports judicial review of legislative interference with enumerated rights while denying equal judicial protection of unenumerated rights is inherently suspect. The words of the Ninth Amendment argue strongly against such a construction.’” Id. at 970 n.129 (quoting from Barnett, Reconcepting, supra note 16, at 21).

Unfortunately for both of us, Berger was understandably misled by a printer’s error in the Cornell Law Review version of my article. The first passage in question from footnote 54 was originally part of a block quote to Berger himself. Sometime after I reviewed the page proofs, the indentation was eliminated thereby making the passage quoted from Berger appear to be my own words (which I then proceed to contradict in the next sentence). This error was corrected in the revised version of the article published as Barnett, James Madison’s Ninth Amendment in R. Barnett, supra note 13. See id. at 18 n.50.

1451 Annals of Cong. supra note 7, at 454 (statement of Rep. Madison) (emphasis added). This statement was hardly exceptional. The leitmotif of the framing period was fear of legislative abuses. See e.g. id.: “In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker. It therefore must be levelled against the legislative, for it is the most powerful and most likely to be abused, because it is under the least control.

Further testimony is provided by the first words of the first amendment, “Congress shall make no law...” U.S. Const. amend I (emphasis added).

145Berger, supra note 31, at 964.

As David Mayer has observed,146 the evidence as to the original conception of judicial review is exceedingly slim. But what evidence there is provides scant support for the view that unenumerated rights were to be treated differently than enumerated rights, with one possible exception that Berger (and McAfee) has stressed. As I noted in Part II, in his House speech proposing amendments, Madison defended the bill of rights from the charge that it would provide an ineffective “paper barrier” against abuses of power, in part, by pointing to “independent tribunals of justice [that] will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”147

Berger has contended that the phrase “rights expressly stipulated” means that only rights expressly stipulated could be protected by judges.148 Berger’s theory amounts to a claim that the Bill of Rights carved out exceptions to the delegated powers and that by this means did the judiciary gain jurisdiction to adjudicate violations of the rights retained by the people. But suppose that Berger is correct. This would mean that—contrary to the universal opinion of Federalist and Antifederalist alike—the Bill of Rights significantly expanded the protection of rights.149 So, for instance, until the ratification of the first amendment carving out an “exception” to enumerated powers, Congress was perfectly free to infringe upon the retained rights of free speech or of assembly or the exercise of religion. Even Berger himself has rejected such an implication when he asserts that “the Bill of Rights added nothing, but
was merely declarative."\textsuperscript{150} If the Bill of Rights added nothing,\textsuperscript{151} however, then the retained rights left unenumerated are as fully enforceable as those retained rights that were enumerated. Berger cannot have it both ways.

\section{IV. Conclusion: The Equal Protection of Liberties and the Future of the Ninth Amendment}

What is the future of the ninth amendment? In law, as in most areas of life, betting that the future is going to be pretty much like the past is usually the safest wager. If this turns out to be true, then the ninth amendment, which has been so tragically neglected by the Supreme Court over the past two centuries, is doomed to remain in a state of desuetude. But while betting against change may be the most conservative gamble, it is often a losing one. The past twenty years has witnessed a trend in the direction of a revived ninth amendment.

In particular, a renewed interest in the views of the framers of the Constitution and of the Civil War amendments has caused those who favor an expansive judicial protection of fundamental rights to focus attention on the original intent of the ninth amendment. Moreover, the framers' concept of natural rights is no longer in complete disrepute. If the Senate confirmation hearings of Judge Robert Bork to the Supreme Court of the United States was a watershed development in the legitimization of the ninth amendment, the confirmation hearings of Justice Clarence Thomas may prove to have a similar effect on the legitimacy of natural rights. History may well mark the turning point for popular acceptance of natural rights theory in the United States to be Senate Judiciary Committee Chairman Joseph Biden's opening statement during the Thomas confirmation hearings in which he openly embraced natural rights and stated that the issue for him was which version of natural rights the nominee favored.\textsuperscript{152}

With the addition of Justice Scalia, Kennedy, Souter, and Thomas to the Supreme Court and the elevation of William Rehnquist to Chief Justice, "conservatives" appear now to be in firm control of the Court. The type of "judicial conservatism" that will eventually emerge in the third century of the Bill of Rights, however, is still very much in doubt. Will it be a majoritarian conservatism of judicial deference to majority will as expressed in legislation? Or will it be a more libertarian conservatism that views the courts as neutral magistrates empowered to protect the individual from the government?\textsuperscript{153} Which of these conservativisms comes eventually to prevail will depend, perhaps in principal part, upon whether a majority of the Court can be persuaded to take James Madison's ninth amendment and its pivotal role in constitutional interpretation to heart. At the moment, it appears that a justices with a more libertarian brand of conservatism\textsuperscript{154}—and a respect for the ninth amendment\textsuperscript{155}—have the upper hand.

Which judicial philosophy prevails will also depend upon whether proponents of the ninth amendment will take a more principled stance towards so-called fundamental liberties. The liberties each person holds fundamental are imperiled when advocates of some liberties they hold dear are more than willing to deny or disparage the liberties thought fundamental by others. For example, many of those favoring a fundamental right of privacy that includes a woman's right to chose to terminate a pregnancy offer no support to and indeed would actively oppose those who favor a fundamental "right to choose" to engage in a lawful occupation—such as driving a taxi cab—free from protectionist economic regulations. And few seem at all concerned with the fundamental "right to choose" whether or not to own a gun or to alter one's mental state by means of substances alcohol, nicotine, peyote, or heroin. According to this discriminatory methodology, if some choices are deemed fundamental, other rights-respecting choices are vilified and ridiculed.

\textsuperscript{150}Berger, supra note 31, at 6 (footnote omitted).

\textsuperscript{151}With respect to the rights retained by the people when forming government, Berger is essentially correct that the Bill of Rights added nothing. With respect to additional procedural protections, such as the right to a jury trial in civil cases, I disagree that the Bill of Rights added nothing. As Madison's House speech explaining the proposed amendments exemplifies, such protections would probably not have been recognized as rights retained by the people, but were instead "positive rights." See supra note 13.

\textsuperscript{152}Senator Biden's remarks are reprinted in appendix B of this volume.

\textsuperscript{153}See Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (reprinted as appendix D of this volume) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").

\textsuperscript{154}Id. at 2805 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U. S. Const., Amend. 9.").
I am not suggesting that some exercises of liberty are not in fact more important than others. However, by picking and choosing among all the unenumerable liberties of the people to determine which choices are fundamental and which are not, those who would limit judicial protection to liberties deemed fundamental are putting courts in the difficult position of establishing a hierarchy of liberties. This contributes to the longstanding fear that any revival of the ninth amendment would place courts in the role of a “super-legislature” usurping the functions of other branches. When interpreted as justifying a presumption of liberty, however, I think this fear of the ninth amendment is unfounded precisely because such a presumption provides a principled defense of all liberties of the people and removes the courts from having to decide which liberty is truly fundamental and which is not.

Adopting the presumption of liberty would enable us to acknowledge the ninth amendment’s unique constitutional function by resisting legislative or executive usurpation of the unenumerated rights “retained by the people” while, at the same time, avoiding unfettered judicial discretion. The presumption of liberty would permit us finally to remove the ink blot from the ninth amendment.

1. The Ninth Amendment:
Inkblot or Another Hard Nut to Crack?*

Sotirios A. Barber

Introduction
The times are right for remembering the ninth amendment, for we need reminding of it. The ninth amendment expresses and symbolizes a constitutionalism premised on the belief that the political aspirations of humanity are defined by transcultural or real standards of political morality, like simple justice as opposed to particular or popular historical understandings of justice. Yet powerful forces in twentieth-century American thought are at odds with this belief in simple justice.1 And this means that the time may not be so good for American constitutionalism as a whole.

This article singles out one element of modernist thought for comment: the New Right constitutionalism of which Robert Bork is considered the leading theorist. New Right constitutionalism is the only modernist teaching that rejects the essential tenets of American constitutionalism while packaging itself in its colors. For this and other reasons—like the public psychology of an acquisitive culture2 and the firm grip of modernist thought in American higher and professional education—New Right constitutionalism is the most serious near-term threat to American constitutionalism.

Part I of this article presents the nerve of the conflict between New Right constitutionalism and the constitutionalism embodied in the ninth amendment.

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*Reprinted, by permission, from 64 Chi.-Kent L. Rev. 67 (1988).
1For a general survey, see E. Purcell, The Crisis of Democratic Theory (1973). See also R. Bernstein, Beyond Objectivism and Relativism (1983).
amendment. Part II discusses how we should interpret the Senate’s rejection of Robert Bork. Part III submits an affirmative case for a broad liberal reading of the ninth amendment. Part IV concludes the article by considering objections to this liberal reading.

I. The Ninth Amendment as a Reminder of Real Rights
Our era with regard to the ninth amendment parallels Lincoln’s era with regard to the proposition of the Declaration of Independence that all men are created equal. To those politicians and judges of his day who measured the intentions of the framers by their worse selves, Lincoln responded by citing the high-flown language of the framers’ better selves, the language by which the framers would have been known to their posterity. In this language Stephen Douglas and Roger Taney found an intent to assert merely the equal rights of Englishmen in America and Great Britain. Lincoln found much more. “I had thought the Declaration contemplated the progressive improvement in the condition of all men everywhere,” said Lincoln.3

Lincoln held it morally impossible to read the Declaration in the fashion of Douglas and Taney. Commenting specifically on Douglas, Lincoln remarked that should the Declaration be read Douglas’ way, the French and Germans among us “are all gone to pot along with the Judge’s inferior races.” Read Douglas’ way, the Declaration covers only those Englishmen here and in Great Britain in 1776. “[W]hat a mere wreck—mangled ruin—[this reading] makes of our once glorious Declaration,” Lincoln said. Are we “really willing that the Declaration shall be thus frittered away . . . thus shorn of its vitality, and practical value; and left without the germ or even the suggestion of the individual rights of man in it?”4

Lincoln knew that the authors of the Declaration had not intended to declare equality “in all respects.” Nor had they intended the “obvious untruth, that all [men] were then actually enjoying that equality” or were soon to limit the future extension of the maxim to whatever classes of persons and relationships it could fairly have described when written. They meant instead, said Lincoln, “to set up a standard maxim for free society . . . familiar to . . . and revered by all; constantly looked to . . . labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading . . . its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”5

Lincoln opposed a view that would have degraded the maxim to mere rhetoric for rationalizing the Revolution—“old wadding left to rot on the battle-field.” Its authors meant it “for future use,” said Lincoln. They “meant it to be” what, “thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back [to] the hateful paths of despotism.” The authors “knew the proneness of prosperity to breed tyrants,” said Lincoln, “and they meant when such should re-appear . . . and commence their vocation they should find left for them at least one hard nut to crack.”6

When the Senate turned back the Bork nomination in October, 1987, one need not have stretched matters much to see a parallel between the ninth amendment and the Declaration's maxim. As the maxim had stood to those who defended slavery or the right of the community's majorities to adopt slavery on a theory Lincoln described as "no right principle of action but self-interest,"7 so the ninth amendment stood to Bork and others who believe that constitutional rights owe their existence and status solely to majoritarian recognition. Bork believes, or comes down close to the belief, that our most important right as individuals is the right to join with other individuals to form majorities whose representatives can enact their preferences into law.8 He seems to believe the Constitution limits the majority's agent-government solely because majorities at the founding and at later moments of constitutional amendment willed it so.9 In effect, Bork denies that individuals and minorities have rights as persons, rights the community is obligated to honor whether it has recognized them or not.

3R. Basler, Abraham Lincoln: His Speeches and Writings 362 (1946).
4Id. at 362-63 (emphasis in original).
5Id. at 360-61 (emphasis in original).
6Id. at 360-62.
7Id. at 291, 303-08 (emphasis in original).
9See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 2-3 (1971).
He denies that the Constitution is open to rights against the community and its majorities beyond those rights recognized in the community's positive law.10

A liberalized form of Bork's basic view would honor rights embedded deeply in a community's moral tradition, like the right to marital privacy protected by a narrow reading of Griswold v. Connecticut.11 Other variations, also usually (but not necessarily) to the left of Bork, yield to judges the power to anticipate changes in community morality.12 At bottom, these and other variations hold that the community is ultimately responsible to no standards beyond its own making. They therefore share a conventionalist view of constitutional rights because they agree that rights have no source or weight beyond social convention, established or emerging.

A few of Bork's critics on the Senate Judiciary Committee and elsewhere insisted that they had rights against the community and its majorities solely by virtue of their natural personhood, and not just because the community had elected to honor those rights. They therefore suggested a broad moral realist understanding of rights: rights as in some sense real or natural, not just conventional; rights as connected in some way with what our most reflective and dedicated thinking proposes about the truth concerning simple justice or human nature.13 These critics cited the ninth amendment as one sign that the Constitution itself honors rights beyond those expressed in the positive law.14 They might have added that the ninth amendment implies that the community is capable of doing wrong in ways other than contradicting expressed self-limitations on its power. For, as a norm addressed to the community's agent-government, the ninth amendment presupposes the community's capacity for violating rights beyond those expressed, which is tantamount to a capacity for injustice beyond inconsistency with past statements. Since the ninth amendment is a precaution against this capacity for injustice beyond self-contradiction, the ninth amendment implies a standard of justice that is primarily substantive.15

Later in this paper I shall add to what others have said for this view of the ninth amendment. I can assume its validity in this comment on the Bork episode, however, because Bork himself has conceded the central part of it. When asked for his view of the ninth amendment during the hearings, Bork said the amendment was like an inkblot covering an enumeration of specific rights. He said he could not decide cases under the amendment without knowing what was under the inkblot.16 By treating the ninth amendment as a mistaken way to secure rights, Bork implied that the amendment was not designed merely to underscore the tenth amendment's reminder that the powers of the national government vis-a-vis the states were limited through enumeration. Bork implicitly rejected a federalism reading of the ninth amendment that would find the amendment's meaning deducible from the powers enumerated in article I, section 8 and elsewhere in the Constitution.17 Bork acknowledged, in other words, that constitutional rights in general, including the inkblotted ones, are or would be exemptions from the powers of govern-
ment—limitations on the means government may employ in pursuit of its authorized ends. The problem with the inkblotted rights on this account is that we do not know what they are. The ninth amendment is regarded as a mistaken attempt to secure rights, not another way of confining government to enumerated powers.

II. What Might the Bork Episode Mean?

Bork's defeat came after his repudiation of the ninth amendment and his related rejection of a general constitutional right to privacy, the most controversial modern expression of the ninth amendment's promise to honor rights beyond the positive law. This juxtaposition of events invites, though hardly compels, an interpretation of the Bork episode as the nation's rejection of Bork's constitutionalism for the constitutionalism of the ninth amendment: that the positive law can fall short of its aspiration to real justice for individuals and minorities, and that judges and others have an affirmative duty to further this aspiration.

Bork and the Administration reject this interpretation of the Senate's action. They believe the Senate and the public were victimized by a campaign of lies and special interest pressure that could corrupt the process of judicial nomination for years to come. Aside from their allegations of malevolence, Bork and the Administration have reason to seek an explanation other than the nation's embrace of the ninth amendment and the constitutionalism it expresses. For Bork's majoritarianism is but a right-wing version of a basic moral conventionalism that most American intellectuals profess. This includes leaders among Bork's critics who cannot fully embrace the traditional constitutionalism of the ninth amendment. So the Administration and its critics are now engaged in what Dworkin calls the "second battle over Bork—the battle over the best explanation of his defeat."20

Assuming, then, that the facts of the matter will support either of two conflicting interpretations, how should we view the Bork episode? Should we favor an interpretation that turns away from Bork's constitutionalism and toward the view that our basic law would reconcile majoritarianism to a standard of justice beyond the written law and social convention generally?

We can begin by considering why we are interested in explaining Bork's defeat. Our interpretation of the Bork episode matters because both sides expect a successful interpretation to constitute a reason for how the nation should conduct her affairs; we expect a successful interpretation to have normative force. If the Administration should make the case for its version of what happened, then the Bork episode will suggest no reason to alter the Administration's constitutional philosophy, just its nominating strategy. Should Bork's critics give the most persuasive account, the nation would have an additional reason to reject Bork's constitutionalism as a normative position. The normative stature of Bork's constitutionalism would have been either diminished, enhanced or left unchanged depending on one's interpretation of what the nation's representatives did, because the public's considered opinion, or what represents that opinion, has normative weight with us.

As in the controversy over what the framers intended, a controversy stretching from before Lincoln's time to the present, the meaning of the Bork episode thus proves to be more than a historical question. We are debating a question of history taken as normative, and that requires us to see the historical material as expressive of something praiseworthy. When we take public opinion as normative, we cannot just take a poll to determine what the public approves. For "the public" of whose judgment we would inform ourselves is an entity of presumed normative authority. We want not just the opinion of the public; we want the opinion of the public as worthy of its normative or conduct-guiding status. And an entity loses its conduct-guiding status—its claim to be worthy of guiding conduct—to the extent that we, upon thorough reflection, believe its judgments flow from indefensible views of what is good or right, or false opinions about what conduces to what is good or right, or irrational processes of testing its premises and reaching its conclusions.

Both Madison and John Marshall recognized the distinction between mere public opinion and the public's considered judgment. When Madison opposed Jefferson's proposal for letting the public settle certain constitutional disputes among the branches of government, he argued that in the heat of political controversy one could expect that "[t]he passions . . . not the reason, of the public, would sit in judgment. But it is the reason of the public alone that ought to control and regulate the government. The passions ought to be controll'd and regulated by the..."
government." And John Marshall could attribute the authoritativeness of the act of public opinion that established the Constitution not just to the act's mere occurrence in history, but also to the quality of the act as "a very great exertion" that neither "can . . . nor ought . . . to be frequently repeated."22

If we should count as a fully authoritative expression of the public mind anything that some lawful representative of the public might say on any occasion, without considering any question of its quality, then the Senate vote on Bork should have to count as sound in all respects. Bork and the Administration evidently reject such a superficial measure of public opinion, and correctly so. To know what the public really approves and the Administration evidently reject such a superficial measure of public opinion, and correctly so. To know what the public really approves and the people want; we would have to know what it would approve after as full and fair a consideration as circumstances would permit. We would have to settle difficult questions about the nature and measurement of the public's real wants.23 And we would have to be satisfied that our processes of measurement—whether predominantly scientific, as in a public-opinion poll, or predominantly political, as in a system of representation—adequately approximated a dialogue between "the public" and a well-intentioned critic. Nothing less could yield a reliable version of what the public really wanted—its real "interests" as opposed to its unauthoritative "inclinations," to use a distinction of importance to the authors of The Federalist.24

The question of what the authoritative public approves thus becomes indistinguishable from what the public would approve if it wanted to remain worthy of normative authority and if it were in a position to give the matter full and fair consideration. Abstractly put, the public would have to want what is simply right or as close to what is right as its material conditions permitted. And this is a question upon which informed and reflective individuals can form opinions that are worth treating as responsible hypotheses—often at least as responsible as the hypotheses concerning the public mind produced by established scientific and political processes. Thus, Federalist No. 71 could state as a general truth of republican theory and the authoritative public mind:

The republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breese of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly intend the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulterer, who should pretend that they always reason right about the means of promoting it. They know from experience, that they sometimes err; and the wonder is, that they so seldom err as they do; beset as they continually are by the wiles of parasites and syphomists, by the snares of the ambitious, the avaricious, the desperate; by the artifices of men, who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.25

With this understanding of why we are interested in what the Senate did, we can now assess the broader moral significance of the Bork episode. For this understanding puts Bork's view of the meaning of the Senate's action at a disadvantage. If the public should accept Bork's constitutionalism it has to be prepared to claim that, in principle, it can do no wrong, except (for some reason) behave inconsistently with principles of its own making. Such is the upshot of Bork's view that the majority's own will provides the sole legitimate standards for limiting majority will. This assertion of community power to define the most basic standards of right and wrong would conflict with the presuppositions of our ordinary moral experience, as manifest most clearly in our ordinary patriotic desire to praise our community. Praising the community presupposes standards which the community can either succeed, approximate, or fail to live up to. Praising the community makes sense only where failure is assumed to be possible. Assume Bork's radical conventionalism as a normative position within the community, and it would be unpatriotic not only to suggest that the community should try to be other than it is, it would be unpa-

25The Federalist No. 71, at 482–83 (A. Hamilton); see also id. No. 63, at 424–25 (J. Madison).
Bork's constitutionalism is thus at odds with the presuppositions of our conventional understanding of political morality. Our conventional understanding is a moral realist understanding because our social practices presuppose that the community is capable of both justice and injustice and therefore amenable to praise and blame and worthy of either preservation or change. Bork's conventionalism is therefore faithless to our conventions; it self-destructs. To borrow from Michael Moore's argument against philosophical conventionalists like Richard Rorty:26 If Bork is right in his belief that the community cannot err, he is wrong to say so, because our community allows that it can err, morally and in other ways. And if Bork's conventionalist beliefs are wrong, he errs in professing them. If he is right he is wrong, and if he is wrong he is wrong.

Bork's constitutionalism is therefore wrong—either simply wrong or wrong with us, wrong in this community. Should spokespersons for this community seriously assert that in principle the community can do no wrong, this community would adjudge them either willful, stupid, shameless, or blasphemous. And these are not terms we would want to apply to ourselves or our collective selves. A community fairly characterized in this way would lose its moral authority with us. Thus, The Federalist saw clearly that the community deserved, and that the community believed it deserved, praise for its forthright recognition of its proneness to instrumental and moral error and its willingness to strive for self-improvement.27

In sum, I think that upon full and fair consideration the public certainly would reject Bork's constitutionalism. And so we should hope that the facts of the Bork episode can bear the interpretation that Bork's critics would give them. I want next to propose that if the public has rejected Bork's constitutionalism, or when it does, it should embrace the constitutionalism of which the ninth amendment is emblematic.

III. The Ninth Amendment's Constitution

I have suggested that officials and citizens faithful to the ninth amendment would conduct themselves and perform their duties in a manner calculated to hold the community and its agent-government responsible to real standards of political morality, real as opposed to standards believed to be merely conventional or of the community's own making. This understanding of the ninth amendment is a broadened form of what I shall call the current liberal (and libertarian) conception of the ninth amendment. The liberal conception holds that individuals and minorities enjoy judicially enforceable rights against the community beyond those rights specified in the constitutional document. The language and history of the ninth amendment certainly admit, though they may not compel, the liberal interpretation.28 And Bork's inkblot argument, the most publicized recent argument against honoring the amendment, concedes the liberal reading when it decides to treat the ninth amendment as a mistake. I submit in this section an affirmative case for a broad liberal reading of the ninth amendment. The concluding section takes up objections to the liberal reading.

I argued in the preceding section that we should hope that past and future facts permit us to interpret the Bork episode as the nation's rejection of Bork's constitutionalism. In order fully to recognize the American public as a norm authority, the public's acts must meet our expectations of what is worthy of normative authority. A public that took Bork's constitutionalism to heart could not meet the requisite expectations. A similar argument holds for interpretations of the framers' intent. If the framers' language and the historical record yield interpretive options, some of which honor and some that dishonor the framers, and if we seek their intentions in a context that presupposes them worthy of authority, then we should choose the interpretation that honors them. There is nothing novel in this approach. Nor does it make impossible claims to settle concrete questions in a direct way; it can only move discussion in the right direction.

Thus, Taney wanted the country to believe that he was moved to his interpretation of the Declaration by a desire to avoid the conclusion that


27See supra text accompanying note 25; see also The Federalist No. 1, at 3–6 (A. Hamilton); id. No. 9, at 50–51 (A. Hamilton); id. No. 10, at 57, 63–64 (J. Madison); id. No. 15, at 91–93 (A. Hamilton); id. No. 49, at 341–43 (J. Madison); id. No. 51, at 349–53 (J. Madison); id. No. 55, at 377–78 (J. Madison); id. No. 63, at 422–25 (J. Madison); id. No. 78, at 528–29 (A. Hamilton). For a broadly similar statement of the American character as reflected in the founding, see Goldwin, Of Men and Angels: A Search for Morality in the Constitution, in The Moral Foundations of the American Republic 24 (R. Horwitz ed. 1986). Perry's theory of an American tradition dedicated to moral growth—"growth" as distinguished from mere "change," presumably—is vitiated by Perry's ultimate embrace of a conventionalist metaphysics. See M. Perry, supra note 12, at 96–102, 110–11, 119–21 (1982); Perry, supra note 12, at 1049–75.

its authors were hypocrites. Herbert Storing termed Taney’s view (the common view in our own day, Storing believed) “a gross calumny on the Founders,” partly to avoid this calumny Storing defended Lincoln’s interpretation of the Declaration. Taney saved the Declaration’s authors from hypocrisy only to suggest that they may have been guilty of injustice, and he covered that suggestion by separating law from morality, a move that calumniated the law. Lincoln’s was the better interpretation. By imputing to the framers an aspiration to overcome slavery, Lincoln reconciled the framers to simple justice without denying the undeniable gap between their words and their deeds. He could face the fact of this gap without depreciating the framers and the law because aspirations presuppose such gaps. Gaps between word and deed do not necessarily signal hypocrisy, and both the framers and the law could have aspired to simple justice.

A similar argument applies to interpretations of the ninth amendment. We who look to the amendment for guidance presuppose its authority; we should read it, if its language and history permit, in ways that preserve its authority. And it claims moral as well as legal authority because the document of which it is a part claims moral authority, as did the framers who defended the document at the founding. That the document claims other than mere legal authority, and therefore possibly moral authority, is evident from hypocrisy only to suggest that they may have been guilty of injustice. The framers and the law could have aspired to simple justice.

Secondly, the Constitution presents itself in the preamble as enacted for the sake of ends, including “Justice,” that the document leaves undefined; these ends subsume the Constitution as a bundle of means. This basic understanding of the Constitution as means to ends that the law does not define is evident throughout The Federalist. Thus, Federalist Nos. 9 and 10 defend the entire constitutional scheme as

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**Footnotes:**

31Dred Scott, 60 U.S. (19 How.) at 405, 407.
32Id. at 405.
33See R. Flathman, Political Obligation 48–50 (1972) (the general rule that law should be obeyed cannot itself be a legal rule).
34See sources cited supra note 27.
35Designed to control the effects of faction and majority faction in particular, with “faction” defined as a group which acts in a manner “adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” When Federalist No. 40 defends the Philadelphia Convention’s circumvention of Congress’ charge merely to amend the Articles of Confederation, it cites “rules of construction dictated by plain reason, as well as founded on legal axioms” that, under the circumstances, require abandoning the Articles for a new constitution. As applied under the circumstances, these rules would have had the delegates consider “[w]hich was the more important . . . the happiness of the people . . . and an adequate government . . . or that an adequate government should be omitted, and the articles of confederation be preserved.”
36Federalist No. 45 flatly says that “no form of Government whatever, has any other value than as it may be fitted for the attainment of . . . the solid happiness of the people.” Federalist No. 51 says “[j]ustice is the end of government . . . the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.” As we have seen, Federalist No. 71 distinguishes the objective “interests” of the people from their “inclinations,” speaks of “the true means” of pursuing the former, and charges officials with the “duty” of that pursuit in opposition to “passion” and “transient impulse” of the public if need be. And Federalist No. 78 charges judges not only with correcting infractions of the Constitution in properly brought cases and controversies, but also with “mitigating the severity, and confining the operation” of “unjust and partial laws” that may happen to be within the government’s constitutional grant of powers.
37These passages presuppose standards of political morality to which government is responsible despite their nonreducibility to positive legal formulas. The liberal reading of the ninth amendment fits this reference...
of the law to higher authority and serves to remind us of it, as the Bork episode shows. For when positive law requires officials to honor rights beyond those specified in the positive law, it charges officials with prudent efforts to bring out the best in the legal and social material with which they have to work by preventing at least some forms of injustice beyond those against which the positive law directly provides. This serves to nudge the law toward simple justice. When the ninth amendment directs officials to honor unenumerated rights, it suggests the Constitution's openness to justice—the continuing, never-ending aspiration to justice of which Lincoln and Madison spoke. This is an aspiration that convention can neither satisfy nor contain.

This view of the ninth amendment preserves our moral authority as a people because it expresses a praiseworthy recognition of, and a praiseworthy response to, the facts of our common moral experience. The facts I refer to are: (1) the evident defeasibility of all concrete conceptions of general normative ideas like justice, along with the familiar "indeterminacy" in the application of general legal-moral standards in concrete cases; and (2) the ordinary assumption or sense that, although defeasible in formulation and controversial in application, some conceptions and decisions are morally superior to others. A view that can account for this mixed moral experience must recognize both elements of the mixture.

If these elements are ineluctable aspects of our moral experience, as they evidently are, a successful approach will give each its due. All such approaches will be moral realist in that they preserve the sense that moral terms like justice refer to real and partially accessible relationships, not just conventional ones or wholly inaccessible ones. These requirements favor that form of moral realism which conceives concrete conceptions of general moral standards as defeasible theories of the real relationships signified by general moral terms. Thus "justice" refers to justice, and our "justice" would be a conception or a theory of justice, a theory that could be improved. The task of moral philosophy on this view—the task, rather, of anyone interested in justice, whether politician, citizen of a regime that pretends to justice, philosopher, or anyone else—is to do what one can feasibly do to achieve progressively better versions of justice, in theory and in practice, or to support in one's own way a system that actively aspires to such achievement.

In this connection, the open-endedness of the ninth amendment warrants special emphasis and elaboration. By allowing that there can be actionable injustices beyond the positive law, the ninth amendment implies that the legal instruments for insuring justice can never be fully codified. The ninth amendment is thus express authorization for a power that Federalist No. 78 assumes already in the possession of our courts: the power to mitigate governmental injustices that occur within the scope of authorized governmental power. This is a power to restrict the use of unjust but not expressly proscribed means to authorized governmental ends. Thus, Storing could say that even "[w]ithout a bill of rights our courts would probably have developed a kind of common law of individual rights to help to test and limit governmental power."

Yet Ely and others err in thinking constitutional theory should look for ways to close the ninth amendment and other open-ended provisions by identifying "sources" to which judges and others can go to locate rights for application in concrete cases. This quest for sources is an error when open-endedness is part of the very logic of a provision, as it is in the case of the ninth amendment. Even if we were to amend the Constitution to incorporate by reference all state constitutional rights, common law rights, rights enumerated in treaties and other international conventions, implied structure-based rights, rights rooted in tradition and conventional morality, rights derived from sacred texts and revealed by divine dispensation, and all other positive and conventional rights in the broadest sense of these terms, the ninth amendment would still be meaningful. It would still make sense to say that there are rights beyond those enumerated and incorporated by reference. Since one could still question the justice of the system and the adequacy of recognized rights, one could hold the government obligated to avoid unanticipated injustices.

42Id.

43Storing added:

Might the courts thus have been compelled to confront the basic questions that "substantive due process," "substantive equal protection," "clear and present danger," etc., have permitted them to conceal, even from themselves? Is it possible that without a bill of rights we might suffer less of that ignoble battering between absolutistic positivism and flaccid historicism that characterizes our constitutional law today?


41J. Ely, supra note 15, at 32, 22-41.
Because of the elusive nature of justice and the defeasible character of all conceptions of justice, the system's conception of justice, however dense, would fall short of the system's expressed aim of simple justice.

A similar logic is found in the meaningful forms of judicial review under current fifth and fourteenth amendment doctrine. By the meaningful forms of review I mean those that require "intermediate" to "strict scrutiny" of legislation. These meaningful forms are to be opposed to "minimal" or "relaxed scrutiny" because the "mere rationality" required in matters calling for relaxed scrutiny is a test with no critical bite at all, and a test that is no real test is fraudulent.45

Applying some meaningful test of reasonableness would find judges and others conducting case-by-case review of legislation in changing circumstances. For the reasonableness of measures is a contextual matter. Because we cannot control the future, we cannot know in advance of particular circumstances where the harm visited by government on some individual or minority would be justified by a credible view of the common good within the system's capacities.45 Thus, a reasonableness test is incorrigibly open-ended. And the right to be harmed only by governmental acts that are reasonable by some honest test is the least of the protections we could expect under the ninth amendment.

I am not suggesting that it would be a mistake to create a common law list of specific rights under the ninth amendment—Griswold's right to privacy, for example, and the acknowledged substantive due process rights. It is the quest for sources and the limitation of rights to those that can take their place on such lists that offends what seems the best interpretation of both the ninth amendment and the Constitution as a whole. To reiterate, the best interpretation would have to conform to the two undeniable facts of our common moral experience: the defeasibility of our conceptions of justice and the sense that we can distinguish better from worse conceptions. I contend that a successful explanation of these facts must view our conceptions as mere versions of justice, a real relationship which we know through progressively better theories. Other approaches are untenable, either simply untenable, or untenable with us, or both. Thus, to deny the presupposition of moral truth behind our common sense of better and worse answers in moral controversies is to lapse ultimately into a profound philosophical skepticism that is unable to sustain itself, for the thoroughgoing skeptic cannot defend the prescription implicit in the very enunciation of the skeptical thesis itself; i.e., that we ought to believe it. And denying the defeasibility of our moral conceptions in the face of their manifest defeasibility signals qualities ranging from a cowardly unwillingness to face the evidence, to jingoism, willful blindness, and even repressive zealotry—vices all, with us at least, and perhaps simply.

So we could have a common law list of rights—an "honor roll" of sorts—as well as an active reasonableness test under the ninth amendment. But a difference would remain between constitutionally expressed rights like those of the first amendment and a declared ninth amendment right. The difference would reside in the added force of positive constitutional status behind the expressed constitutional right. Improvement in our understanding of justice can change old views of what rights we ought to honor as well as old conceptions of rights the positive law requires us to honor. Thus, our best thinking on the subject at a given point in time can persuade us that we ought to recognize a right to privacy, a liberty to contract, and a freedom of speech. Later we might decide we were mistaken and that the mistake was grave enough to outweigh the real values associated with honoring precedent (stability and equality of treatment, for example). We then have an argument for withdrawing recognition of these rights. But expressed constitutional provision supports one of these rights, and that fact counts as an argument in behalf of retaining that right, an argument that is not available for the other two. The positive law would thus require us to honor some conception of free speech, however minimal, even if we were convinced it was a mistake to honor any. Perhaps we might decide to put free speech "in the course of ultimate extinction," as Lincoln proposed for the purely positive right to property in human beings. But it would remain a positive right for a time and derive some support from the values that we have reason to associate with honoring the positive law generally. The same could not be said for the rights to privacy and contract. They would owe their status to the force of the arguments that directly support them. Of course, these arguments would have to consider the costs of disestablishing mistaken rights, costs like weakening or destroying the public and private institutions that support

45S. Macedo, supra note 13, at 59-68. "[C]onstitutionalism's core commitment to genuine reasonableness is threatened by the ersatz rationality standard." Id. at 61.

46For a defense of this interpretation of meaningful rationality, see S. Barber, supra note 13, at 126-31.

For the reduction of conventionalism to skepticism, see Moore, Natural Law Theory, supra note 13, at 291-301, 309-13.
the rights or depend upon them, a calculation Bork seemed willing to make before disestablishing rights to privacy.47

A moral realist approach to the ninth amendment therefore does risk what Justice Black decried as an accordion-like "power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'"48 One must concede Black's point notwithstanding the problems he had in remaining faithful to his professed positivism.49 But I would respond that it makes no sense to defend the positive law by putting its professed aims (justice, for example) in tell-tale quotation marks, thus relegating it to the rationally defenseless, if not the fraudulent. And I would add that an open-ended ninth amendment as here conceived is firmly linked to values that are in turn linked to some of the rights we now honor in the positive law.

These values include first and foremost the substantive value of truth—moral/scientific truth as a value all rational creatures can in principle share. They also include progress toward truth, which in turn requires self-critical striving and reasoned openness to better arguments regardless of the personalities, social status, and other personal qualities of those who advance those arguments. I need not elaborate the general connection between these values and such established and proposed rights as the freedoms of conscience and inquiry; the freedoms of speech, press, and association; the freedoms from racial, sexual, and ethnic discrimination; and the opportunities for the individual privacy and material independence needed to form fresh arguments that can either reaffirm established opinions or change them for the better.50

IV. Conclusion: The Ninth Amendment and Other Constitutional Principles

Other objections remain, for many join Justice Black and Judge Bork in regarding an open-ended ninth amendment as an instrument of judicial supremacy in derogation of democracy, the authority of the framers, and the rule of law. These objections underscore the fact that there are different conceptions of "democracy," "framers' intent," and other general normative ideas. For friends of the ninth amendment can argue, as I have argued here, that the nation should interpret the framers as having intended a continuing effort to bring our democracy and law as close to justice as we can, thus doing all that we can to vindicate the claims that our democracy and our law have always made for themselves. Opponents of the ninth amendment are free to assert their versions of the general normative ideas of democracy, framers' intent, and the rule of law—versions that call for ignoring the ninth amendment. But we have a right to know more than their conclusions about what we all should approve. We need to know if critics of the ninth amendment have reasons why the nation should prefer their particular versions of democracy and the rest. Those who think they can answer that question abandon essential elements of their argument against honoring the ninth amendment. They implicitly concede the Constitution's openness to standards of political morality beyond the positive law. They act as if they believe that reason compels us to incorporate into our understanding of the Constitution their versions of democracy, framers' intent, and the rule of law. They believe this despite the fact that the constitutional document mentions nothing about democracy, framers' intent, and the rule of law, much less

48 Adamson v. California, 332 U.S. 46, 69 (1947) (Black, J. dissenting) (footnotes omitted). One might minimize the accordion effect by granting overriding importance to the related values of consistency, coherence, and equality of treatment and marshaling these values in behalf of a strong commitment to precedent. Cf. Dworkin, supra note 20, at 41. I reject this general view on the argument that the ninth amendment and the Constitution as a whole imply that the community can do injustice in ways beyond contradicting itself. See supra text accompanying notes 13–15. I defend a substantive theory of constitutional aspirations and argue against a conventionalist (though not a prudential) commitment to precedent in S. Barber, supra note 13, at 4–6, 72–90, 105–15, 119–22, 128–31, 218–19.
49 See, e.g., J. Ely, supra note 15, at 38–39. (Black vitiated his positivism by ignoring the plain language of the ninth amendment and its clear implications for the breadth of judicial power).
50 These rights are all exemptions from governmental power. Whether the Constitution is open to welfare rights which judges can enforce is of course most problematic. But there is no problem in principle with affirmative rights to governmental services that courts can declare and exhort officials to, even where there is no power of judicial enforcement. The Federalist consistently construes the powers granted republican governments in terms of a duty to achieve the ends that moved the sovereign people to grant powers in the first place. Welfare rights are therefore a possibility. The question would turn on several considerations: a substantive theory of the ends of government, whether serving those ends sometimes could entail legislative entitlements, and whether courts could exhort a reluctant community to its constitutional aspirations. Despite judge-taking doctrine regarding the case and controversy requirement, Marshall's opinion in Marbury v. Madison could provide precedent for a judicial power to exhort officials to duties whose performance judges cannot enforce. 5 U.S. (1 Cranch) 137 (1803). See also S. Barber, supra note 13, at 71–83, 129–31, 201–03, 212–13.
specific versions of these ideas. They also depreciate what the document does say about justice, equality, due process, and unenumerated rights.

If critics of the ninth amendment should stick by their basic position regarding the nation’s alleged aspiration to simple justice, then they would have to say we cannot have a reason for preferring particular versions of other general norms, like democracy and the rest. They might then contend that we must settle for established beliefs about these things. And on our noting that the very debate among us indicates disagreements in crucial areas, if not the most basic ones, they might believe we have no choice but to postulate answers and proceed from there. Just how we would distinguish postulated answers of this sort from the imposition of some tyranny is a question we would have to address, and soon. For it would take an enormous amount of political power and good fortune to transform a postulated answer into a political consensus. Even then, the conventionalists would leave us without real reasons for preferring the order and stability gained through postulated solutions to goods of the kind to which disorder gives scope: the heroic achievement of successfully postulating one’s own solution, for example.

In any case, the fact is plain enough: all participants in the current debate either pursue what they understand to be an arbitrary position or they presuppose that reason is capable of finding better and worse answers to normative questions generally. Since they are hardly likely to argue for an admittedly arbitrary position, participants in the debate will tend to proceed within the ordinary presuppositions which make the debate possible. Bork is a case in point. For all his heroic professions of skepticism, Bork proceeds as if social order is objectively good for everyone who can give the matter adequate thought and therefore a suitable foundation for collective action.51 Bork exempts the value of social order from the famous equal gratification principle which he applies to merely conventional goods.52 And he neither speaks nor acts as if this exemption is either an arbitrary or a tyrannical one. Thus, he enters into a public debate as a thinker, not just an official, with arguments, not just edicts, presumably for the sake of advancing us all toward truths about the world, truths with implications for our conduct. By entering with arguments instead of edicts he enters with submissions. He submits his propositions to the reasoned acceptance of others, and therefore potentially to

31 See Address by R. Bork, supra note 8, at 4.
32 See Bork, supra note 9, at 2-4, 10.

the reasoned rejection of others, since there can be no reasoned acceptance without the possibility of rejection. Entering with edicts would have disqualified him for the debate. Willful assertions would not only have departed from social expectations regarding conduct in debate, they would have signaled attitudes that offend on moral grounds. Aside from the content of his theory, Bork’s conduct as a theorist shows how unlikely it is that anyone can successfully deny the presuppositions of our common moral experience regarding defensible conceptions of an elusive moral reality.

Those who oppose honoring the ninth amendment on grounds of democracy and the rest must therefore answer the following question. Why should we degrade democracy, the framers, and the rule of law by conceiving these authorities in ways that deny their claim to justice—ways that mark them as unworthy of authority?

Often accompanying arguments from democracy is an objection to honoring open-ended provisions like the ninth amendment from a fear of judicial supremacy, usually coupled with a populist abhorrence of “Platonic guardians.” I conclude with a brief comment on these objections.

To say that judges should perform their duties consistently with the ninth amendment does not imply that courts should monopolize the function of constitutional interpretation. If anything, it suggests the contrary. For by signaling responsibilities beyond conventional standards, the ninth amendment shifts the focus of our concerns away from all concrete versions of justice and other norms to the real things and relationships of which the versions are versions. This favors a multiplicity of interpreters as essential to the process of seeking better versions. An arrangement that discourages a multiplicity of interpreters risks a shift in attention away from the true source of authority to the instruments for realizing it. Severed from a concern for justice, courts and other institutions lose their self-critical capacities and degenerate into willfulness, stupidity, and (if anyone is left to notice, judicial monopoly resulting as it has more from the acquiescence of others than from judicial usurpation) illegitimacy. Thus, a realist argument is available for the view of Jefferson, Lincoln, and even New Right constitutionalists like Edwin Meese that officials ought to look for ways to respect judicial power in
specific cases without abdicating their higher responsibility to the Constitution and its aims.  

As for the role of philosophy in mitigating unanticipated injustices to individuals and minorities, much depends on the conception of philosophy we employ. Philosophy as a set of discrete teachings to be consulted not as heuristics but for uncritical application in concrete cases—philosophy as ideology—is distinguishable in no way that is relevant here from conventional answers regarding moral/scientific truth. If all conceptions of justice are defeasible, so are the conceptions of philosophers. Because open-endedness is basic to its logic, the ninth amendment commits us more to a process or a method than any specific substantive teaching except one: that moral/scientific knowledge is better than mere opinion, that progress toward moral/scientific knowledge is objectively good, that progress toward moral/scientific knowledge is presumptively possible, and that the touchstone of truth is reality or nature, not social convention and its spokespersons, be they judges, professional philosophers, or what have you.

This process or method is nothing other than giving and exchanging reasons in an open-minded and public-spirited way about what to believe and how to live. Philosophy as a method is the most careful and ambitious form of this activity. Aside from what one might say about the teachings of some philosophers (conventionalism comes readily to mind) philosophy as a method is hardly alien to common sense. With us at least, if not simply, common sense presupposes philosophy as a process because common sense distinguishes truth from opinion, values truth above opinion, and values self-critical and public-spirited striving for truth above willful and opinionated self-assertion. Deny philosophy and its predicate—the possibility of progress toward the truth, in this case moral and political truth—and one must eventually concede the conventionalist view that nothing succeeds like success, that there is no real difference between growth and change, and that mere words like “democracy” will mean whatever those with sufficient power want them to mean. If there is any support for these conventionalist versions of the real truth, it can hardly be found in the popular mind for which the conventionalist position in constitutional theory currently purports to speak.


54 Ely had philosophy as ideology in mind when he caricatured reliance on philosophy with the example: "We like Rawls, you like Nozick. We win, 6–3. Statute invalidated." J. Ely, supra note 15, at 58.

2. A Moral Realist Defense of Constitutional Democracy*

Michael W. McConnell

Constitutional democracy is that form of government in which representative institutions, acting through constitutionally-prescribed procedures, have the authority to make legally-binding decisions about some (though not all) matters. The system is “democratic” because representative institutions are ultimately majoritarian. It is “constitutional” because it is constituted by some source of enacted fundamental law that defines and limits the authority of the governing institutions, reserving some matters to the private sphere. Congress may regulate commerce, but it may not establish a national church. Within the scope of authority defined by the Constitution, the decisions of representative institutions must be enforced by executive officers and judges, whether or not they agree with the substance of the decisions. The Constitution’s own term for “constitutional democracy” is the “Republican Form of Government.”

The doctrine of “moral realism,” associated with the much older conception of natural right, holds that there is an objective standard of right against which we can judge the decisions made by representative institutions. A decision reached by the legislature, within the scope of its constitutionally-delegated authority and through constitutionally-prescribed procedures, can nonetheless be said to be wrong. Democratic legitimacy is no guarantee of right results.

*Reprinted, by permission, from 64 Chi.-Kent L Rev. 89 (1988).
1U.S. Const. art. I, § 8, cl. 3.
2Id. at amend. 1.
3Id. at art. IV, § 4.
The question raised by Professor Sotirios Barber’s essay is whether a belief in natural right is compatible with constitutional democracy. He contends, in effect, that it is not. He argues that moral realism compels the conclusion that judges and other officials are entitled (under the ninth amendment or other “open-ended” provisions of the Constitution) to overturn the decisions of representative institutions on the basis of their own understanding of natural right, even if that understanding has no basis in the text, structure, or history of the Constitution, the sense of the community, the precedents of the courts, or other sources of positive law. Indeed, he takes the position that to confine the authority of judges to any set of “sources” whatsoever is “an error.” Any particular conception of natural right, including the Constitution’s, will inevitably fall short of natural right itself: all are “de defeasible” and “fall short of the . . . aim of simple justice.” Therefore, Professor Barber concludes, those who believe in natural right must oppose any attempt to use the Constitution as the sole basis for limits on governmental power. A moral realist must believe in judicially-enforceable “unenumerated rights”—rights that have their source beyond the Constitution, in natural right itself.

I do not dispute Professor Barber’s belief in natural right. I am, under his definition, a moral realist: one who believes in “rights as in some sense real or natural, not just conventional; rights as connected in some way with what our most reflective and dedicated thinking proposes about the truth concerning simple justice or human nature.” But I do not agree that a belief in natural right compels a belief in judicially-enforceable unenumerated rights. Professor Barber’s fundamental fallacy is to confuse the willingness to recognize the authority of representative bodies with the belief that “in principle the community can do no wrong.” Proponents of constitutional democracy do not accede to the decisions of representative institutions because they are always right. We do so because the republican form of government seems more likely than the alternatives (including rule by judges) to reach right results over time in a wide range of cases. We are willing to bear the risk that the community will sometimes be wrong because the risks posed by the alternatives are worse.

Professor Barber directs his argument almost solely to the importance of natural rights, while giving little attention to the institutional question of how they can be identified and implemented. This is a peculiar and dangerous oversight. It is peculiar because the central questions addressed by our Constitution have to do with the allocation of power. It is dangerous because the power to identify and implement natural rights, independent of constitutional principles or majoritarian sanction, is an awesome power. Constitutional democracy is based in no small part on the insistence that no one can be trusted with unrestrained power. Professor Barber’s position is that government officials who assert power in the name of natural right are answerable to no principle of positive law, and that judges who assert such power are answerable neither to any principle of positive law, nor to any other branch of government, nor to the electorate.

There may be arguments for reading the ninth amendment expansively, but moral realism does not compel this interpretation. Rather, in the last section of this essay I will present reasons why moral realists, in particular, might prefer constitutional democracy to Professor Barber’s alternative.

I.

Most modern judges and commentators perceive some degree of “open-endedness” in the Constitution, for various reasons and with various justifications, some stronger than others. Very few, and certainly not Professor Barber’s favorite target, Robert Bork, would limit constitutional interpretation to the narrow applications specifically contemplated by the framers. The discernment of governing principles in the Constitution and their application to new and sometimes unforeseen circumstances requires judgment and discretion. The most we can hope
for is that judges will be steeped in the philosophy of the Constitution, and will interpret it in a way that is true to the vision of the framers and ratifiers.

Professor Barber distinguishes himself by advocating open-endedness in itself, an open-endedness freed not only from the specific contemplations of the framers but from the very philosophy of the Constitution. He insists on "the elusiveness of justice and the defeasible character of all conceptions of justice." This necessarily includes the conception of justice reflected in the Constitution. Any constraint on the judge's ultimate freedom to do justice is necessarily inconsistent with moral realism, or so he believes. His position may thus be described as anti-constitutional: anti-constitutional because it sets up an authority (the judge's own view of natural right) as superior, as a matter of law, to the Constitution.15

Of course Professor Barber rejects the standard interpretivist position, represented by Judge Bork among others. The interpretivist view is that judges must look to the text, structure, history, and purposes of the Constitution to determine the principles to apply to the circumstances of today. The basis for this view is that all legitimate authority, including that of judges, stems initially from the consent of the governed. Many observers believe this view is too narrow, though often their criticism is directed against a mere caricature rather than against interpretivism at its best.16 It is important to note that Professor Barber does not reject interpretivism on the ground that we cannot reliably discern the original meaning, or that it is difficult to know how to apply original meaning to modern circumstances. His objection is much more fundamental: he rejects the very notion that the constitutive principles of government should be decided by the people. The "assertion of community power to define the most basic standards of right and wrong," he says, "would conflict with the presuppositions of our ordinary moral experience."17 To anchor positive law in the will of the people—whether enacted law, tradition, or community moral consensus—is to commit the sin of "constitutionalism."

Professor Barber's argument thus bears little resemblance to the current debate over interpretivism; he denounces both sides. Ronald Dworkin he dismisses as a "deep conventionalist."18 Laurence Tribe is a (mere?) "conventionalist."19 He has hopes for Michael Perry, but, alas, Perry's theory is "vitiated by [his] ultimate embrace of a conventionalist metaphysics."20 So is Rogers Smith's.21 John Hart Ely is "correct" in some respects, but "errs" when he attempts to provide some theory to guide judges in the legitimate exercise of authority under the open-ended provisions of the Constitution.22 Nor do judges escape the indictment. Professor Barber criticizes Justice Black for his "professed positivism."23 He does not mention Justice Brennan, but it is easy to guess what he would have to say about a Justice who believes that "[t]he act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought."24

Professor Barber's attack thus goes far beyond the constitutional theory of Robert Bork. He rejects any attempt to cabin judicial discretion admitting that it embodies substantive value choices." Id. at 16. In so doing, he embraced the central tenet of interpretivism, properly understood: that the Constitution embodies certain unchanging principles that judges have an obligation to enforce, whatever their personal opinions on those principles may be.

1Barber, supra note 4, at 75; see also id. at 69 (criticizing Bork's belief that "the Constitution limits the majority's agent-government solely because majorities at the founding and at later moments of constitutional amendment willed it so.")

16Id. at 72 n.19.

17Id.

18Id. at 76 n.27.

19Id. at 70 n.13.

20Id. at 80.

21Id. at 83.

through a "strong commitment to precedent." He rejects Justice Brennan's position that some provisions of the Constitution look to an evolving community consensus, or to "rights embedded deeply in a community's moral tradition." He even rejects the expansive variation of this view that would "yield to judges the power to anticipate changes in community morality," even though, to a skeptic, this looks very much like the power to do anything at all. These positions, he says, "share a conventionalist view of constitutional rights because they agree that rights have no source or weight beyond social convention, established or emerging." They are, therefore, no more than a "liberalized form of Bork's basic view."  

Indeed, since moral realism implies loyalty to natural right as such, Professor Barber must set his face against any and all limits on judicial discretion, beyond the judge's own conscience. He cannot imagine a constitution, even in theory, that should be permitted to constrain judicial decision making. It is not just our Constitution that is deficient, but the very idea of a constitution.

Even if we were to amend the Constitution to incorporate by reference all state constitutional rights, common law rights, rights enumerated in treaties and other international conventions, implied structure-based rights, rights rooted in tradition and conventional morality, rights derived from sacred texts and revealed by divine dispensation, and all other positive and conventional rights in the broadest sense of these terms... [i]t would still make sense to say that there are rights beyond those enumerated and incorporated by reference... Because of the elusive nature of justice and the defeasible character of all conceptions of justice, the system's conception of justice, however dense, would fall short of the system's expressed aim of simple justice.  

The judge's own opinion of what is right: that is the only standard Professor Barber can support. Anything else would "fall short of the system's expressed aim of simple justice."  

Professor Barber does not defend his position on the basis of the Constitution's language or history. The best he can offer is that "[t]he language and history of the ninth amendment certainly admit, though they may not compel," his interpretation. He thus leaves open the possibility that the ninth amendment means precisely what it says, and no more. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." In other words: the Bill of Rights, indeed the entire Constitution, is not the only source of individual rights. Common law, state statutes, federal statutes, state constitutions, administrative regulations, municipal ordinances, contracts, familial relationships and other sources all are legitimate bases for positive law rights under our system. The framers thought it useful to express in no uncertain terms that the adoption of a Bill of Rights would not, by negative implication, abolish these rights. Nothing in the language or history of the ninth amendment suggests that the rationization of the judge is one of the sources of rights recognizable by positive law. Nor has such a reading ever been the basis of the holding of a majority opinion in the Supreme Court.

Professor Barber's apparent indifference to language, history, and longstanding interpretation makes sense given his philosophy of judicial authority. By Professor Barber's lights, these sources cannot be determinative, for they are mere positive law. The most we could prove from them is that the American people never intended to delegate authority to judges to countermand the decisions of representative institutions on the

25Id. at 76. For a historical argument along similar lines, see Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987). Her position, slightly different from Professor Barber's, is that the founders understood and intended the Constitution to be only one of several sources of fundamental law. It is a tribute to the integrity of Professor Sherry's scholarship that she quotes substantial evidence against her own position, while providing ingenious readings to account for it. While this is not the occasion for a full treatment of the historical materials, it is sufficiently relevant to Professor Barber's thesis to quote some of this evidence—statements made at the Constitutional Convention drawing a sharp distinction between constitutional law, which is enforceable by courts, and natural law and justice, which have only normative force. See id. at 1159 (James Wilson stated that "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."); id. at 1160 n.142 (George Mason stated that the judges "could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course."). See also infra note 51 (quoting statement by James Madison to similar effect).

31U.S. Const. amend. IX.
basis of their own understanding of moral reality. This would not tell us whether, if the public had proper "normative" instincts and could give the matter "full and fair consideration," they would have written a new and improved ninth amendment.

In any event, Professor Barber's contribution to the debate is theoretical rather than textual or historical. He believes he can refute the opposition on the basis of first principles. It is on that level that I therefore will respond. I will leave formulation of a positive theory of the ninth amendment to another occasion.

Professor Barber's attempted refutation of traditional constitutional jurisprudence (which he chooses to call "New Right constitutionalism") is based on a simple misunderstanding. Here is his argument:

If the public should accept Bork's constitutionalism it has to be prepared to claim that, in principle, it can do no wrong, except (for some reason) behave inconsistently with principles of its own making. Such is the upshot of Bork's view that the majority's own will provides the sole legitimate standards for limiting majority will.

Bork's constitutionalism is therefore wrong — either simply wrong or wrong with us, wrong in this community. Should spokespersons for this community seriously assert that in principle the community can do no wrong, this community would adjudge them either willful, stupid, shameless, or blasphemous.

"Bork's constitutionalism," however, does not depend on the transparently silly assertion that the community can do no wrong. It depends on the quite different proposition that within the scope of authority delegated to representative institutions by the state and federal constitutions, no other institution has a better claim to rule. Unfortunately, our choice is not between natural right and majoritarian rule. It is between one set of human institutions and another, none of which is infallible. A belief in natural right does not tell us what decision-making institution we should prefer.

Under Professor Barber's formulation, judges would be entitled to enforce principles that the community never thought about, or was divided about, or silently rejected. The judge could even enforce principles the community expressly attempted to foreclose through constitutional language. It would be "willful, stupid, shameless, or blasphemous" to assume that every provision of the Constitution is right. But is it so stupid to say that every provision of the Constitution is binding on judges, as well as legislatures, until it is amended?

A judge might conclude that equal representation of jurisdictions of unequal population violates the principle of one person, one vote. What is to keep such a judge from holding invalid the equal representation of the fifty states in the Senate? Why should a judge be bound by the constitutional features of article I, section 3? Why should a judge be deterred by article V's provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate," even by constitutional amendment? These provisions are mere positive law. "In principle," mustn't we acknowledge that the community may have erred?

Professor Barber never tells us why judges should be the officials charged with improving upon the Constitution. Nothing in his theory is distinctive to judges. Indeed, he argues that a "multiplicity of interpreters" is "essential" to the moral realist vision. Presumably, all officials (all citizens?) are required, under the moral realist teaching, to strive for greater justice to the extent of their ability, without regard to limits on authority deriving from mere positive law. If the Army Chief of Staff concludes that the community has fallen short of the ideal of simple justice, he must send in the tanks and right the wrong. We may disagree with the General on the merits, but in principle, Professor Barber leaves us with no basis to object to the legitimacy of his action.

When judges go beyond the Constitution, they act with no more legitimacy than this hypothetical General. Part of natural right — the part Professor Barber leaves out — is that no one may act beyond the legitimate scope of his authority. Under our system, all governmental authority derives initially from the consent of the governed, through the Constitution. When the people consented to the Constitution, they did so on the supposition that the principles it embodies would be the supreme law of the land. There are, admittedly, wide expanses of judicial discretion under the Constitution. But a judge who deliberately imposes

34 Barber, supra note 4, at 74.
35 Id. at 67.
36 Id. at 74-75 (emphasis in original).
on the community a principle that he knows the community has never accepted commits the judicial equivalent of a coup d’etat.

III.

Professor Barber selects his rhetorical targets shrewdly. He does not attack John Marshall; he attacks Robert Bork. He does not criticize traditional constitutional jurisprudence; he criticizes “modernism” and “New Right constitutionalism.” He cloaks his radical anti-constitutionalism in the comforting robes of tradition. He describes his view of the ninth amendment, which was unheard-of for the first 150 years and has yet to be squarely the basis of any Supreme Court majority opinion, as “the traditional constitutionalism of the ninth amendment.” He invokes the memory of Lincoln, though taking almost precisely the opposite position on constitutionalism from that Lincoln defended. Professor Barber’s real target is not modernism, but the constitutionalism of Marbury v. Madison and the Federalist Papers.

In its simplest terms, constitutionalism is the doctrine that in deciding cases and controversies, courts are bound by the substantive principles of the Constitution, just as other officials are bound by the Constitution in the performance of their responsibilities. The Constitution is, in Chief Justice Marshall’s words, “paramount law.” If other sources of law inferior to the Constitution are in conflict with the Constitution, the Constitution is given precedence. As Marshall put the point in Marbury:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . The principles, therefore, so established, are deemed fundamental . . . [and] are designed to be permanent. Judges are obligated to enforce the Constitution, not because any individual provision comports with natural right, but because it is the “duty of

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40 Id. at 67.
41 Id. at 72.
42 Id. at 68-69.
43 5 U.S. (1 Cranch) 137 (1803).
44 Id. at 177.
45 Id. at 176.
46 Id. at 177.
47 Id. at 179-80 (emphasis in original).
49 Barber, supra note 4, at 69.
with a belief in natural right? By no means. A moral realist can embrace the theory of natural right, and still believe in constitutional democracy, provided he recognizes the distinction between positive law and natural right. Positive law is the law of the legal system; it is law the judges are bound to enforce. Natural right is a standard of judgment against which we can determine whether positive law is good or bad, just or unjust. The founders of the United States were believers in natural right; this much is unmistakable from their Declaration: "We hold these truths to be self-evident . . ."50 The Constitution was framed in accordance with the people's understanding of natural right; we know this from the preamble's statement of intentions. But the Constitution is not merely a proclamation of natural right. It is positive law. It is persuasive to the extent it accords with natural right, and that is much of its appeal, but it is authoritative because it was ratified by the people.51 Like any human endeavor, the Constitution did things it ought not to have done and left undone things it ought to have done. Among other examples that could be named, it provided protections for the institution of human slavery in the South,52 and it failed to provide protection for basic human rights against state governments.53

What is the constitutionalist's response to the disjunction between the commands of the Constitution and those of natural right? The most profound answer to this urgent question was provided by Abraham Lincoln. The following is his response to the positive law argument that, since the founders had not abolished slavery, this meant that the Declaration's statement of natural law ("all men are created equal") must not have included blacks:

[The authors of the Declaration] did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the

50The Declaration of Independence para. 2 (U.S. 1776).
51Professor Sherry has described the development of the framers' understanding that the Constitution is enforceable as positive law because it was adopted by the people. Sherry, supra note 32, at 1146–55. She calls attention to a speech by Madison contrasting a "constitution established by the people themselves," with a "league or treaty," like the Articles of Confederation, "founded on the Legislatures only." "[A] law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or pernicious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void." Id. at 1153–54.
52U.S. Const. art. 1, § 9, cl. 1 (protection of slave trade until 1808); id. at art. IV, § 2, cl. 3 (fugitive slave clause).

right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated . . .54

Here is the test case. Natural law declares that all men are created equal; the Constitution permits slavery. Did Lincoln contend that judges should disregard positive law and declare slavery illegal on the basis of natural law? Certainly not. He urged, instead, that the Declaration's statement of natural law should serve as a "maxim for free society," a guide to future decision-making by the people through their representative institutions, and eventually to correction of the Constitution through constitutional amendment. Natural law declares the "right"; enforcement through positive law will follow "as fast as circumstances should permit." To say that there are principles of natural right is not to say that judges have the immediate power to enforce them.

A defender of constitutional democracy can therefore accept the "aspirational" character of natural law, and even of the Constitution, without acceding to the theory of open-ended judicial review.55 The Constitution is chock-full of aspirations. We usually call them, more mundanely, constitutional principles. Moreover, many of the aspirations of our political system in the field of civil rights, among others, have been realized through the actions of representative institutions. In such instances—the Civil Rights Act of 1964 and the Voting Rights Act of 1965 come to mind—the resulting positive law has far greater public legitimacy than if the same results had been obtained on the cheap, through judicial fiat. Finally, the constitutional amendment process exists as a continuing reminder that changes in our conceptions of natural right can be incorporated into fundamental law without either revolution or breach of democratic principle. The difficulty and relative rarity of constitutional amendments may cause us to forget that all the most prominent constitutional provisions protecting natural rights are products of constitutional amendment: the Bill of Rights and the Civil War amendments. Traditional constitutionalism is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the
text, structure, and purposes of the Constitution. Open-ended judicial review does not give greater protection to natural rights—it simply substitutes the judge's understanding of natural rights for the Constitution's.

Professor Barber's position more closely resembles Chief Justice Taney's than it does Lincoln's. In *Dred Scott v. Sandford*, the Supreme Court confronted an act of Congress that abolished slavery in the territories. Article IV of the Constitution vests in Congress the power to adopt "all needful Rules and Regulations" for the governance of the territories, and nothing in the language or history suggests that decisions about slavery are an exception. Under traditional canons of constitutional interpretation, the Court should have given effect to the Missouri Compromise and declared Dred Scott a free man. Chief Justice Taney, however, apparently concluding that the prohibition of slavery is in violation of natural right, invoked a constitutional principle that was as unprecedented at that time as it is notorious today: substantive due process. *Dred Scott* was the first Supreme Court decision to take the view that a statute can be unconstitutional because it violates unenumerated rights: "An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory . . . could hardly be dignified with the name of due process of law." Chief Justice Taney was not clever enough to anticipate the open-ended construction of the ninth amendment now urged. It would have served his purposes well. Slaveholding, he could have said, is a right "retained by the people" and thus protected against hostile legislation.

One presumes that Professor Barber disagrees with the result in *Dred Scott*. But can he withhold his approval of the underlying jurisprudential premise? The Missouri Compromise is mere positive law; the right to own other human beings is protected by the judge's view of natural law; the Constitution contains provisions that invite judges to enforce simple justice in lieu of majoritarian preferences. Sure, Taney got it wrong, but isn't that the risk we have to take?

It was Benjamin Curtis, dissenting in *Dred Scott*, not Robert Bork, who penned the following prescient commentary on the theory of unenumerated rights:

[When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.]

### IV.

Professor Barber is not oblivious to the objection to open-ended judicial review based on what he calls "a fear of judicial supremacy, usually coupled with a populist abhorrence of 'Platonic guardians.'" His response is to deny that "courts should monopolize the function of constitutional interpretation." If anything," he says, the moral realist position "suggests the contrary." It favors "a multiplicity of interpreters as essential to the process of seeking better versions [of justice]." Even courts can "lose their self-critical capacities and degenerate into willfulness, stupidity, and . . . illegitimacy." So seriously does Professor Barber take this "multiplicity of interpreters" view that he even has a good word to say for Attorney General Meese, who has recently propounded it.

Without in any way disparaging the Meese-Barber position, with which I agree, it is fair to ask whether this is an adequate response to the problem of judicial supremacy. Once we concede that judges have no monopoly on wisdom about natural right—that sometimes representa-
tive institutions get it right and judges get it wrong—what is the basis for Professor Barber's prescription of judicial enforcement of simple justice? What happens when the Congress concludes (rightly) that slavery is wrong and should be banned from the territories, and the judges in charge conclude (wrongly) that slavery is an unenumerated right protected by the open-ended provisions of the Constitution? Does Professor Barber mean to suggest (as Lincoln and Meese were careful not to do) that other officials have the authority to defy a Supreme Court judgment? If so, his position ceases to be anti-democratic and becomes hyper-democratic, since it would free the political branches to disregard constitutional limitations (mere positive law) that they consider unjust.

The "multiplicity of interpreters" boils down to this: one interpreter—the Court—always wins. Whenever the Court's vision of natural justice is violated by the action or inaction of other branches of government, the Court will issue a binding judgment, based on its own lights, and it does not matter how persuasive the contrary opinion of the other "interpreters" may be. The Court's judgment is final. The other interpreters are relegated to what Lincoln called "political resistance"—the laborious process of changing the law.

To be sure, the other branches are able to interpret the Constitution in the course of performing their ordinary duties. Congress can decline to pass a bill it considers unconstitutional (or contrary to natural law), and the President can veto it. But the invocation of the Constitution in these contexts adds nothing to the authority of either Congress or the President. Congress can decline to pass a bill for any reason or no reason at all, and the President is equally free to veto.66 I certainly hope that Congress and the President exercise their powers in accordance with what the Constitution and natural right require, but this limited power of "interpretation" does not in any way diminish the power of courts. Whatever its other merits, the "multiplicity of interpreters" approach is not responsive to the danger of judicial supremacy created by the open-ended theory of judicial review.

Some might answer that judicial supremacy is not a prospect to be feared, since under Professor Barber's theory courts will wield authority only to protect rights. But as Dred Scott illustrates, it is mistaken to view the expansion of "rights" as necessarily good or progressive. If rights are wrongly conceived, they can be as inimical to justice, and even to liberty, as any recognition of state power. Enforcement of the unenumerated right to own slaves precludes emancipation. Enforcement of the unenumerated right of freedom of contract precludes minimum wage laws. Enforcement of the unenumerated right to abort overrides the right to life. Enforcement of the right of voluntary associations to control their own membership makes it more difficult for the community to eradicate race and sex discrimination. Enforcement of children's rights against parental control conflicts with parents' rights to control the family. The point is not that any or all of these rights are wrongful, but that the recognition of unenumerated rights is likely to conflict with plausible assertions of right on the other side.

The problem becomes still more acute if we recognize "affirmative rights" (the right to receive government assistance or support) as well as "negative rights" (the right to be free from government interference). Under an open-ended theory of judicial review, there is no logical limit to the power courts could assert to protect "affirmative rights" in ways not chosen by the people through their representative institutions. A federal district court in Kansas City has doubled the property tax to pay for better schools,66 and state courts in New Jersey have required local communities to build more public housing.67 The natural rights Professor Barber has in mind are "all exemptions from governmental power," he says. "Whether the Constitution is open to welfare rights which judges can enforce is of course most problematic."68 Why so? If a judge concludes

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66No one, to my knowledge, proposes that Congress and the President (or for that matter, the states) have an authority to enforce constitutional principles that exceeds the ordinary bounds of their office. For example, when Congress passed the Voting Rights Act of 1965, embodying its independent interpretation that literacy tests are unconstitutional, the validity of the enactment depended on the positive law question of whether it was acting within its enumerated powers. Katzenbach v. Morgan, 384 U.S. 641 (1966). Similarly, Presidents sometimes assert the authority to refuse to implement a statute they believe to be unconstitutional. The legality of this refusal depends (or should depend) on a construction of the "take care" clause. See Ameron, Inc. v. United States Army Corp of Eng'n, 787 F.2d 875, 889 (3d Cir.), adhered to, 809 F.2d 979 (3d Cir. 1986). A similar question came up in 1798 in the context of state power to block federal legislation that the states deemed unconstitutional, i.e., the Alien and Sedition Acts. See Kentucky and Virginia Resolutions of 1798, reprinted in H. Commager, Documents of American History 178-83 (7th ed. 1963). It is inconceivable that these non-judicial powers of constitutional interpretation, controversial as they are under orthodox principles of constitutional law, would be recognized as legitimate under an open-ended theory.


69Barber, supra note 4, at 83 n.50.
that welfare benefits higher than those voted by the legislature would be just, what in the theory of open-ended judicial review should constrain him?

Apparently very little: Professor Barber goes on to say that "[w]elfare rights are therefore a possibility. The question would turn on several considerations: a substantive theory of the ends of government, whether serving those ends sometimes could entail legislative entitlements, and whether courts could exhort a reluctant community to its constitutional aspirations." Since courts are the bodies that will be weighing these considerations, the issue thus hinges on two questions: whether the judge thinks increased welfare benefits would be just, and whether the courts have the political muscle to make their judgments stick.

To be persuasive, Professor Barber's theory requires some reason to believe that courts are the most reliable expositors of natural right. Some commentators, for example, point to the courts' relative disinterestedness, attention to principle, and scholarly method. Professor Barber makes no such argument, apparently because he does not agree with it. Judges, too, are prone to "wilfulness and "stupidity." That is why he advocates a "multiplicity of interpreters." If a genuine multiplicity of interpreters is "essential" to the theory of open-ended review, as he states, the theory falls short. Invocation of natural right is not a sufficient theory of constitutional law if it cannot deal with the institutional issues of how natural right is to be identified and implemented.

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Professor Barber's position on affirmative rights is somewhat less clear than the discussion in the text may indicate. Other language in this part of his essay suggests, though it provides no reason, that judicial power to create and enforce welfare rights may be limited to the power to "exhort officials to duties whose performance judges cannot enforce." Of course, this would require reversal of the almost 200-year-old jurisprudential prohibition against issuing advisory opinions. See Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), reprinted in 3 H. Johnston, Correspondence and Public Papers of John Jay 483-89 (1891). Professor Barber does not let this bother him, dismissing the jurisprudential prohibition, with unself-conscious irony, as "judge-made doctrine." Barber, supra note 4, at 83 n.50.

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Barber, supra note 4, at 86.

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This brings us to the final issue: why might a moral realist prefer constitutional democracy to judicial supremacy or the other alternatives? Professor Barber suggests that conventionalists can have no answer to this question, and I think he is right. But ironically, one who shares Professor Barber's moral realist persuasion, as I do, has no difficulty in providing reasons to support constitutional democracy and to reject Professor Barber's radical anti-constitutionalism. I would propose three reasons, in ascending order of importance.

First, there is no reason to believe that judges are likely to be more reliable than representative bodies in discovering and enforcing natural right. Judges are grossly unrepresentative of the population. All are lawyers, most are middle-aged or older, all are upper-middle class or above, most are white males, most are secular and skeptical in their philosophical orientation, in common with the professional elite of this country. Rather than natural right, judges are more likely to impose upon us the prejudices of their class. The nature of their task makes it more attractive to seek the abstract solution than the intelligent compromise. The doctrine of precedent, so important to the court's system of institutional authority and integrity, makes correction of mistakes relatively difficult. The courts' fact-finding ability is woefully deficient. They are dependent for information and ideas upon people with an inherent professional axe to grind. They are carefully insulated from the real world. Their caseloads (especially the Supreme Court's) are overwhelming. They have little time for even the most important of cases, and it is the rare Supreme Court Justice who can keep up with more than a negligible sampling of the poetry, science, economics, literature, philosophy, theology, and history that should inform an expositor of moral reality. Their sole assistants are bright young things just out of law school. Perhaps most importantly, judges are irresponsible in the most fundamental sense: they are not accountable for the consequences of their decisions and ordinarily are not even aware of them. Power without responsibility is not a happy combination.

Not that representative bodies are much better. Legislatures and executive agencies are subject to special interest pressure and all too prone to respond thoughtlessly to passing fashions. Common experience shows that it is a rare politician whose understanding of natural right
noticeably influences his decisions. Politicians may be more representative of the population than judges are, but not necessarily of its better qualities. Madison's description would not seem out of place today:

Complaints are everywhere heard from our most considerate and virtuous citizens . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.75

Notwithstanding this dispiriting account of legislative vices, there is something affirmative to be said for constitutional democracy (in addition to the still-persuasive point that courts may be worse). Largely because of the problems Madison described, our constitutional system was not set up as a pure democracy. The essential structural features of our republican system are: (1) a large expanse of territory, which dilutes the power of concentrated local interests, (2) representation, which "refines and enlarges" the popular view, (3) deliberation, which makes it more likely that reasons, rather than brute political force, will prevail, (4) separation of powers, which gives officials in various branches and levels of government the incentive and ability to curb the excesses of the others, (5) checks and balances, which slow down the process of change and thus promote stability and deliberation, and (6) federalism, which permits a diversity of approaches to public issues.

These features do not guarantee just results, but they are not obviously inferior to open-ended judicial decision-making. Moreover, natural rights are further protected by an astonishingly comprehensive and well-chosen set of substantive constitutional rights and protections. The most fundamental and important rights are protected either explicitly or by implication under traditional constitutional interpretive methods. With these substantive protections in addition to the constitutional structure of government, the advantage of open-ended judicial review becomes all the more attenuated. Left for the ninth amendment are those "rights" controversial enough that majorities in the various states oppose them, "rights" like the right to work for more than ten hours a day or for less than the minimum wage, to start an ice business without a license, or to abort a fetus before it is able to survive outside the womb.76


74For present purposes, we must exclude cases involving restrictions that are anachronistic and unenforced, other than by the design of the violator (Griswold v. Connecticut, 381 U.S. 479 (1965)), or by capricious accident (Bowers v. Hardwick, 106 S. Ct. 2841 (1986)). One does not need open-ended judicial review to prevent imposition of penalties in these circumstances. Conventionalism will do nicely, and even a traditional interpretation may question whether there has been due process of law when the "law" in question has fallen into desuetude. Whether these cases, or others like them, were rightly decided should not affect the disposition of cases of genuine conflict between popular and judicial conceptions of justice, such as capital punishment or abortion.
troubled by the prospect that judges might be persuaded that the principles of the Constitution are "defeasible" and that some or all of them should be supplanted by principles more consistent with the judge's idea of "simple justice." I would rather consider each specific proposal for changing the law on its merits than to issue a blank check to judges.

Indeed, I fear that a moral realism dominated by the insight that all conceptions of justice are "defeasible" is, in practice, indistinguishable from moral relativism. Such a view makes it difficult for us to take a stand: to say "this I think is right." Professor Barber rejects the authority of the Constitution because it may turn out, on further reflection, to be "irrational" and "unjust." A moral relativist would reject the Constitution for the same reason. It seems more consistent with moral realism to hold that our Constitution is (or is not) the best practicable constitution we can conceive under present circumstances, perhaps proposing amendments, and to insist that judges enforce it as it is.

Third, even if judges were more capable of discerning natural right than are representative bodies, and even if their vision of natural right, where it differs from the Constitution, would be an improvement, a moral realist might oppose granting judges the power to enforce their views of natural right as positive law because this would debase and impoverish republican government. One of the reasons for adopting constitutional democracy is that properly established and limited representative institutions are the most likely to govern in the public interest. A second, independent reason is that self-government directed toward the common weal is good in itself. An important aspect of liberty—albeit not the most important—is self-determination: the collective right of a people to chart its own course. If the quest for justice is taken out of the political arena and moved into the branch of government uniquely insulated from popular participation, one of the great functions of republicanism will be lost.

I suspect that Professor Barber might agree with this, if he ceased to assume that there is no difference between constitutional democracy and moral skepticism. He concludes his essay with the following observation: "the touchstone of truth is reality or nature, not social convention and its spokespersons, be they judges, professional philosophers, or what have you. This process [of discovering truth] is nothing other than giving and exchanging reasons in an open-minded and public-spirited way about what to believe and how to live." Republican government at its best is a form of deliberation about the common good; republicanism is all the more attractive a system because it involves the citizens and their representatives, and not a selected group of "spokespersons, be they judges, philosophers, or what have you." Judicial review, by contrast, removes certain issues from the domain of politics. That is the very purpose of constitutional limitations.

Simple justice is not an issue that should be removed from the public agenda. I believe, and I think Professor Barber believes, that open-ended conceptions of justice and the common good should occupy a far more central place in our public deliberations than they now do. I believe, and I think Professor Barber should believe, that the process of discovering the best conceptions of the public good is better advanced through republican institutions than through arguments between lawyers and in front of lawyers. This means that representative bodies must be accorded the latitude to resolve issues of justice (those not resolved by the people themselves in the course of constitution drafting and amending), even if, from time to time, they deviate from what judges believe to be the dictates of justice. Open-ended judicial review—the doctrine of unenumerated rights—threatens to cut short the very process of "open-minded and public-spirited" deliberation upon which moral realism depends.

77S. Barber, supra note 15, at 49.
78Barber, supra note 4, at 87.
3. Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*

Sotirios A. Barber

In trying to explicate the meaning of the ninth amendment and its current political relevance, I have criticized Robert Bork's inkblot theory of the amendment and concluded, in the main, that the Constitution would have all of our officials strive for justice as they perform their several lawful functions. By "justice" I mean justice, the real thing, not this or that historical version of the real thing. My ninth amendment paper cites and joins some of my other writings in contending that it is the American constitutional document, in light of the American constitutional tradition and the moral intuitions of ordinary men and women throughout our history, that requires this striving for justice itself, and requires it of all constitutional functionaries, including judges. Professor McConnell seems eager to label my views "pure" or "radical anticonstitutionalism."¹

I cannot be happy that Professor McConnell employs such a harsh name, especially since I think he proceeds to his judgments more through self-assertion and distortion than through responsible scholarly argumentation. But Professor McConnell has his point of view, and he does give me an opportunity to raise a question of general theoretical interest concerning the relationship between our approaches to constitutional interpretation. On the one hand, he and I seem to agree that moral skepticism have nothing to offer the field of normative constitutional theory. We both consider moral skepticism philosophically bankrupt despite its current status as entrenched academic orthodoxy. Each of us claims to embrace some form of moral realism. We disagree, however, on what the basic realist position in constitutional theory ought to be.

I shall try to show here that our disagreement centers on the role of reason or reasoning in constitutional thought and adjudication. My approach emphasizes an attitude and a set of practices he derides as “the ratiocination of . . . judge[s].” He in turn emphasizes what I regard as a degrading and potentially tyrannical faith in “sources” which he assumes to be clear and powerful enough to settle the most important questions of constitutional principle, thus eliminating the need for ratiocination in efforts to find the meaning of the law. The question posed by this disconstitutional principle, thus eliminating the need for ratiocination in theory?-What should a belief in simple justice mean for approaching the institutional and substantive issues of constitutional interpretation?

As indicated, I see certain problems of scholarship in Professor McConnell’s treatment of my article. Problems of this sort normally have little theoretical significance. Yet I believe that the scholarly defects of Professor McConnell’s article reflect his basic answer to the question, whither moral realism. Discussing these defects is therefore one way of testing Professor McConnell’s constitutional jurisprudence. I shall divide the following comment into four parts. Faithful to a principle of interpretive charity, though not without doubts about its content and application here, I shall first bring what limited order I can bring to what Professor McConnell seems to say about the ninth amendment. I shall then discuss Professor McConnell’s apparent view of the source of constitutional meaning in hard cases, relating that view, next, to Professor McConnell’s argumentative methods and tone. I believe this will be enough to dissuade most readers from Professor McConnell’s approach. Yet I may have to concede in conclusion that I am unable fully to refute what I take to be Professor McConnell’s most basic position. He may end up right notwithstanding his problems—perhaps even because of them.

I. McConnell on the Ninth Amendment

A. Rights Galore: Old, New, and Unenumerated

Though he defers a full theoretical statement of his views to a future work, Professor McConnell sketches an affirmative theory of the ninth amendment in the course of criticizing my position. That theory is not what one might have expected from an active defender of Robert Bork. To begin with, Professor McConnell quietly declines to view the ninth amendment as either an inkblot or a restatement of the tenth amendment. Equally noteworthy is his description of himself as a moral realist who rejects the moral skepticism of most lawyers and others among what he calls the country’s professional elite. What Professor McConnell neglects to mention is that his beliefs in a moral reality and a meaningful ninth amendment leave only a contingent and derivative link between his constitutionalism and Bork’s. McConnell and Bork differ on the level of philosophic fundamentals.

McConnell the moral realist may join Bork’s opposition to judicial power, but he can hardly accept Bork’s underlying reasons. No realist can accept an argument whose premises include Bork’s well-known view regarding the equality of “gratifications.” Professor McConnell must justify his opposition to judicial activism on different grounds. He therefore argues from empirical premises regarding the moral capacities of officials and the educative capacities of institutions. He enters a negative assessment of the morality of the legal profession and the country’s professional elite as a whole. And he talks not about an equality of gratifications, but about a constitutional arrangement he believes most likely to approximate justice in the long run while enhancing the political morality of the people of the nation and their elected institutions. Standing alone, this argument leaves Professor McConnell with no principled opposition to judicial power. If lawyers and judges had or could acquire the requisite virtues, and if a strong judiciary should prove essential to justice and the nation’s moral growth, Professor McConnell might disagree in all respects with Bork’s opposition to judicial power.

I mention this possibility because I am not sure it is completely hypothetical. Professor McConnell may be in the process of developing a theory that calls for a most powerful judiciary. When he quietly agrees to

2Id. at 105.

3Id. at 105-06.

4Beyond the philosophic and stylistic matters which I emphasize in this reply, Professor McConnell ignores key empirical questions associated with his view. First, there is the challenge to constitutional conservatives to produce evidence in behalf of their view that a stronger tradition of judicial deference would probably have made for a more principled politics in America. See id. at 29-30; cf. R. Dworkin, A Matter of Principle, 69-71 (1985). Second, in rejecting what he calls the “Meese-Barber position” (he might have said the Jefferson-Lincoln position) on a plurality of constitutional interpreters, Professor McConnell assumes, inter alia, that under all or most social conditions judges will probably be impervious to the constitutional opinions of other institutions, regardless of their quality. See McConnell, supra note 1, at 102-03. This assumption may reflect Professor McConnell’s negative assessment of the legal profession generally. For further comment on his assessment, see infra text pp. 127-29.

5For the distinction between principled and merely prudential opposition to judicial activism, and criticism of other ostensibly nonskeptical arguments against judicial activism, see Barber, Epistemological Skepticism, Hobbesian Natural Right, and Judicial Restraint, 48 Rev. Pol. 374 (1986).
lift the inkblot and distinguish the message of the ninth amendment from that of the tenth amendment, Professor McConnell accepts the invitation of the ninth amendment to embrace a doctrine of judicially enforced unenumerated rights. Indeed, he proposes a formidable list of such rights. A potent example is what he refers to as “protection for autonomous institutions potentially in conflict with the central government.” We can wonder whether Professor McConnell will ever manage to defend this associational right in a manner consistent with his opposition to the jurisprudence of Roe v. Wade, for this “protection for autonomous institutions” turns out to be a very pregnant guarantee. As Professor McConnell conceives it, the right includes protection for (1) “churches and synagogues,” (2) “colleges and universities,” (3) “the press,” (4) “voluntary associations,” (5) “families,” and even (6) “neighborhoods.” The reader should note how this herd of associational rights begins modestly with those that overlap enumerated and established first amendment rights, (1) – (3), multiplies into penumbras of enumerated rights, (4) – (5), and finally expands to something one would have thought a New Right theorist would be the first to call a “new right,” the protection of (6) “neighborhoods.”

Professor McConnell’s list of unenumerated rights also includes a family of property rights. He would protect things ambiguously referred to as “decentralized economic power through private property” and a “guarantee of economic opportunity through free enterprise.” Lest there be any mistaking the historical significance of these economic rights, whatever they may precisely be, readers should note Professor McConnell’s observation that they have “been challenged by intelligent people who take a different view of natural right and simple justice,” especially elements of the New Deal who believed “a more powerful central government . . . necessary to the public weal,” and those who “think that socialism is preferable to free enterprise.” Here, then, we may have judges reading the Constitution as protecting not only private property but “decentralized economic power,” as opposed to centralized representational institutions, and “free enterprise” as opposed to New Deal “socialism.”

10*Id.
11*Id.* at 108.

For all his talk about my radical anticonstitutionalism, Professor McConnell even lists a few judicial warrants for the *continuing* discovery of unenumerated rights and an open-ended guarantee of substantive justice for all on a case-by-case basis. I mean substantive protection above and beyond the rights he lists or could list. Thus, he refers to a guarantee of “legislative generality.” This right seems to have substantive import for Professor McConnell because he separates it from a guarantee of “procedural regularity.” He also lists, as either one or two rights, “equality before the law and freedom from invidious distinctions”—not just invidious distinctions on specific grounds like race or even sex, but invidious distinctions, period. There is more than enough room in these formulations for what Professor McConnell calls the “notorious” doctrine of substantive due process, along with substantive equal protection—doctrines he decries as warrants for open-ended judicial review. Surely we are entitled to wonder how Professor McConnell can say elsewhere in his article that “[open-ended judicial review does not give greater protection to natural rights—it simply substitutes the judge’s understanding of natural rights for the Constitution’s.”

**B. Moral Realism and Legal Positivism? A Troubled Union**

An explanation could lie in a course that Professor McConnell flirts with but may already have abandoned. The course in question would derive unenumerated rights from purely conventional sources. Professor McConnell says at one point that the ninth amendment means “precisely what it says, and no more.” He then quotes the text of the ninth amendment and adds the following remarkable paraphrase of what the amendment “precisely . . . says”:

In other words: the Bill of Rights, indeed the entire Constitution, is not the only source of individual rights. Common law, state statutes, federal statutes, state constitutions, administrative regulations, municipal ordinances, contracts, familial relationships and other sources all are legitimate bases for positive laws rights under our system. The framers thought it useful to express in no uncertain terms that the adoption of a Bill of Rights would not, by negative implication, abolish these

9*Id. at 107.
10*Id.
11*Id.* at 101, 103, 104
12*Id.* at 100–01.
13*Id.* at 94.
already self-refuting. Debate as judges.15

Uncertain "sources" he enumerates avoids or even mitigates the ratiocination of Professor "the ratiocination of the judge." Nor need anyone bother to criticize derived solely from state statutes, state constitutional provisions, common law precedents, and even federal statutes. What can he have had in mind when proposing such sources of ninth amendment rights? Should McConnell ever try to clarify these suggestions, he will surely withdraw them.

It comes as no surprise, therefore, that elements of Professor McConnell's thought combine to suggest a different course. He ventures beyond positive law sources at one or two points when referring, approvingly, to the Constitution's purposes. "Traditional constitutionalism," he says, "is not hostile to judicial enforcement of aspirational principles—if they can fairly be discovered in the text, structure, and purposes of the Constitution." He may not have decided whether by the Constitution's purposes he refers merely to posited ends or also to something real—whether, in other words, the framers thought they wanted justice when they advanced their conception of justice, or whether they wanted merely to assert themselves. He at least has some doubts.

Immediately following the statement just quoted he contrasts a judicial concern for constitutional purposes with "[o]pen-ended" judicial protection for "natural rights."17 Here constitutional purposes and simple justice seem somehow opposed. But an earlier part of his discussion connects the Constitution's purposes with rights beyond the positive law. In distinguishing "natural right" from "positive law," Professor McConnell says:

Positive law is the law of the legal system; it is the law the judges are bound to enforce. Natural right is a standard of judgment against which we can determine whether positive law is good or bad, just or unjust. The founders of the United States were believers in natural right; this much is unmistakable from their Declaration: "We hold these truths to be self-evident . . . ." The Constitution was framed in accordance with the people's understanding of natural right; we know this from the preamble's statement of intentions. But the Constitution is not merely a proclamation of natural right. It is positive law. It is persuasive to the extent it accords with natural right, and that is much of its appeal, but it is authoritative because it was ratified by the people.18

This passage struggles to affirm the exclusively positive status of the Constitution. But it is less than a complete success, for in the end it connects both the law of the Constitution and the framers' purposes with simple justice. When Professor McConnell says the Constitution is not merely a proclamation of natural right, he at least suggests that the Constitution is partly an expression of the desire for justice. To this extent he keeps faith with the claims of the Constitution, the framers, the tradition, and what reflective men and women have typically required in order to respect their institutions, that is, in any sense of "respect" closer to admiration than fear.

I note at this point that Professor McConnell steers relatively clear of my argument that, given our ordinary moral intuitions, one would calumniate democracy, the Constitution, the framers, the tradition, and what reflective men and women have typically required in order to respect their institutions, that is, in any sense of "respect" closer to admiration than fear.

14Id., at 94–95


16McConnell, supra note 1, at 100.

17Id., at 100–01

18Id., at 99 (footnote omitted).

19Id.
"authoritative because it was ratified by the people." Putting these statements together Professor McConnell might easily have emerged with the plausible and traditional view that the Constitution is a positive law that envisions the protection of natural rights. This would have avoided the problem of separating what Professor McConnell sees as the reason for the Constitution's authority from the reason for its persuasiveness.

Professor McConnell prefers to hint that the Constitution's authority and the reason for its persuasiveness are opposed to each other. But this suggestion is untenable. If, as he says, ratification is responsible for the Constitution's authority and the Constitution's persuasiveness is responsible for its ratification, and if, as he suggests, the Constitution's perceived relationship to justice is responsible for its persuasiveness, then the Constitution's authority is connected to its perceived relationship to justice. I need not repeat here an argument I have attempted elsewhere about the precise links between justice and the Constitution's authority as law. For present purposes I need only show that a link of some sort between justice and authority is present, if precariously, in Professor McConnell's own thought. To see further that this is the case we might ask why Professor McConnell emphasizes a devotion to natural right as responsible for ratification. Why not rather some combination of less noble motives like the desire to protect slavery, secure a windfall for speculators in government bonds, advance the cause of oligarchic power, and wipe out the Indians? When Professor McConnell identifies natural right as the cause, he assumes that he must look beyond possibly unjust historical motives and account for positive authority partly by attending to the rhetorical claim typical of all such authority, viz., that it seeks justice.

Yet Professor McConnell mentions slavery, and suggests that Lincoln adopted a dutifully positivist attitude against abolition through judicial fiat. He also suggests that John Marshall and the authors of The Federalist had a purely positivist view of legal authority. But Lincoln at least appears to have followed Publius in defending constitutional protection for slavery only as a necessary evil. And Lincoln seems to have

looked to justice, not to the concrete purposes of slaveholding framers, when he called upon the Court to reverse Dred Scott and hold that Congress could outlaw slavery in the territories.

The upshot of Lincoln's position on judicial power has to be gauged in light of considerations beyond those Professor McConnell takes up. First, there is Lincoln's "house divided" belief that the nation as a whole had eventually to become either all slave or all free. There is also his view that the Constitution had put slavery "in the course of ultimate extinction." In the context marked by these beliefs, asking the Court to overrule Dred Scott can be construed as asking the Court to play its part in achieving a constitutional aspiration to rise above conditions responsible for the initial protection of slavery. Secondly, there is Lincoln's own conduct during the war. When justifying his suspension of the writ of habeas corpus, he all but claimed power under the "take care" clause to disregard sections of the Constitution that stood in the way of securing the system's essential objectives. And he later rationalized the Emancipation Proclamation as a necessary means to the successful prosecution of the war. Lincoln's approach thus turns out to be a poor model for what Professor McConnell has in mind for the judiciary.

Without pretending to settle the historical question of Lincoln's views on the Court, let us take Lincoln's beliefs about presidential power and consider what those beliefs ought to mean for Professor McConnell. Professor McConnell seems to think that the president's position vis-a-vis the law is similar in an important respect to that of the judiciary. I infer this from his statement that "[w]ithin the scope of authority defined by the Constitution, the decisions of representative institutions must be enforced by executive officers and judges, whether or not they agree with the substance of the decisions." If Lincoln's actions represent Professor McConnell's view of fidelity to the law, and if we agree with Professor McConnell that the President and the Court have similar obligations to follow the law, then, for courts as with presidents and all other officials, the meaning of the laws—i.e., the real meaning of laws that live up to the

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24R. Basler, supra note 23, at 355, 585.
25Id. at 372-73.
26Id. at 360-61, 373,
27Id. at 600-01.
28Id. at 690.
29McConnell, supra note 1, at 89.
public claim of all laws—is to be found as Lincoln found it, not in historical texts and purposes construed separately from a desire for simple justice. As Harry Jaffa has shown, Lincoln’s construction of the Declaration of Independence was oriented to a conception of equality as an end of government that was different from the Lockean conception that was shared by the signers of the Declaration. Professor McConnell is therefore far from success in enlisting either Lincoln or the original constitutional document to the cause of New Right legal positivism.

Professor McConnell also tries to enlist John Marshall and The Federalist to the cause. He describes Marshall and Publius as strict legal positivists on the strength of isolated statements which he construes in a manner that ignores the broader philosophies of which the statements are but parts. My ninth amendment article outlines an argument about Publius’s constitutional philosophy and footnotes another article in which I discuss both Marshall and Publius in greater detail. These articles defend a number of contentions that I should have expected Professor McConnell to try to refute. I argue, for example, that The Federalist No. 78 envisions judges “mitigating the severity” of “unjust and partial laws” even when these laws are beyond the Court’s reach on positive constitutional grounds. I argue that conceding such power to unelected judges in keeping with Publius’s repeated view that there is a difference between the public’s objective interests and its transient inclinations, and that the duties of constitutional officials are defined in terms of the former.

McConnell cites a leading student of Marshall’s jurisprudence who offers a considerable body of evidence for the view that Marshall accepted a Lockean commercialism (and decided cases accordingly, where feasible) not just as an inheritance, but because he considered it a true political teaching. As Robert Faulkner puts it, and as I quoted him, Marshall looked upon Locke’s teaching “as the private law, and the public law, dictated by nature itself.”

I cannot confront Professor McConnell’s arguments against these arguments, for instead of arguments he offers little beyond mere counterassertion. It therefore remains to be seen how he can turn Marshall’s judicially active concern for national power and vested rights into emblems of New Right majoritarianism. It also remains to be seen what Professor McConnell can do with Publius’s belief that the legitimacy of popular government depends on its reconciliation to higher standards of political morality, that “Justice” has been and will remain “the end of government,” and that where constitutional forms permit majorities to unite and oppress the weak, there is no real law, for “anarchy may as truly be said to reign, as in a state of nature.” Whatever the future may bring, Professor McConnell is still a long way from showing that Publius and Marshall held historical consent, necessary though it be, as the sole foundation for legitimacy.

C. McConnell as Natural Lawyer? Faith of Our Fathers

But Professor McConnell may want to develop his argument in a different direction, for, as I have pointed out, he strays from the legal-positivist course when he characterizes the purposes of the Constitution as natural rights and allows that judges can look to those purposes when deciding hard cases. If, as he says, the purposes of the Constitution can serve as sources for judicially enforced unenumerated rights, and if, as he also says, the purposes of the Constitution include the protection of natural rights, then it would seem to follow that natural rights can serve as sources for judicially enforced unenumerated rights.

Ibid. at 91.


31Barber, The Ninth Amendment: Inklblot or Another Hard Nut to Crack?, 64 Chi.-Kent L. Rev. 67, 78–79 (quoting The Federalist No. 78, at 528 (A. Hamilton)) (reprinted as chapter 1 of this volume).

32Id. at 78–79 (citing The Federalist No. 71, at 482); see also The Federalist No. 63, at 422–25. For a more extensive treatment of this subject, see Barber, Judicial Review and The Federalist, 54 U. Chi. L. Rev. 837 (1986).


35See The Federalist No. 9, at 50–51; id. No. 10, at 57–58, 60–61.

36Id. No. 51, at 352.

37Id.

38This is McConnell’s suggestion in McConnell, supra note 1, at 97–98, and in his rather arbitrary and purely formal definition of “constitutionalism,” id. at 89. Since Publius and Marshall linked legitimacy and constitutionalism with a substantive notion of justice, they could not have seen consent as both a necessary and sufficient condition for either constitutionalism or legitimacy. For a discussion of the ambiguous status of consent in classical liberalism, see R. Smith, Liberalism and American Constitutional Law 41–45 (1985).

39McConnell, supra note 1, at 91, 100.

40Id. at 99.
To Professor McConnell's previous list of positive-law sources of unenumerated ninth amendment rights, we may therefore add what he calls "natural rights." All that would prevent us from doing so is Professor McConnell's hostility to an open-ended judicial protection of natural rights. That hostility is not a consistent feature of Professor McConnell's thought, as I have pointed out. But it does seem to predominate. What we would need, therefore, is a theory of natural rights as a closed body of norms. What seems to trouble Professor McConnell most is the openness of the positive law to higher standards of justice; what he cannot accept is openness or "ratiocination" at the level of ultimate constitutional standards. Hence his statement that the only hope for controlling an open-ended judicial review under general constitutional standards, both as a moral realist and as one who fully accepts the authority of the framers, he probably believes: (1) that the framers had one basically coherent and unambiguous philosophy of constitutional government; (2) that this philosophy can be exhaustively described, at least in principle, by an enumeration of particular norms, including a closed body of rights; and (3) that it is impossible to be faithful to the more authoritative intentions of the framers by improving on their historical understanding of justice and other values, because those conceptions are simply right, or as right as they can be in an imperfect world. These beliefs would explain Professor McConnell's suggestions that the Constitution seeks nothing higher than a particular conception of justice, and that constitutionalism excludes a right to revolution. They can also explain his ridiculing my views regarding the defeasibility of all historical conceptions of justice and the consequent need for dialogical practices and attitudes as essential for approximating the real wants and intentions of those who are objectively worthy of political authority.

For what I call "self-critical striving" toward a moral reality whose elusiveness renders our conceptions defeasible, Professor McConnell substitutes total immersion in what he sees as the one true historical teaching, the philosophy of the framers. Once possessed of the spirit of that vision, we apparently can dispense with "the ratiocination of . . . judge[s]." Presumably, the spirit itself will simply reveal the unenumerated rights, as needed, and "in no uncertain terms." For judges, and all other subjects of the Constitution, constitutional meaning is not the object of some exercise in ratiocination or philosophic quest. Constitutional truth is just given, revealed somehow to those completely immersed in the right source.

Professor McConnell's approach is thus reminiscent of a model of reality which grounds the world and our knowledge of it ultimately in some willful act. Bork seems to operate from a humanistic version of this basic model when he grounds all moral truth and reasoning in the ethical systems of different societies, systems which, he says, have "no objective or intrinsic validity of [their] own." This model can also explain Bork's belief that our most important freedom is the freedom to enact our moral preferences into law. True freedom apparently means participation in a power mighty enough to dictate the very meaning of right and wrong, along with other values—true freedom included, perhaps. At bottom, for Bork, the source is force, and convention is both. As a self-styled moral realist, Professor McConnell cannot accept Bork's brand of moral skepti-
cism. He is therefore left with a version of the willfulness model that pos-its a will higher than that of the different societies, a will that can function as the source of real truth. Professor McConnell suggests something like this when he assumes that a secular philosophical orientation precludes a concern for moral truth.49 I would argue, by contrast, that at least some aspects of a secular outlook are essential to an authentic or unequivocal moral realism. We associate this-worldly rationalism with such an outlook, and no one can deny ratiocination a powerful role because no one can realistically deny either our presuppositions of a moral reality or our capacity to challenge, or at least wonder about, any proposition regarding moral truth. I would therefore be prepared to question matters of fact and commitment in this context, and I would support democracy or a conception thereof only provisionally, and only as the latest of a continuing stream of arguments might favor.50 Bork supports what he supports basically because it's there. And if I am right about Professor McConnell, he would move as faith in a certain vision moves him.

II. On McConnell's Argumentative Method and Tone

Now let us see if his jurisprudence can explain the scholarship style of Professor McConnell's commentary on my article. The reader should bear in mind that I am assuming that Professor McConnell has or will eventually resolve the tensions in his thinking in the only way he can, against his positivist inclinations and in favor of his realist inclinations.

Because Professor McConnell seems to consider the framers' historical understanding of constitutional language (something I would distinguish from the real meaning of the language itself) as unerring truth revealed only to those who abandon argument for complete immersion in the right vision, he may think he is excused from reasoning with those who are not completely immersed. The unimmersed either do or do not want justice. If they do not want justice, reasoning with them would perhaps be futile. If they do want justice, then they must want what Professor McConnell is certain the framers wanted, whether they realize it or not, since all who claim to want justice really want the same thing, and the framers' conception of justice is that thing. Reasoning or argument fails to bring the unimmersed to justice not because they are unimmersed, but because argument cannot bring anyone to justice, only immersion can do that. Exchanging arguments about something implies a critical distance that enables one to weigh the pros and cons, and one cannot be totally immersed at a critical distance. So forget the quest for better arguments. Just do what you can to immerse others; all will thank you eventually.

Such a belief can explain (though, I venture, never justify) the way Professor McConnell neglects such conventional rules of argumentation as those against begging questions, distorting historical facts and distorting the arguments of one's critics. I limit myself to the most serious examples.

Professor McConnell calls me a radical anticonstitutionalist because I disagree with his conception of constitutional democracy. With Bork and most other New Right constitutionalists, Professor McConnell views the Constitution as an act of majoritarian empowerment; he adopts what I call a model of majoritarian willfulness. I read constitutional logic, language and tradition differently. I see the Constitution as an expression of an aspiration to achieve an intrinsically admirable condition. I have defended my reading at some length in a work that Professor McConnell cites.51 Moreover, the literature of contemporary constitutional theory contains conceptions of constitutional democracy that differ both from Professor McConnell's conception and mine. These different answers to the questions of what constitutionalism and the Constitution are, are linked to different theories of constitutional interpretation, constitutional obligation, constitutional rights, the duties of constitutional officials, and so forth.52 Yet, like Alexander at the Gordian knot, Professor McConnell simply pretends that these difficulties do not exist. In a breathtaking act of question begging, his very first paragraph sweeps aside the central difficulties of constitutional theory and just declares what constitutional democracy is. At no point does he offer a supporting argument. He does not even bother to identify his definition as his definition. He simply asserts it categorically as a straight read-off from reality.

49See McConnell, supra note 1, at 105.

50This is not to reject all forms of reliance on faith, commitment, community sentiment, and tradition, for these sources of authority can include a reliance on ratiocination or, as I prefer, self-critical striving to realize the implicit claims of all rationally defensible authority. For works in constitutional theory that combine a reliance on reason with various of these other forms of authority, see M. Ball, The Promise of American Law (1981); R. Dworkin, Law's Empire (1987); M. Perry, Morality, Politics, and Law: A Bicentennial Essay (1988); S. Macedo, Liberal Virtues: A Liberal Theory of Citizenship, Virtue, and Community (forthcoming 1988); G. Walker, The Deep Structure of Contemporary Constitutional Controversy: Morality, Skepticism, and Augustine (forthcoming 1989).

51See McConnell, supra note 1, at 92 n.15; see also S. Barber, supra note 21, at 39-62, 113-15.

52See generally W. Murphy, J. Fleming, & W. Harris II, American Constitutional Interpretation 81-180 (1986); W. Murphy, What Is The Constitution? (forthcoming).
So: constitutional democracy is X (never mind the controversy about whether it might be Y or Z); Barber deviates from X (don’t mention his reasons, or even that he has reasons); therefore, Barber is a radical anticonstitutionalist.

Professor McConnell does me and the rest of his readers another and related injustice by trying to isolate me as a noninterpretivist who proposes something the Court has never accepted and who displays no respect for constitutional text, tradition, and authorities, either classical or contemporary, on or off the bench. I am not sure what the principle of interpretive charity requires of me at this point, but if I continue to assume that Professor McConnell has read the works on which he comments, then he must know that my theory of the ninth amendment overlaps with a substantive approach to the due process and equal protection clauses, such that the latter clauses can do the work of the ninth amendment, precisely as they have done for the greater part of our constitutional history. There is hardly anything new about the practice of open-ended judicial review, as Professor McConnell himself indicates.

Most regretful is Professor McConnell’s account of my theory as one which licenses judges and others to disregard the institutional and substantive limits of the so-called positive law. Yet I hardly appeal from law to justice in any matter of constitutional meaning, whether involving rights, powers, or questions of institutional competence. The closest I have ever come to rationalizing usurpations is a theory of constitutional action in emergencies or circumstances that officials cannot control in constitutional ways. I have argued that as a matter of constitutional logic, institutional boundaries can be crossed only when events have caused actual institutional collapse. Professor McConnell may well find something in this argument to support his charge of “radical anticonstitutionalism,” as he conceives it. If he does, however, he will no longer be able to treat Lincoln and Publius as model constitutionalists. I can engage Professor McConnell on this aspect of the question when he reaches it.

In the meantime, I have tried to develop a set of interpretivist proposals. In works that Professor McConnell cites, I claim that the Constitution requires multiple interpreters, a weak rule of precedent in constitutional cases, and a mode of interpretation that proceeds partly through a self-critical striving for better theories of justice. My claim to be an interpretivist may prove false, of course. But it is a claim that is backed with arguments. Should Professor McConnell ever deal with those arguments as arguments, he will have to confront the contention that no interpretivist can responsibly avoid the burdens of what Professor McConnell calls ratiocination. To refute this claim Professor McConnell need only show that his version of the source of constitutional meaning is sound and that immersion in it succeeds where ratiocination fails.

I have already commented on Professor McConnell’s suggestion that Publius, Marshall, and Lincoln were positivists in the Borkean mold, or vice versa. That suggestion, in my view, is enough to vitiate Professor McConnell’s own claim to be an interpretivist—that is, one who acknowledges that there are limits on the interpretations that laws and other texts can legitimately bear. If the reader needs more, consider Professor McConnell’s agreement with the position that the Constitution protects unenumerated property rights. In brief, he finds the controlling error of that decision to be a natural law conception of property rights that Taney deployed to deny Congress power to exclude slavery from the territories. But as we assess this view of the case, we should recall Professor McConnell’s agreement with the position that the Constitution protects unenumerated property rights. In light of this position, Professor McConnell cannot be altogether opposed to the abstract proposition that Congress should respect the property rights of persons who move from one place to another. What is regrettable in Dred Scott is the additional proposition that Congress has a duty fully to respect property in human beings. That Congress should respect property is one prop-

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53S. Barber, supra note 21, at 105-47, especially 119-30, 145-47; Barber, supra note 31, at 80-83.
54McConnell, supra note 1, at 101, 103, 104.
55Barber, supra note 31, at 70 n.12, 72 n.25, 73 n.26, 77 nn.29 & 32, 79 n.40, 85 n.52, 87 n.54.
56McConnell, supra note 1, at 89, 90-91, 92 n.15, 93-94, 96-98.
57S. Barber, supra note 21, at 190-95; cf. 199-204.
58S. Barber, supra note 21, at 13-62, 116-20, 145-47; Barber, supra note 31, at 70-71, 72-73, 77-78, 80-83, 84, 86.
59McConnell, supra note 1, at 101.
60Id. at 107.
position; that the law either has or can legitimately make human beings ordinary pieces of property is quite another. Everything in Dred Scott turns on Taney's affirmative answer to the latter, an answer he pretended to believe was a clear mandate of the American founding.

Taney tried to give the impression that law and justice were separable and that the applicable texts and traditions pointed clearly in one direction. On the pivotal question—the constitutional status of blacks as persons—Taney affected "pure positivism," if I may borrow a term, precisely the affectation we find in Bork. In treating Dred Scott as an emblem of legal positivism, I emphasize that I am not saying that Taney actually acted in a purely positivist manner, for he did not. I deny that anyone can act in a purely positivist manner. I even deny that anyone can really want to act in a purely positivist manner, except perhaps the fictional constructs of some other-worldly jurisprudence or social science that would move their subjects about by forces fully beyond human capacities. I would support my contention by defending a conception of human action that is linked to notions of reasoned choice and a capacity for reflective criticism. So I am not talking about what Taney actually did; I am talking about his attempt to escape moral responsibility for what he did. That attempt furthered the degradation of both the law and the community by denying that the Constitution is what it says it is: an instrument of justice. Yet Professor McConnell would have us identify Dred Scott as representative of a natural law approach, an approach that denies both the possibility and desirability of excluding moral choice from legal decision. Surely Professor McConnell owes us an explanation.

III. Conclusion: Can "Error" Save McConnell?

Am I engaging in oppressive acts of name calling and question begging of my own? Perhaps. My theory of Professor McConnell's theory results from an attempt to reconcile his professed moral realism with what he says about immersion and ratiocination. If my construction of his theory sounds like name calling, then there is either something wrong with my argument about the upshot of his views, or there is something wrong with Professor McConnell's views. If my argument is flawed, I know of no conventionally respectable or naturally just cure other than further argumentation from the other side.

Yet I concede that in calling for arguments as opposed to assertions and professions of faith, I seem unable to escape presuppositions and conventions associated with the practice of reasoning about controversial matters—a practice whose very status seems the central issue between Professor McConnell and me. So, by my own account of the contest, it is really I who may be begging the question-in-chief. I could point defensively to Professor McConnell's own praise of Professor Suzanna Sherry for "quote[ing] substantial evidence against her own position," praise that attests his respect for the conventions he flaunts in dealing with my arguments. But such a move would only deepen my immersion in rationalist assumptions, for it would apply the same rationalist norm of "integrity" that Professor McConnell applies favorably to Professor Sherry. Perhaps I could try to deny that rationalist assumptions are really controversial since one cannot really engage in political or academic controversy without acting from rationalist assumptions. I could then skewer Professor McConnell for the incoherent act of entering this debate with an article that suggests immersion in something he treats as opposed to ratiocination. But that would prove nothing beyond my determination to sink deeper into the presuppositions whose status is at issue. For even if we cannot question reason and its conventions in a coherent way, we can surely doubt their claims. Since reasoning itself can lead to perplexity about reason and the value of reasoning, we cannot simply excommunicate antirationalist messages like Professor McConnell's, notwithstanding their apparent incoherence. Apparent incoherence may be essential in any attempt to capture doubts about reason and reasoning, doubts real enough to demand philosophic attention and respect despite the possible limitations of language. So my survey of his "errors" may do no real damage to Professor McConnell's basic position.

In fact, an additional consideration forces me to concede that Professor McConnell's criticism of my position may actually be right. Although I can make sense of the Constitution only by reading it a certain way, my reading may be most unrealistic. For it supposes that a properly "constitutional attitude" can obtain among the nation's political and pro-

61See id. at 98.
63For a summary of Taney's political objectives in Dred Scott, see G. White, The American Judicial Tradition, 68-69, 74-83 (1976).
64See S. Barber, supra note 21, at 224 n.43; Barber, supra note 33, at 290-92.
65McConnell, supra note 1, at 94 n.32.
4. Constitutional Rhetoric and the Ninth Amendment*

Sanford Levinson

Introduction

I am rightly identified with those constitutional theorists who are decidedly skeptical of the enterprise of searching for singularly “correct” interpretations of the Constitution. Instead, I am often more interested in analyzing the diverse rhetorics of argument that comprise the working repertoire of the constitutional lawyer. Why certain arguments arise at given times—and why, concomitantly, others pass out of fashion—is of central interest to me, at least as a scholar. It is this interest, then, that is reflected in the first part of the article, where I view myself primarily as what might be termed simply an analyst of our legal culture.

No one who is familiar with contemporary constitutional discourse could fail to be impressed by the re-emergence of the ninth amendment into the consciousness of constitutional analysts. I want to suggest some possible reasons for this renewed interest at this particular time in our history. Law, as James Boyd White well reminds us, is a “culture of argument,” and it is that culture, as well as some of the specific arguments, that I want to explore in the first portion of this article.

The second part of the article is best conceived by imagining a shift of roles from detached cultural analyst to a more involved teacher of constitutional law and analyst of constitutional arguments. I argue that revival of the ninth amendment as a live part of our constitutional rhetoric will force us to confront in radically new ways the constitutional case law of

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67McConnell, supra note 1, at 91.
68See id. at 105.
chattel slavery and, beyond that, the legitimacy of particular forms of legal reasoning.

Perhaps in recognition of the fact that I occasionally take on the role of practicing lawyer, however, I will turn in the final section to some tentative suggestions as to how a revitalized ninth amendment might actually function in our legal culture. I also will make some even more tentative suggestions concerning the role of the judiciary—particularly the "finality" of its interpretations—in regard to a revitalized jurisprudence of the ninth amendment. As suggested at the outset, one should not read the ensuing pages for a general theory of how "correctly" to interpret the ninth amendment. As suggested at the outset, one should not read the ensuing pages for a general theory of how "correctly" to interpret the ninth amendment, but for a "tentative" interpretation of the ninth amendment as the "final" interpretation of the ninth amendment, a tentative interpretation that I would be reticent for another reason: I certainly do not consider myself to be an "expert" on the amendment. The theme of this first section, though, is that my status as "non-expert" is less attributable to personal deficiencies than to my socialization into the legal academy—a socialization shared by most readers of this symposium. I do not consider myself to be an "expert" on the amendment. The theme of this first section, though, is that my status as "non-expert" is less attributable to personal deficiencies than to my socialization into the legal academy—a socialization shared by most readers of this symposium. I suspect my knowledge of the ninth amendment is equivalent to that of most legal academics, including those who are considered well educated in constitutional law. It may therefore be worthwhile to consider which aspects of our legal culture might account for this "trained incapacity" regarding this particular aspect of the Constitution.

What constitutes a particular culture is the set of statements that are considered to be "warrantedly assertable" within it. That is, the performance of linguistic acts does not lead a speaker's audience to dismiss the speaker as an incompetent participant in the cultural conversation, worthy only of dismissal. "To think like a lawyer," the training in which is presumably the mission of legal education, is, as we all know, to be educated into what count as "intelligent" statements about legal possibility. Part of such intelligence is knowing what arguments not to make because they serve mainly to demonstrate one's lack of intelligence within the relevant context. It is useful in this regard to recall Justice Holmes' derision some sixty years ago of those hapless lawyers who, lacking truly "legal" arguments, would descend to invoking the equal protection clause.3

There was a reason that the first book to appear on the ninth amendment had the plaintive title The Forgotten Ninth Amendment.4 As if in confirmation of its own thesis, this 1955 effort to resurrect the amendment scarcely made much of a ripple. Moreover, the sad fact is that Patterson's book serves best as a heartfelt plea for recognition of the amendment's existence; its analytical contribution is minimal. Leslie Dunbar did write in 1956, James Madison and the Ninth Amendment,5 a helpful analysis of the history of the amendment; however, he basically throws up his hands at the prospect that the amendment might actually help justify judicial invalidation of governmental activity. Although Dean Redlich was willing in 1962 to argue for the relevance of the ninth amendment in contemporary constitutional jurisprudence, his discussion of the "judicial criteria" for its application is limited to the last three pages.6 And, as we all know in any case, legal education was (and largely remains) dominated by the writing of Supreme Court justices.

As a law student the early 1970's, I did have Justice Goldberg's opinion in Griswold v. Connecticut7 to parse. There Goldberg indeed mentioned the ninth amendment, cautioned that we ought not "ignore" it, but then immediately indicated that he did not mean to imply that the ninth amendment is applied against the States by the Fourteenth.8 In any event, however, I think it accurate to say that the opinion in that much-discussed case that was most popular with legal academics—at least those who supported the decision—was Justice Harlan's.9 Incorporating by reference his earlier opinion in Poe v. Ullman,10 Justice Harlan relied on the sweep of the liberty that is protected against infringement by the due process clause of the fourteenth amendment.

Goldberg's reference to the ninth amendment for many, I suspect, simply

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4B. Patterson, The Forgotten Ninth Amendment (1955) (excerpted in volume 1).
7381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (reprinted in volume 1).
8Id. at 492.
9Id. at 499 (Harlan, J., concurring in judgment).
corroborated the suspicion that he was basically a liberal ideologue and certainly not the very model of a careful lawyer that Justice Harlan represented, especially to his former clerks and other admirers who contributed so much to the molding of that generation's view of what "thinking like a constitutional lawyer" meant. 11

Not the least cost of Justice Goldberg's premature retirement from the Court was the loss of a context within which he might elaborate the thoughts that he only introduced in Griswold. From a more sociological viewpoint, one also notes the loss of his opportunity to mold a generation of law clerks who might take his new and disturbing ideas back to the legal academy. As Goldberg himself pointed out in a footnote, 12 the ninth amendment had scarcely ever been cited by the Court, let alone used as a constitutional warrant for decisions like Griswold. From a more sociological perspective, one also notes the loss of his opportunity to mold a generation of law clerks who might take his new and disturbing ideas back to the legal academy. As Goldberg himself pointed out in a footnote, 12 the ninth amendment had scarcely ever been cited by the Court, let alone used as a central focus of analysis by scholars otherwise devoted to foraging the constitutional text for help in analyzing the variegated issues confronting contemporary analysts. There was much work to be done and, for a variety of reasons, only Justice Goldberg seemed interested in doing it. But, of course, Justice Goldberg made his disastrous decision to go to the United Nations, and neither of his successors—Abe Fortas or, later, Harry Blackmun—seemed interested in elaborating the work only begun in Griswold.

The ninth amendment remained the stepchild of the Constitution, though, like Cinderella, it seems on the verge of taking center stage. As already suggested, this development owes relatively little to the Court, although it is true that it has been somewhat awkwardly cited by several justices, including Blackmun and Chief Justice Burger, in cases involving abortion 13 and the rights of newspapers to gain access to criminal trials. 14 Moreover, a number of important articles have appeared in law reviews over the past several years, 15 and Charles Black made it the focal point of his most recent book. 16

I believe that the most important contributors, ironically enough, to the now-cascading recognition of the presence of the ninth amendment in our Constitution are Edwin Meese and Robert Bork. The brooding omnipresence over the constitutional debate of the past couple of years has been Attorney General Meese, with his emphasis on the so-called "jurisprudence of original intent." 17 And it has become a cliche that the most important celebration of the constitutional bicentennial turned out to be the hearings concerning the successor to Lewis Powell (who, incidentally, seemed to express no interest in the possible meaning of the ninth amendment). Judge Bork was deprived of a seat on the Supreme Court largely because of his refusal to acknowledge the "unenumerated" right to privacy as being part of the set of constitutional rights legitimately enjoyed by Americans. It is, I think, accurate to describe Judge Bork's attitude toward the ninth amendment as one of disdain. 18

Although many defenses of privacy were offered both by witnesses and senators themselves, probably the most important involved the presentation of the ninth amendment as a warrant for decisions like Griswold. I would argue that the most important result of the Bork hearings, beyond their leading to his rejection, was the embrace by many of the senators of the rediscovered amendment, which thereby gained a public prominence hitherto lacking. The subsequent hearings concerning the confirmation of now-Justice Anthony Kennedy also included significant references to the ninth amendment, and his seemingly more

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11See Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Powell, 24 Stan. L. Rev. 1001 (1972) [pean to Justice Harlan by way of suggesting that Justice Powell could aspire to emulate him]. I do not necessarily wish to "debunk" Justice Harlan. I share in much of the admiration for him. I would, however, dissent from the proposition that admiration of his approach to judging necessarily requires that one denigrate compelling approaches (or judges).

12Roe v. Wade, 410 U.S. 113, 129 (1973); id. at 153 (Burger, J., concurring).

13Roe v. Wade, 410 U.S. 113, 129 (1973); id. at 153 (Burger, J., concurring).

favorable references to the amendment helped to warrant the view that he is distinctly more "moderate" than Bork.19

Anyone interested in constitutional rhetoric, however, must instantly recognize that the desire to defend Griswold by no means requires the embrace of the ninth amendment. As already suggested, the opinions in Griswold themselves demonstrate that there are a multiplicity of ways to arrive at the result that at least some version of privacy is constitutionally protected. I have already mentioned Justice Harlan's reliance on the due process clause. There is also, of course, the formal opinion for the Court, written by Justice Douglas, which invoked the "penumbras and emanations" of the Bill of Rights.20 Why not settle for one of these opinions and leave the ninth amendment in its accustomed obscurity?

In regard to Douglas' opinion, I think the answer is relatively simple: His attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade. For example, one may recognize that the fourth amendment protects privacy, but one must also recognize that the amendment speaks just as strongly in behalf of overriding privacy so long as another important value—protection of public security—and an important process—the granting of a limited search warrant by what we have come to call a "neutral and detached magistrate"21—are followed. The protection against compulsory self-incrimination of the fifth amendment may at first appear to be a better example of a categorical vindication of privacy, save for the willingness of the Court (over Douglas's dissent) to allow the overriding of any privacy right via the grant of immunity to the otherwise silent witness.22 Such grants destroy any argument that the fifth amendment is a strong protection of privacy rather than, for example, a recognition of the distaste that we have for a person's being the agent of his or her own subjection to punishment or simply a protection against untoward police practices that we fear will result if we allow the police to seek confessions for use in subsequent criminal trials. One could similarly critique all of Douglas' other citations to the constitutional text. I think it fair to say that there is no constitutional scholar who endorses the Douglas opinion.

Still, we can ask why those who support Griswold's result do not settle for Harlan and forget the ninth amendment entirely? There can certainly be no doubt that Harlan's opinion, as an intellectual synthesis of a particular way of looking at the Constitution, is one of the greatest achievements in our judicial history. It may well suffice for many. Nevertheless, an analysis of the contemporary culture of constitutional argument reveals good reason to return to Goldberg's invocation of the ninth amendment.

In his valuable book Constitutional Fate,23 my colleague Philip Bobbitt develops a theory of what he calls the "modalities" of constitutional argumentation. Bobbitt is referring to the modes of argument that participants within the practice of American constitutional law use to try to persuade one another of their points of view. There is obviously an affinity between "modalities" and rhetorics, and Bobbitt's is the fullest examination that exists of what count as warrantedly assertable propositions that can be made by those engaged in the specific practice of constitutional interpretation.

Bobbitt offers six modalities, but two are particularly important to this part of my analysis. These are the "textual"24 and the "historical."25 The first refers to the words (and their presumptively plain meanings) found in the constitutional text; the second, to the intentions of the persons who contributed to making the words legally binding. Both of these modalities are richly reflected in our standard constitutional discourse. "Textuality," after all, is the motif of Marbury,26 where Marshall proclaimed the "obvious" meaning of the allegedly plain text.27 And Justice

19See Senate Comm. On the Judiciary, Nomination of Anthony M. Kennedy to be an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 113, 100th Cong., 2d Sess. 20–21 (1988). The section is headed by the following, which is capitalized in the original: "V. JUDGE KENNEDY HAS A REASONED AND BALANCED APPROACH TO THE NINTH AMENDMENT: ONE THAT IS FULLY CONSISTENT WITH HIS UNDERSTANDING OF 'LIBERTY' IN THE DUE PROCESS CLAUSE." The Committee's discussion goes on to note that Judge Kennedy had testified that the framers had believed "that the first eight amendments were not an exhaustive catalogue of all human rights and that "the Court is treating [the Ninth Amendment] as something of a reserve clause, to be held in the event that the phrase 'liberty' and the other spaces phrases in the Constitution appear to be inadequate for the Court's decision." Id. at 20 (emphasis added by the Committee). (Justice Kennedy's testimony is reprinted in appendix B of this volume).
20See 381 U.S. at 484–86.
24Id. at 7, 25–38.
25Id. at 7, 9–24.
26U.S. (1 Cranch) 137 (1803).
27See especially Marshall's discussion. Id. at 156–60.
Hugo Black, throughout his career, took up the cudgels in behalf of text and against a purportedly unfettered judiciary. It was he, after all, who dissented in *Griswold*, citing the inability to find "privacy" in the text. Moreover, it was Black as well who emphasized the importance of original intent in his interpretations of the first amendment or his claim that the fourteenth amendment was meant to incorporate the Bill of Rights. His confidence that the first amendment's "no law" meant "no law" was bolstered by his particular reading of the background of the Bill of Rights, which enlisted the almost sacred figures of Thomas Jefferson and James Madison as proponents of Black's particular reading.

There are other contending modalities, including reliance on doctrinal precedent; prudential analysis that takes into account the political consequences of a specific decision; structural analysis predicated on the division of the American government into separate branches horizontally and separate units of state and nation vertically; and, finally, what Bobbitt somewhat confusingly calls "ethical" argument, which involves reference to the constitutive norms of our cultural "ethos," our fundamental norms that define us as a particular socio-moral order. That being said, it is nonetheless important to recognize the special hold (some would say stranglehold) of text and history over much of ordinary public discourse concerning constitutional interpretation. (The desire to be textual, after all, is what explains Douglas' own desperate search for legitimation within the "four corners" of the standard (i.e., non-ninth amendment) Bill of Rights.)

Attorney General Meese, like Bork, is the champion primarily of a "historical" modality, though both also emphasize the importance of the text as they criticize judges who allegedly disregard both text and history in the name of their constitutionally untethered visions of politics. Although some of us (who are sometimes labeled "nihilists" for our efforts) are indeed roaringly skeptical of the plausibility of looking to text or history for authoritative guidance; it is only fair to recognize that this theoretical argument often antagonizes audiences who tend to define law as consisting precisely of an authoritative text with meanings constituted by the intentions and purposes of the authors undergirding the particular document.

In any event, for defenders of *Griswold* to insist on the use of other possible "modalities," including the "ethical" mode, seems to allow the Meeses or Borks to claim victory in regard to their claim that there is no textual or historical warrant for certain doctrines like that of "privacy." As a political matter, such a concession is simply stupid, something to be done only if one believes that there is no alternative. Thus, the revival of the ninth amendment, for many of the arguments made by its proponents rely precisely on what Meese and Bork purportedly respect—constitutional text and historical intention. Indeed, after writing a first draft of this paper, I had a conversation with one of the architects of the strategy that led to Bork's defeat that supported the inference that the decision to emphasize the ninth amendment was made in part precisely on the grounds suggested.

Consider in this light the fact that one of Judge Bork's most important critics—and adverse witnesses at the Senate hearings—was Philip Kurland of the University of Chicago Law School. I suspect that Professor Kurland is best known to many of us as the author of the single most vituperative anti-Warren Court article ever to appear in the *Harvard Law Review*. Kurland has consistently presented himself as a person for whom text and history were important, and he denounced the Warren Court for its purported willingness to ignore both in the interests of its own vision of the political or social good. In the normal course of events, one might have expected Kurland to applaud the appointment of a man

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30 See Black, *The Rights Retained by the People*, supra note 121, at 508-10 (Black, J., dissenting).
whose declared position seemed indeed the desirability of shooting the piano players of the Court (or at least changing the music drastically).

Instead Kurland wrote passionate condemnations and delivered forceful testimony denouncing Bork. Why did this happen? Part of the reason may lie in Kurland's respect for adherence to precedent, even when the initial decisions were mistaken, and in his perception that Bork was not similarly respectful. But this does not explain Kurland's own willingness to invoke the ninth amendment, which, as already seen, has scarcely provided much of the scaffolding for decided case law. Instead, he pointed to his own self-education that occurred while compiling, with Ralph Lerner, The Founders' Constitution, which brings together many of the background sources of the Constitution. Like most of us, Kurland had not previously thought very much about the ninth amendment. To put it mildly, it was not one of his mentor Felix Frankfurter's favorite parts of the Constitution. One can only imagine what Kurland had not previously thought about the ninth amendment, which, as already seen, has scarcely provided much of the scaffolding for decided case law. Instead, he pointed to his own self-education that occurred while compiling, with Ralph Lerner, The Founders' Constitution, which brings together many of the background sources of the Constitution. Like most of us, Kurland had not previously thought very much about the ninth amendment. To put it mildly, it was not one of his mentor Felix Frankfurter's favorite parts of the Constitution. One can only imagine what Kurland thought of Goldberg's opinion in 1965. But The Founders' Constitution could scarcely delete it, and Kurland was forced to confront it.

On turning to Volume Four, the reader discovers twelve pages devoted to the now famous patch of text: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As a piece of text, it seems hard to interpret this, at least on the surface, as anything other than a reminder that the notion of constitutional rights should not be limited to those enumerated in the Constitution; rather, they should include as well "others retained by the people." Accompanying the text, though, are a set of documents that help one to understand the reasons for the insistence that the ninth amendment be included as part of the Bill of Rights that were proposed by the First Congress and ratified by the States very shortly thereafter.

The debate about the Bill of Rights began almost immediately upon the submission of the 1787 Constitution to the states for ratification. George Mason had refused to sign the document because it lacked a bill of rights, and many "Antifederalists" picked up this charge. Many of them elaborated one or another version of natural rights, and it is no surprise that the first entry in the Kurland-Lerner text is William Blackstone's powerful evocation of the English tradition of natural rights. Moreover, the American sources emphasize the (altogether realistic) fear that the failure adequately to recognize the limits upon government would serve as a future warrant for the aggrandizement of governmental power.

The Antifederalists were responding to arguments earlier made by supporters of the Constitution, who emphasized that the new national government was a limited one, possessing only the powers that were assigned to it in the text of the document. This fact that the national government required assigned powers, of course, was what differentiated it from state governments, viewed as possessing plenary power, which in turn required the prohibitions of bills of rights and the like to withhold certain powers from the states. This argument was most powerfully made by James Wilson in a Philadelphia speech and by Alexander Hamilton in the 84th Federalist Paper. Both argued that the national Constitution was one of only limited, assigned powers. What the national government had not been specifically authorized to do, it could not do. Hamilton's argument does not fit altogether well with his defense of implied power only four years later in relation to the chartering of the Bank of the United States, but we can let this point pass. The far more substantial flaw in the Wilson-Hamilton argument, as many of the Antifederalists pointed out, is article I, section 9 of the Constitution, in which Congress is prohibited, among other things, from establishing titles of nobility. The 1787 Constitution is not merely an assignment of power; section 9 is an explicit limitation of power. The obvious question,
then, is why there exist only the limits found therein. Had section 9 not appeared in the original Constitution, the Wilson-Hamilton argument would have made a lot of sense logically; with section 9, however, it collapses.

Still, there remained a powerful truth to the Federalist argument. Did any enumeration of limitations on government carry with it the negative pregnant that everything else was in fact permitted? The importance of this question was only heightened by the introduction of the Bill of Rights, which specified in the first eight amendments a variety of limitations upon government. This question receives its answer in the ninth amendment. As James Madison put it, speaking to the House of Representatives on June 8, 1789,

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.44

The “guard” was the ninth amendment, with its message, as plain as one might hope for given the vagaries of language, that the specification of some rights was not to be interpreted as denying the equal presence within the legal system of other, unenumerated rights.

In Griswold, Justice Goldberg specifically wrote that he did not “mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government.”45 Laurence Tribe, in his magisterial treatise on the Constitution, similarly points out the impossibility of viewing the ninth amendment as the source of rights.46 Rather, it acknowledges the existence of rights not specified in the text. As then-Justice Rehnquist put it, though referring to the tenth amendment, it is “an express declara-

441 Annals of Congress 456, [439] (1789). Sherry notes that two versions of the Annals exist, with different paging; thus the alternative page in brackets. Sherry, supra note 15, at 1162 n.150.

45381 U.S. at 492.

can be chosen by the national government to achieve even those powers that are quite clearly within the province of that government. The reminder at the end of the tenth amendment that power might also be reserved “to the people” reminds us that there may be some powers that no level of government has, but one can still differentiate the ninth and tenth amendments. One ironic proof of this distinction is that even those who disdain the tenth amendment by pronouncing it, with Chief Justice Stone, a mere “truism” about the allocation of power, do not reduce the ninth amendment to the same kind of tautology. The problem with the ninth amendment is not its obviousness, but rather its mystery.

In any event, I hope that I have sketched a plausible explanation for the particular rediscovery of the ninth amendment at this time. Still, to establish the propriety of introducing the formerly forgotten ninth amendment into the ongoing conversation of constitutional lawyers does not begin to resolve the important interpretive problems linked to it. I now turn to consideration of some of those problems, repeating, however, the caveat introduced at the beginning of this article that I do not purport to have achieved a “decoding” of the mysteries of this piece of text.

II. The Ninth Amendment as a Limitation on State Power
(Or, Why Not Revive the Privileges and Immunities Clause of the Fourteenth Amendment?)

Meese and Cooper could concede much of the argument so far, but then go on to say it still does not justify Goldberg’s invocation of the amendment in Griswold for one very simple reason: it recognizes limits only on the national government and says nothing about the state governments being similarly limited. There is surely something to this argument. The standard reading of the Bill of Rights, after all, is that it was meant to apply only to the national government. Indeed, Madison apparently initially proposed that the amendments be interspersed throughout the original text rather than collected in a separate catalogue, and the ninth amendment was to be assigned to article I, section 9, which unequivocally applies only to the national government. Moreover, the remark quoted earlier refers to “the hands of the General Government,” even though we know that Madison engaged in a losing effort to add an amendment that would have limited the state’s ability to regulate speech or abridge freedom of conscience.

It is obviously open to an interpreter to argue that the separate placement of the amendments is significant and affects the meaning we should assign to them. The ninth amendment does not specifically refer to the federal government; instead, it seems to announce a general principle of construction: enumerations of limitations should not be read as announcing a negative pregnant—that which is not specifically limited is therefore permitted. There are two enumerations of limitations in the Constitution. Article I, section 10, sketches out certain limitations on the power of the states, and one does not do any violence to the text to argue that the ninth amendment points to the incompleteness of section 10 just as surely as it does to that of section 9. However, this argument has not been generally accepted.

Part of the reason it has not been accepted, ironically enough, is that early decisions that did clearly rest on a notion of unenumerated constitutional limitations of government, such as Calder v. Bull, did not cite the amendment. As Suzanna Sherry has recently demonstrated, there are many such early decisions, and part of the problem is that presented to Sherlock Holmes: Why did the dog not bark in the night? Did Justice Chase, for example, fail to cite the ninth amendment because he viewed it as irrelevant to the case, which, after all, arose at the state level and had nothing to do with the actions of the national government? Or did he fail to cite it because it literally went without saying that the principle of construction applied to all cases that were otherwise properly before the courts? One might, of course, ask similar questions about Marshall’s and Johnson’s failure to cite the amendment in Fletcher v. Peck, which is otherwise full of tips of the judicial hat to the existence of natural justice as a limitation on government.

Nor, apparently, was the ninth amendment cited as a restriction on state power even by those with the greatest incentive to do so—radical antislavery lawyers. William Wiecek points out that the materials of “anti-slavery constitutionalism” were forged out of two provisions of article IV—the privileges and immunities clause and the guarantee of a
This history goes a long way toward supporting the argument of Assistant Attorney General Stephen Markman, made in a letter to the Wall Street Journal on January 15, 1988, that the ninth amendment “has no limiting effect at all on the powers of the states.” Is there a plausible response to this argument? I think that there is. It involves shifting our attention to another oft-forgotten section of the Constitution, the privileges and immunities clause of the fourteenth amendment. Indeed, I have found myself wondering quite often over the past several months, as I have tried to lessen my ignorance of the ninth amendment, why it is that so much attention. No one can doubt that the fourteenth amendment, as it were—of our contemporary constitutional rhetoric?

One answer to this question was given me by Mark Tushnet, who suggested that the very fact that the ninth amendment has played such an inconsequential role in our case law is a potential source of strength, for the elites). These are the privileges and immunities which belong to persons simply by virtue of their status as citizens of the United States. These fundamental rights are protected against national interference by the logic of national citizenship. As Curtis emphasizes, many Republicans believed that they were already protected against state interference, so that the second sentence of the fourteenth amendment, prohibiting state abridgement of these privileges and immunities was simply declarative of what the Constitution, correctly interpreted, already required. The Constitution, from this perspective, had not been correctly interpreted. Marshall, for example, in *Barron v. Baltimore*, had limited the other hand, confronts an absolutely disastrous barrier from the perspective of the conventional lawyer. That is, of course, the *Slaughterhouse Cases*, in which Justice Miller and his colleagues in the majority eviscerated the clause by trivializing its meaning. To use the privileges and immunities clause as the source of legitimation for *Griswold* would not only be intellectually daring; it would also require overruling one of the established warhorses of our case law.

What this illustrates, among other things, is the way that we as scholars are prisoners of the intellectual structures generated by our obsessive attention to the judiciary as the source of authoritative legal norms. Recent scholarship by Michael Kent Curtis and Robert Kaczorowski, among others, has demonstrated as clearly as one can reasonably expect that the consciousness behind the privileges and immunities clause in 1866 was far more radical than that described by Justice Miller in 1873 (when, among other things, Northern supporters of radical reconstruction had lost their nerve and were rapidly moving toward reconciliation with the white Southern elites). As Senator Trumbull put it, “To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens as free men in all countries . . . .” These are the privileges and immunities which belong to persons simply by virtue of their status as citizens of the United States. These fundamental rights are protected against national interference by the logic of national citizenship. As Curtis emphasizes, many Republicans believed that they were already protected against state interference, so that the second sentence of the fourteenth amendment, prohibiting state abridgement of these privileges and immunities was simply declarative of what the Constitution, correctly interpreted, already required. The Constitution, from this perspective, had not been correctly interpreted. Marshall, for example, in *Barron v. Baltimore*, had limited the

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60 See *United States v. Cruikshank*, 92 U.S. 542 (1876).
reach of the Bill of Rights to the federal government. But, like other misinterpretations, it could be overruled by a later court with more wisdom. This was, among other things, the reason that some Republicans believed that the fourteenth amendment was wholly unnecessary as a matter of constitutional logic, even if it served as a reminder for the dimwitted that the states were indeed subject to the full slate of constitutional limitations.

Still, there exists the smelly carcass of Slaughterhouse, and relatively few lawyer-scholars seem willing to argue frankly that Justice Miller's opinion should be forthrightly disregarded as a statement of the meaning of the fourteenth amendment. Is there any other advantage to focusing on the ninth instead of the fourteenth amendment? My colleague Douglas Laycock suggests that there is: the text of the ninth amendment compels recognition of unenumerated rights, whereas even a vigorous reading of the privileges and immunities clause can stop short of that recognition. We see this point most clearly in regard to the debate about the "incorporation" of the Bill of Rights, which is most often defined as consisting of, at most, the first eight amendments. Judicial conservatives who are willing to concede the legitimacy of incorporation can avoid the charge of ignoring or eviscerating the privileges and immunities clause by conceding that it incorporates the first eight amendments while denying that it does anything else. This was, of course, Justice Black's view. One can argue that Black was mistaken—that the clause not only incorporates the first eight amendments but also recognizes the existence of unenumerated rights that are equally enforceable by the judiciary—but those who take Black's view are not in the untenable position of saying that the clause adds nothing (or so little as to be practically meaningless) to the Constitution. They are in that untenable position with respect to the ninth amendment. Those who would deny that it protects unenumerated rights can offer no plausible alternative construction; they must instead, like Robert Bork, deny that it means anything at all.

One can, then, be a full incorporationist and yet remain narrowly textual in one's privileged modality insofar as one incorporates only the rights purportedly specified in the first eight amendments. Even if one makes a textual argument for taking the ninth amendment into account—it is, after all, part of the text—the mode by which one breathes life into it is scarcely textualist. Instead, one is invited by the text to adopt a specifically non-textualist modality of argument in order to answer the question what comprises the set of unenumerated rights.

Laycock is right in terms of describing the patterns of argument, but one answer is simply to attack Justice Black's reading of the clause as too limited. Or, concomitantly, one can extend the ambit of "full incorporation" to the patch of text overlooked by Justice Black namely, the ninth amendment itself. Still, even if these arguments are accepted in regard to "unenumerated" limitations on the powers of the states, that does not solve, at least for a textualist, the application of such limitations to the national government, given the textual application of the fourteenth amendment only to the states. There is no satisfactory theory, for example, that explains the imposition on the federal government, in Bolling v. Sharpe, of the equal protection norms enunciated that same day in Brown v. Board of Education. One cannot, then, omit the ninth amendment from general constitutional law, even if one might prefer that unenumerated rights vis-à-vis the states be handled through a revived privileges-and-immunities jurisprudence.

In any event, we should assume for purposes of discussion that the ninth amendment remains our cygnusore. We are still left with the problem of providing some positive content to its otherwise negative reminder that our rights are not exhausted by enumeration. What are some of the central problems, and what might be a solution? The next section focuses on the former; the concluding section offers a tentative approach to the latter.

III. Chattel Slavery and the Challenge to the Jurisprudence of the Ninth Amendment

I believe that the arguments presented above, however theoretically interesting, are overshadowed by that great brooding omnipresence of American constitutional jurisprudence—chattel slavery. At the very least, I believe that those who argue in behalf of the vitality of the

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66See his dissenting opinion in Adamson, 332 U.S. at 71-89, coupled with his dissent in Griswold, 381 U.S. at 907.

67See sources cited supra notes 60-61 and accompanying text.


69347 U.S. 483 (1954). See, for example, the exchange between Judge Bork and Senator Specter on this point. Judge Bork, like Attorney General Meese, purports not to view Brown as a deviation from the "jurisprudence of original intent," but he admitted that he could not rationalize Bolling within this jurisprudence (though he also assured the senators that he would not overrule the decision). One could, however, view the right not to be the victim of stigmatic discrimination on the grounds of race as precisely the kind of unenumerated right recognized by the ninth amendment as applying to the actions of the federal government.
ninth amendment, in regard to either the national or state governments, must confront the existence within our positive jurisprudence of a variety of laws that enforced or otherwise legitimated the practice of chattel slavery. It is the purpose of this section to argue that our history presents one extremely important, even if not necessarily fatal, obstacle to reviving the ninth amendment. I should, however, make clear what argument I am not making: I am not here arguing that the failure, as mentioned earlier, of even anti-slavery theorists to cite the ninth amendment is dispositive (or even highly relevant) for the interpretation that we can give it. Instead, I am arguing that we today must address the relevance, within our own suggested approaches to the ninth amendment, of chattel slavery and must indicate how our theories would handle slavery. More particularly, the "we" used in the preceding sentence refers especially to those of us within the legal community who teach or otherwise concern themselves with educating others about the implications of legal arguments. I believe that an increased focus on the possibilities of the ninth amendment must lead as well to paying greater attention to the questions surrounding chattel slavery when we engage in classroom exposition of the Constitution. There are two quite different arguments that an anti-slavery theorist might raise through citation of the ninth amendment. One might first assert that the ninth amendment, properly understood, invalidated all legal enforcement of or collaboration with slavery. This argument depends in turn on viewing the ninth amendment as a general way of introducing natural justice into discussions of constitutional meaning. If, as Justice Johnson suggested in Fletcher, reflecting an argument made by Grotius in the 17th century, even God could not violate natural law,70 then it would seem to follow that a mere nation of humans would be equally bound, with obvious consequences for the legal legitimacy of slavery. A second argument would be more modest: it would admit that positive law can override natural justice, but then argue that the ninth amendment nonetheless could prove useful as a principle of construction in favor of limiting the incursions on natural justice. That is, just as we are often told to construe statutes to avoid the possibility that they conflict with known constitutional norms, one could construe the Constitution itself to avoid the possibility of conflict with natural justice. What links both of these arguments together is their frank use of notions of natural justice, derived completely extra-textually.

Perhaps the most noteworthy rejections of such arguments are those of John Hart Ely and my colleague Douglas Laycock. In Democracy and Distrust, Ely criticizes Justice Black severely for his willingness to ignore the ninth amendment.71 But Ely also vigorously attacks those who would inject extra-textual values into the Constitution.72 Instead, he presents an alternative method of breathing life into the ninth amendment, which involves extrapolation from the themes and values already implicit in the Constitution. As Ely puts it, the "content [of the ninth amendment] should be derived from the general themes of the entire constitutional document and not from some source entirely beyond its four corners."73

Laycock, in a long review-article on Ely, has presented the most ambitious attempt yet available to outline such a theory.74 He is a self-described constitutional positivist, and he sharply rejects the natural-justice interpretation of the amendment. Instead, he, like Ely, adopts what might be described as a true "penumbras and emanations" approach. "Unenumerated" rights are derived from a close reading of the existing text. But in Laycock's view, they are protected by the ninth amendment itself—not by the other texts from which they are extrapolated. Presumably the lack of a ninth amendment would render illegitimate the derivation of "unenumerated" rights that he otherwise endorses.

In a strong, supple argument, Laycock finds a right to travel and a right to privacy amply present in the existing Constitution.75 He is far more skeptical, however, about constitutional anti-slavery arguments of the kind I am suggesting. He emphasizes (and gives priority to) repeated textual acknowledgment of slavery and argues that this limits what one can legitimately derive from the equal textual presence of the ninth and tenth amendments.

7010 U.S. (6 Crane) at 143 (Johnson, J., concurring) ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.").


73J. Ely, supra note 71, at 12.

74Laycock, supra note 48.

75Id. at 363.
Pointing to the fugitive slave clause in article IV of the Constitution, Laycock argues that it generates a legal obligation of a free state to return an escaped slave.76 (Indeed, Laycock has suggested that this obligation should have been enforceable via a writ of mandamus in the federal courts.) Moreover, he argues, as indeed did almost everyone prior to 1861, that Congress was wholly without power to abolish slavery in the slave states. No doubt he would argue that any attempt prior to 1808 to abolish United States participation in the international slave trade would have been unconstitutional under article V (which protected the trade even against abolition through the ordinary process of amendment). These examples raise profound problems, especially for those who wish to re-infuse natural law into constitutional interpretation, but I am willing to leave them undiscussed here, for the more fundamental challenge to ninth amendment theorists is presented by certain cases and statutes that cannot so easily be defended within the terms of Laycock’s textualist positivism.

Consider within this context the repudiation by Chief Justice Marshall of the natural rights promise he had enunciated in *Fletcher* in a case arising fifteen years later, *The Antelope.*77 There Marshall used all of his formidable rhetorical skills in behalf of a distinctly non-textual form of legal positivism. A ship, the Antelope, was apprehended off the coast of Florida by a United States revenue cutter; 280 Africans were on board. United States law of the time provided that persons discovered attempting to import slaves would forfeit their ships and that the slaves would be returned to Africa. What made the case difficult was that the Antelope was in the control of pirates who had seized the Africans from several slave ships. The original Spanish and Portuguese “owners” of the slaves sued to get their “property” back, claiming that they had not attempted to circumvent the American law and that they therefore deserved to have their slaves returned to them. Marshall wrote the opinion for a unanimous Court ordering the return of at least some of the slaves to their “owners.” The rhetoric is entirely different from that observed in *Fletcher.*

Marshall begins his discussion by reminding the reader that “this court must not yield to feelings which might seduce it from the path of duty and must obey the mandate of the law.”78 But what might be the seduction that so worries Marshall? The answer lies in the moral claims to be made against slavery and the concomitant temptation to act in accordance with those claims. Justice Story, one of Marshall’s colleagues, had earlier denounced the slave trade as “repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice.” And he had gone on to say that “it is impossible, that [the trade] can be consistent with any system of law, that purports to rest on the authority of reason or revelation.”79 Marshall himself notes how “abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice.” Indeed, it “will scarcely be denied” that slavery “is contrary to the law of nature.”80

All of this having been said, however, the Court cannot escape recognizing that “[t]he Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in”81 the slave trade, and that established international law protects the trade, at least in the absence of domestic prohibition. The United States can surely prevent Americans from engaging in the trade and, of course, can prevent anyone from importing slaves into the United States. But, Marshall held, the United States must recognize the claims of “innocent” foreign owners who were not violating the law of their own countries in attempting to ship slaves to a country that could legally receive them. Navy a word is heard about the ninth amendment as a possible limitation on the general duty of the United States to conform to positive international law.

Similarly, Story, whatever his views about the morality of slavery, upheld the constitutionality of the Fugitive Slave Act of 1793 when it was challenged in *Prigg v. Pennsylvania.*82 Not the least remarkable feature of that Act, of course, is that it is wholly unsupported by the assignment of power to the Congress in article I. Story, a masterful interpreter of the Constitution, makes no effort to point to any article I source of the Act. Instead, he engages in a far more daring invocation of “implied powers” than any ever dreamed of by John Marshall, for Story’s opinion requires

76*Id.* at 365.
78*Id.* at 114.
80*Prigg* U.S. at 120.
81*Id.* at 114–15.
82*Id.* at 114–15.
that one accept article IV as a de facto assignment of legislative authority to Congress. In effect, he inferences from the specific history of the Constitution, and the grand compromise between slaveowners and their opponents, the constitutional legitimacy of the Act.  

(It may also be noteworthy, of course, that the 1793 Act was passed by the Second Congress of the United States, which included many members who might have been expected to object to an expansion of federal power. It must mean something, for example, that the Madison who was so eloquent in denouncing the legitimacy of the First Bank of the United States was apparently silent about this exercise of national power. One could, of course, explain Madison’s silence as simply displaying political prudence, given the likely views of his slaveholder constituents.)

If one wishes to deny the general power of Congress to pass the Act, it would probably suffice to cite the tenth amendment. There is, though, even here some rhetorical “bite” to the ninth, for one might read it as cautioning that a specific congressional “power”—protection of slavery—should be construed as narrowly as possible in order to avoid denying or derogating the undoubted, even if unenumerated, right generally to be exempt from being a slave.

An even clearer example of my point involves congressional authority over the territories. There is undoubted textual warrant for the exercise of such power.  

The tenth amendment simply does not apply. But might not the ninth amendment have been read as preventing Congress from including within its regulations for the territories any recognition of the legitimacy of slavery? This point applies with even greater force to congressional regulation of the District of Columbia. Could recognition of slavery within the District possibly survive full recognition of the meaning of the ninth amendment? This argument, of course, stands Taney’s Dred Scott argument on its head: he argued that the fifth amendment had the effect of forcing Congress to recognize the legitimacy of slavery in the territories.  

I am arguing that the ninth amendment has the effect of forcing Congress to withhold any legal recognition of slavery there, save perhaps for the necessity under article IV of returning from the territories fugitives from slave states. But, of course, the central fight concerning the territories involved not fugitives, but the right of slaveowners to bring their slaves into the new territories as part of the process of settling there.

Thus, I ask if we can heed the call for a revival of the ninth amendment without a radical revisioning of our constitutional history? Those who view the ninth amendment as pointing us to a source of legal limitations relatively unconstrained by the text must come to terms with slavery in a way that Laycock, an unabashed positivist, does not—though, to his credit, he at least recognizes the existence of the problem. He thinks the best reading of the original Constitution is that slavery was legal and state slave laws were constitutionally protected; the illegality of slavery therefore could not be used as a premise for constitutional interpretation, even under the ninth amendment. But he acknowledges room to argue that constitutional protection for slavery was limited to a few specifics; therefore, judges could have used the ninth amendment to attack slavery in every way in which it was not specifically protected.

Whatever one’s theory of the ninth amendment (assuming that one has a theory of the amendment and does not maintain it in its oblivion), I am arguing that to say, as lawyers, that such decisions as The Antelope or Prigg were “correct” is to make much of the contemporary recourse to the ninth amendment intellectually tenuous and quite possibly indefensible. Why am I so certain about this point? The answer is that one simply cannot take refuge in notions of evolutionary development whereby one distances oneself from figures in the past by saying, for example, that they did not have our own acuity in recognizing the immorality of a particular practice. Ronald Dworkin, for example, has usefully differentiated moral concepts and conceptions to justify an argument that a generalized commitment to “fairness” should override a particular time-bound judgment that a given practice was in fact fair. All of us have made use of such arguments, I suspect, including Judge Bork, who wrote a strongly pro-press opinion in a libel case by suggesting that the framers’ commitment to freedom of the press required much stronger protection for newspapers than they might have realized at the time. One can hardly use such arguments in regard to slavery, however. As Marshall and Story (or tormented state judges like Edmund Ruffin) amply illustrate, they fully recognized at the very instant they were judging that the practice of slavery was indefensible from the perspectives of natural rights, natural law, and Christianity. They were no less enlightened than we today consider ourselves to be about the immorality of slavery. We cannot justify their
decisions by recourse to the easiest kind of historicist arguments involving “paradigm shifts” and the other modes of analysis so common to our contemporary sensibility.

We are thus forced to assess the arguments of Marshall and Story and to decide whether they survive an appreciation of the force of the ninth amendment. If we answer affirmatively, then I submit that the ninth amendment loses much of its rhetorical power as a legitimator of judicial invalidation of injustice. (I suppose that someone might argue that only some injustices, for instance those that do not threaten civil war, can be handled by the judiciary, so that prudence might legitimate overriding the force of the amendment in regard to slavery but not, say, in regard to the violations of marital privacy seen in *Griswold*.)

If, on the other hand, we save the ninth amendment, as it were, by deciding, retrospectively, that the pro-slavery decisions were wrongly decided, then we must take such a conclusion into account as we teach our constitutional law courses. We must subject Marshall and Story to some of the same critique now reserved for Taney and his egregious opinion in *Dred Scott*. If we answer, as I suggested at the outset, as my own tendency, that there is no such thing as “correct” interpretation or, somewhat more modestly, that “correct” interpretation can nonetheless violate the law of non-contradiction so that both A and not-A can be equally correct, then the reintroduction of the ninth amendment as a rhetorical device turns out to lose some of its impact—though one should not underestimate the importance simply of legitimizing ninth amendment citation as a proper example of constitutional argumentation.

IV. Toward a Contemporary Jurisprudence of the Ninth Amendment

In this final section, I want at least to sketch how a revitalized ninth amendment might operate within contemporary constitutional argument. In particular, I want to discuss the fact, which I am certainly not the first to note, that many persons today do not find meaningful a view of the Constitution that relies on such notions as natural rights and natural justice, however historically warranted the invocation of such notions might be. Consider, for example, Alexander Hamilton’s statement, quoted by Suzanna Sherry in her recent article, *The Founders’ Unwritten Constitution*:

> The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.  

This is surely powerful evidence for the belief in “sacred rights” that transcend any “parchment,” including that of the 1787 Constitution. But the obvious question is whether we continue to inhabit in any significant sense Hamilton’s world. Here is where historicism, which cannot be used very well to defend Marshall or Story, may nonetheless prove fatal to the invocation of Hamilton within the contemporary constitutional debate. For my surprise is that relatively few of us continue to believe in the existence of a foundational “human nature” or the presence of a “divinity” who inscribes his or her teachings either into a decodable text of nature or upon our minds via self-evident truths or disciplined right reason. The language of natural rights or natural justice raises every one of the foundational questions that have proved so embarrassing to the enterprise of post-Kantian philosophy. I am sure that some readers do in fact adhere to some variety of naturalism. Most, however, are unlikely to, and the command to consider the Constitution as including the dictates of right reason is literally meaningless.

Professor Randy Barnett has suggested that it may be irrelevant that we today do not share the framers’ views. He notes that even moral skeptics (like myself) do not deny that the founding generation, as a general matter, accepted the idea of natural rights. “Given their political views and fears, had they been positivists, they would have insisted on more positive protections.” Their failure to do so is in some sense evidence of the faith they put in future generations to remain sensitive to the existence of unenumerated rights. “Enforcing the original scheme,” says Barnett, “requires that unenumerated rights be treated ‘as if’ we believed in them.” Fully to address this point would both make this article much longer than it already is and require delving into some extremely complex issues of philosophy that are beyond my ken. One might summarize the problem, though, by asking if it is possible to “do” (rather than merely analyze the “doing”) by others of, for example, Christian theology if one does not believe in the existence of God. This is not meant as (merely) a rhetorical question; if we were, there would be no complexity to

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it. But I am suspicious about an approach that asks us in effect to be unfaithful to our deepest views about the nature of moral reasoning (or, indeed, the structure of the world).

Does this “skeptical” response doom the enterprise of giving meaning to the ninth amendment? I think that one can escape this unhappy conclusion. Instead, one can shift the argument at this point and adopt a quite different tone of voice, one that is often classified in contemporary debate as “interpretive.” Its most prominent American proponents include Clifford Geertz and, within the realm of political theory, Michael Walzer. Although Walzer is a person of the left, similar views can be discerned in the thought of the English conservative Michael Oakeshott. All of them reject abstract rationalism and suggest in its place close attention to the narratives by which we constitute our own particularistic way of life. Such listening—and the careful interpretation of what we hear—will enable us to grasp the deep structures that constitute our political order and to understand as well that some transitory political notions, even when embodied in legislation, could be in serious conflict with these structures. This understanding could generate two quite different models of critique.

One model is the standard form of judicial review, particularly as is often transmitted to our students. That is, one might ask what it is that a particular piece of legislation seeks to do and then ask whether our political tradition, correctly understood, allows this result. There are at least two crucial problems with this model, as suggested by, among others, John Ely. First, why would one believe that the judiciary is the better interpreter of “our” political tradition than a legislature? If it is a truly shared tradition, then there is no reason to believe that one particular institution would be so much better in its mode of apprehension that it is entitled to set aside the contrary determination of another.

A second problem with this model is that it has an overtone of stasis; it can be heard as suggesting that there is a single, changeless tradition that structures our social order, the memory of man (and woman) knowing not to the contrary. This is scarcely tenable, even, one suspects, for the various exotic tribes that have contributed to the classical anthropologists’ vision of an atemporal, ahistorical society. Traditions change, and

with them notions of what is viewed as fundamentally important also change.

Still, no one with a sociological or anthropological bent argues that our world is simply one of randomized Brownian motion. To recognize something as “a society” is to suggest the presence of certain structuring conventions, even as we can also suggest that these conventions are being transformed as the result either of conscious decisions or the pressures of other changes in the social order. What one can do, at least on certain occasions, is to confront one’s fellows with the implications of their decisions and to ask if they are really willing to accept the consequences.

This leads to a potential second model of critique, which in substantial ways adopts Ely’s own emphasis on procedure. It would ask the following question: Is there good reason to believe that the legislator or any other primary decision-maker in fact considered the implications of the given piece of legislation for values that do indeed seem central to “our” tradition? And, even if the answer to this question is affirmative, did the consideration happen recently enough in the past that we can recognize the legislators as our contemporaries?

The first question bespeaks a commitment to “thoughtfulness” as the sine qua non of the republican political order that is privileged (even if not precisely “guaranteed”) by the text of the Constitution itself. It has the obvious defect of any purely procedural test, that it does not on the surface limit the range of decisions that might be made. So be it. Although it is important to remember that procedure is not everything, contrary to what was sometimes urged by Alexander Bickel and other denizens of the “legal process” school, it is surely something whose importance is derided at our peril.

The second question is Jeffersonian in its inspiration insofar as it suggests that only the living are entitled to rule. Whatever the thoughtfulness of a past generation, the one thing that we can be sure of is that its members did not discern our particular world and apply their formidable intelligence to solving its conundrums. As Guido Calabresi argued in his fascinating study _A Common Law for the Age of Statutes_, even the most well-drafted of statutes can become irrelevant or, what is worse, actively counter-productive to the very concerns that gave them life in the first place.

What I am doing is justifying a certain kind of judicial activism should the adjudicator be confronted with either thoughtless present leg-

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islation or old statutes that have not been actively reconsidered at any recent date. But what if the questions are answered affirmatively? This may present many of us with severe analytic and political difficulty, for it then seems, at least to me, hard indeed to justify judicial invalidation of legislative decisions in such a context. This, among other things, is what makes the abortion controversy so difficult, especially in regard to post-Roe laws that have been enacted after a great deal of public debate. (The same problem may be presented by the death penalty, except that capital punishment is passed by legislators who never genuinely imagine that it might apply either to them or to their friends. That, however, is not so much the situation in regard to abortion.)

One might place the argument I am making here within the context of the "remand" function of the Supreme Court, by which Congress or a state legislature is given an opportunity for an "orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made back-handedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance." This notion, which counterenances the possibility that the legislature might indeed decide to infringe on the value recognized as crucial, or even "fundamental," by the Court, seemingly challenges a basic premise of judicial review—the finality of judicial decision, save for constitutional amendment or reversal by the Court itself. In teaching the dormant commerce clause cases, though, I inform my students of the reality that the Supreme Court is simply not supreme in that area. Its decisions are reviewable by Congress, simply by the Court itself. In teaching the dormant commerce clause cases, which with some frequency overrules them. Might one imagine a model of judicial review as suspensive veto, returning the offending legislation to the legislature for a sober second look, this time with the legislature presumably fully cognizant of the impact of the legislation upon the Court's reading of our social ethos?

Obviously one can imagine such a model: I just have. The more important question, obviously, is its desirability. My own inclination would be to support it, especially because the kinds of political interests most easily embraced under the ninth amendment (or, for that matter, the privileges and immunities clause of the fourteenth amendment) are, in contrast to equal protection claims, those that indeed are held by almost all of us. I tend to agree with Ely that the Court has little legitimacy in restraining a hell-bent majority insistent on depriving itself of what had formerly been viewed as "fundamental rights." But one should not easily presume that the legislature in fact has decided to do that, and a remand does not seem wildly offensive to the majoritarian concerns that were repeatedly articulated by Judge Bork in his attack on judicial interventionism.

It is also worth mentioning in this context—i.e., respect for majority rule—that a given majority (or, more accurately, coalition of minorities) in a particular legislative setting may have only the slightest connection with majorities outside of that setting. The reason lies not simply in contingent defects in a particular election, but also in the now well-known problems associated with the Arrow paradox and other problems in the theory of social choice. To describe the legislature as necessarily representing majority sentiment on all issues that it decides is sheer ideological assertion, whose falsity can be shown both empirically and theoretically. That does not, I should hasten to add, make the judiciary a better representative of majorities, but at least it should caution us that the realities of modern politics are far more complex than the civics book-like descriptions sometimes proffered by purportedly serious analysts.

Still, unless one believes, as I do not, that our tradition speaks univocally or that it is changeless, then it is hard, if not impossible, to privilege the readings of courts against those of thoughtful legislators. This is, I think, a potential difficulty in the use of what Bobbitt calls the modality of "ethos." Even if one agrees with the not uncontroversial proposition that one can identify a given cultural ethos that helps to structure our comprehension of what it has meant to be a "free American," I do not think that it is helpful to pretend that the ethos could not undergo quite radical changes (just as it has in fact undergone such changes in the past).

Before I conclude, I should note that most of the discussion so far has focused on what are traditionally deemed "negative" rights involving

92 Professor Barnett suggests that judicial review does not "privilege" judicial readings so much as simply require[] that all three branches agree about a statute's constitutionality for it to survive.... If thoughtful legislators believe a measure is unconstitution- al and do not propose or pass it, their views "prevail" over that of the other two branches. Only if they think a measure is constitutional do the other two branches get a voice. According equal weights to the courts (and the executive) means that when they disagree with the legislature, the statute is stricken. In sum, a requirement of consensus does not presuppose judicial superiority. Barnett Letter, supra note 87. See also Barnett, Foreword, supra note 87, at 49. A full response to Professor Barnett's interesting point would take this article too far afield.

94 P. Bobbitt, supra note 23, at 94-95.
freedom from state regulation. Liberalism and the accompanying notion of the limited state surely emphasizes such rights. It is not surprising that many latter-day rediscoverers of the ninth amendment focus on the "right of privacy"—the so-called right to be let alone. Indeed, Professor Barnett, one of the warmest supporters of the ninth amendment, would restrict it to negative rights.  

I suspect (indeed I am certain) that this attempt to capture the ninth amendment for libertarianism will itself provoke many of the most fundamental future struggles over its meaning (and use). Charles Black, for example, has led the way in reading the ninth amendment as a possible charter for the positive entitlements of the welfare state. But we do well to consider the fact that Professor Kurland, in collecting background sources for the ninth amendment, included an extensive passage from Blackstone’s Commentaries which, along with its expected emphasis on negative liberty, includes the following passage:

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community.

We might listen as closely to this unexpectedly radical thrust of Blackstone as to the much more familiar paeans to traditional negative rights. Indeed, I would suggest that the Blackstone quotation should be of special interest to those who wish to use the ninth amendment as a proxy for natural justice or natural rights. "Ethos" theorists, being more positivistic at bottom, can argue that such notions of a duty to care for one another passed out of our tradition as we became more relentlessly liberal in the nineteenth century. That mode of avoidance is less available to those who wish to argue in behalf of more universal norms.

Conclusion

The fact that the ninth amendment is no longer forgotten clearly does not establish that many of us know confidently what to do with it. Still, the fact that one cannot (or, again more accurately, I cannot) deliver you a satisfying comprehensive theory of the ninth amendment or of the privileges or immunities clause of the fourteenth amendment does not stand for the proposition that they should be ignored as potentially valuable additions to the standard repertoire of arguments by which we daily reconstruct the actual meaning of living within the embrace of the Constitution. The ninth amendment is not the philosopher’s stone. To expect too much from it will simply doom its admirers to disappointment and, not incidentally, make it ever less likely that they will persuade their more skeptical auditors to end the process of forgetting that has characterized its history. But we should all be aware of the contribution that can come even from "a little help from one’s friends," and these days a little help is nothing to snicker at.

95 See R. Barnett, supra note 15.
97 The Founders' Constitution, supra note 36, at 390.
5. Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson

Stephen Macedo

I.

In his important and provocative article, Sanford Levinson appears in two roles. First is Levinson the constitutional interpreter, ally (for the most part) of those who seek to revive interest in the ninth amendment. Second is Levinson the skeptic, warning the reader of his doubts about the possibility of correct constitutional interpretations. In his first role, Levinson critically reviews important claims for and against reviving the ninth amendment. He shows, for example, how the widespread concern with constitutional text and historical intention should bolster the case for taking the ninth amendment more seriously. But Levinson always returns to his second role, framing his analysis of the ninth amendment within a larger skeptical posture about the possibility of "correct" constitutional interpretations (or worse, of a correct "decoding" of the text). And so, Levinson's useful contributions to constitutional interpretation are repeatedly hemmed in and even undermined by disclaimers to the effect that all he is doing is situating the ninth amendment, and the phenomenon of its revival, within our evolving legal culture and rhetorical practices.

Levinson wants to argue, on the one hand, that the revival of interest in the ninth amendment is probably a good thing. But he also wants, on the other hand, to portray himself as a "skeptic," concerned with legal rhetoric and culture rather than with "searching for singularly 'correct'"
interpretations of the Constitution." Situating "ninth amendment talk" within our legal culture, and making sense of the ninth amendment's revival in the context of legal practice and rhetoric, are very different enterprises from justifying the revival of the ninth amendment. Can Levinson have it both ways? Can Levinson both engage in arguments that seem designed to help us better understand the meaning of the ninth amendment, and then retreat to his skeptical posture disclaiming the possibility that the ninth amendment has a correct meaning? Or to put it otherwise, what kind of a skeptic cares enough about better and worse readings of the ninth amendment to put himself to the trouble of research and analysis designed to correct widespread misreadings? Perhaps only a half-hearted skeptic, a skeptic whose doubt is not really corrosive of a serious concern with improving our understanding of the Constitution.

I shall begin by addressing Levinson's substantive arguments about why we should take the ninth amendment more seriously. For the most part, I applaud Levinson's arguments on behalf of the ninth amendment, and try to push the case a bit further. From substantive arguments I will turn to suggest some doubts about Levinson's skepticism: he takes the quality of legal argument too seriously to be a skeptic about the possibility of distinguishing better from worse arguments. All that Levinson's skepticism comes down to is the assertion that neither he nor anyone else has yet attained (or is likely to attain) what could be described as a finally "correct" interpretation of the Constitution. Fine. But one need not believe that our understanding of the equal protection clause, for example, is "finally correct" to believe that it is better than the Court's understanding in Plessy v. Ferguson. And Levinson himself shows that he understands the ninth amendment much better than Judge Bork does (or, at least, than he did at the time of his hearings). So why all the fuss about skepticism? We should take Levinson's "skepticism," I will suggest, as standing in for a kind of theoretical modesty, which is laudable but misleading, and belied by the quality of his own arguments.

II.

Reviving the ninth amendment is not quite a matter of restoring the dead to life. As Levinson points out, the ninth amendment has had at least a shadowy existence. It figured in Justice Douglas' justification of an unenumerated right to privacy in his opinion for the Court in Griswold v. Connecticut, it was the focus of Justice Goldberg's concurring opinion in that same case, and it has been cited since. The ninth amendment received a big boost from, of all things, the Senate debates over the nominations of Judges Bork and Kennedy to the Supreme Court. Judge Bork's unwillingness to regard the ninth amendment as anything more than an unintelligible aberration seriously hurt his cause in the Senate Judiciary Committee.

Levinson does a nice job of showing that, far from what New Right constitutionalists like Judge Bork and former Attorney General Meese claim, emphasizing the authority of constitutional text and historical intention actually lends support to reviving the ninth amendment as a source of unenumerated constitutional rights. Madison insisted on attaching the ninth amendment to the first eight amendments to preclude a possible implication of an enumeration of rights; namely, that citizens retain only those rights specifically enumerated. But proponents of original intent typically use the resort to history as part of an argument that construes judicially enforceable individual rights as only those specifically enumerated and originally intended. The New Right's narrow and specific approach to constitutional rights was precisely the sort of error that the framers of the ninth amendment sought to guard against. It is, then, not surprising that Bork, Meese, and company ignore the ninth amendment. A serious resort to history, it turns out, bolsters rather than undermines the revival of the ninth amendment.

But proponents of the ninth amendment face problems that Levinson considers more substantial than the New Right's selective use of history. First, does the ninth amendment apply to the states? And second, might not the fourteenth amendment's privileges or immunities clause serve as a sounder basis for broadening rights? Levinson seems to come around, eventually, to the view that both neglected clauses need

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4Id. at 131-32, passim.
5163 U.S. 537 (1896).
6381 U.S. 479 (1965); see Levinson, supra note 1, at 135–36.
7Griswold, 381 U.S. at 486 (Goldberg, J., concurring).
8Levinson, supra note 1, at 135.
9Id. at 139-41.
11Levinson, supra note 1, at 143-48.
12Id. at 145.
to be reexamined. Indeed, anyone concerned with doing full justice to individual rights must see the two clauses as working together: the ninth amendment encouraging us to read individual rights broadly, and the privileges or immunities clause helping to justify the application of even unenumerated rights against state governments.

Among other sources, Levinson cites the interesting historical work of Michael Kent Curtis on the intentions of the framers of the fourteenth amendment. Let me only note one of Curtis' most pertinent observations, not mentioned by Levinson: at least one framers of the bill proposing the fourteenth amendment specifically claimed in the Senate debates that the privileges or immunities clause would apply the whole Bill of Rights including the ninth amendment to the states. The serious resort to history is even more damaging to Meese, Bork, et. al. than Levinson claims.

So Levinson helps proponents of the ninth amendment clear their first important hurdle: applying the ninth amendment to the states. The next problem to be faced is giving meaning to the ninth amendment; we must decide, what unenumerated constitutional rights we have. The first place to begin the search for ninth amendment rights is, as Levinson points out, within the Constitution itself. Levinson also considers how moral sources outside the constitutional text, "natural justice" or other moral standards, could furnish sources of unenumerated ninth amendment rights. Here, according to Levinson, we face the problem of the historical coexistence of the ninth amendment and slavery: can the ninth amendment really constitute a protection for moral rights if it was consistent with slavery? Let me take up these two strategies in turn.

First, the search for the ninth amendment's meaning should certainly begin within the confines of the Constitution's text and structure. This, indeed, seems to me to be basically what Justice Douglas sought to do in Griswold. But Levinson, strangely, first heaps scorn on Douglas' opinion, then seems to endorse a roughly similar approach. But Levinson's opinion is open, I think, to a more favorable interpretation than Levinson (at least at first) allows.

Griswold struck down a Connecticut statute making it illegal for married couples to use contraceptives. The Court based its decision on an implicit constitutional right to zones of privacy, which emanate from, or

form "penumbras" around, the specific guarantees of the Bill of Rights. These implicit, penumbral rights, Douglas argued, help give life and substance to express guarantees. And so:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."15

Now Levinson charges that Douglas' "attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade." But later in his paper, in asking how life might be breathed into the ninth amendment without relying on extra-textual notions of "natural justice," Levinson seems to endorse a search for meaning based on the "general themes of the entire constitutional document," or what he calls a "true 'penumbras and emanations' approach."16 Levinson suggests, that is, interpreting the ninth amendment by drawing on themes stressed in the specific clauses and structures of the Constitution as a whole; unenumerated ninth amendment rights might derive from a "close reading of the existing text."17 That seems to me to be a pretty good description of what Douglas (perhaps with some unhelpful metaphors) was up to in Griswold.

14Compare Levinson, supra note 1, at 135-36 with id. at 149-50.
15Griswold, 381 U.S. at 484.
16Levinson, supra note 1, at 136.
17Id. at 149-50 (quoting J. Ely, Democracy and Distrust (1980) and Laycock, Taking Constitutions Seriously: A Theory of Judicial Review, 59 Tex. L. Rev. 343, 349-50 (1981)). It should be noted that while Levinson claims that "there is no constitutional scholars who endorses the Douglas opinion," Ely himself pulls back from condemning Griswold; see J. Ely, supra, at 221 n.4. Ely's own approach, moreover, is to argue that democracy, not privacy, is the dominant value that emanates from the particular constitutional clauses and the structure of the Constitution as a whole. See id. at 73-104. Ely's argument, in other words, looks a lot like Douglas' except one finds democracy where the other finds privacy. And since Ely's preference for democracy over privacy rests on a self-defeating skepticism and an incoherent distinction between "process" and "substance," Douglas' argument (though much more schematic) may be stronger than Ely's. For a useful critique of Ely, see Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980).
18Levinson, supra note 1, at 150.
Imparting meaning to the open-ended command of the ninth amendment by consulting values underlying the more specific acknowledgments of constitutional rights, is a strategy similar to Chief Justice John Marshall’s landmark opinion in *McCulloch v. Maryland.* In *McCulloch,* the question was how to read the necessary and proper clause of article I, section 8. Article I’s enumeration of Congress’ powers, Marshall said, provides only the “great outlines” of what Congress may do. And so, while the Constitution does not specifically grant the power to establish a national bank, Marshall argued that interpreters should look not only at constitutional specifics, but also at the ends and purposes implicit in the powers that are specifically granted. Constitutional specifics, and overall constitutional themes and structures, help justify implied powers beyond those enumerated in article I. The necessary and proper clause helps signal the existence of unenumerated powers; the Constitution as a whole (and especially article I) helps us decide what those powers are.

The ninth amendment is an elastic clause for individual rights that is at least as explicit as the article I elastic clause for Congress’ powers. *McCulloch* and *Griswold* stand for similar ways of fleshing out the meaning of these elastic clauses: going back to the rest of the document and seeking the larger ends, values, and purposes that seem to underlie specific clauses and structures, and then using these to specify additional, implied powers or rights. Levinson’s dismissal of *Griswold,* therefore, is too hasty.

Of course, the ninth amendment does not limit unenumerated rights to those implied in the rest of the document, or those supported by values prominently represented in the Constitution’s text. Some might want to read the ninth amendment as a point at which the Constitution opens to the claims of moral judgment itself, legitimizing the protection of rights justified on moral ground. Here we confront Levinson’s second worry mentioned above. Since it took the Civil War amendments to put an end to the Court’s protection of slavery, Levinson argues, the reliance on the ninth amendment as an expansive source of judicially enforceable moral rights (rights not well-justified by the “penumbras and emanations” approach) is compromised. If slavery and the ninth amendment were consistent with one another, he seems to say, then it is hard to read the ninth amendment as importing natural rights as such into the Constitution.

Levinson seems to regard it as especially troubling that figures like Justices Marshall and Story “fully recognized at the very instant they were judging that the practice of slavery was indefensible from the perspectives of natural rights, natural law, and Christianity.” How could the ninth amendment be read as a “legitimator of judicial invalidations of injustice” if morally sensitive characters like Marshall and Story were willing to uphold the constitutionality of slavery? Well, Levinson himself suggests (parenthetically) but does not pursue the solution to his problem: there might be prudential reasons that justify accepting certain injustices, like slavery, for the sake of overriding values, such as peace and union. Such prudential arguments might have been sound in the case of slavery (at least for a time) while being unavailable to those who today oppose the protection of, for example, marital privacy.

If one pursues the argument that Levinson raises only parenthetically, one might conclude that the constitutional accommodation of slavery was seen, right from the start, as not only prudential but temporary. Abraham Lincoln argued that slavery was indeed inconsistent with the basic moral values underlying the Declaration of Independence and the Constitution, especially the promise of basic human equality. Aware of slavery’s injustice (and indeed, its incompatibility with our basic law) the framers, said Lincoln, “knew of no way to get rid of it at that time.” But the Union was not, Lincoln claimed, a compact protecting slavery:

> [w]hen the fathers of the Government cut off the source of slavery by the abolition of the slave-trade, and adopted a system of restricting it from the new Territories where it had not existed, I maintain that they placed it where they understood, and all sensible men understood, it was in the course of ultimate extinction. . .

The original Constitution, then, can be read as making the minimal concessions necessary to bring the Southern States into the Union, while asserting deeper principles at odds with slavery. The Constitution, in this light, appears as an “aspirational” document: composed not just of posi-

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17 U.S. (4 Wheat.) 316 (1819).
20 Levinson, *supra* note 1, at 150–53.
21Id. at 154.
22Id.
24Id. at 277.
25Id. at 277–78.
tive rules, but also of certain ideals and moral principles to be strived for and progressively approached. Levinson neglects the aspirational element in the Constitution's moral logic and so does not see how the actual accommodation of slavery even by morally sensitive figures like Marshall and Story (and indeed, the founders) is reconcilable with a deep and serious, though perhaps not fanatical, commitment to the realization of certain moral ideals. The ninth amendment, indeed, would seem to fit nicely into this aspirational logic: it expresses a constitutional desire to protect rights not specifically identified in the document, leaving it to future interpreters to advance the project of discerning and protecting constitutional rights.

I have suggested that, in various ways, Levinson might have gone further than he did in encouraging the revival of the ninth amendment. There is more, in particular, to be said for Douglas' opinion in Griswold than Levinson allows, and the method of Griswold furnishes a method for fleshing out the meaning of the ninth amendment. How far should we go in encouraging judges to incorporate into the ninth amendment rights, the support of which comes not from the Constitution's text but from independent moral sources? I am not sure. But my reservations have nothing to do with the Court's protections for slavery.

III.

Now all this leaves us with a fairly full plate. One item remains, however: Levinson's frequent denials that there are uniquely "correct" interpretations of constitutional provisions. How seriously should we take Levinson's professions of skepticism? What sort of skeptic is Levinson? It would hardly be unusual, or even particularly "skeptical," to hold that finally correct interpretations of the Constitution's various passages are not to be had. That's not skepticism, that's just openness to self-criticism, based on the acknowledgment that human beings are fallible. Dworkin, for example, holds that there are "right answers" to hard cases of legal interpretation. He does not by that claim mean that we can point to a series of actual interpretations that are indubitable, un revisable, or finally and absolutely right. He means that among a group of competing positions and arguments about how a particular case ought to be settled, we have no difficulty supposing that one is, all things considered, best. The judge's duty is, then, to weigh the evidence and arguments to the best of his ability, and come down for the position that seems on balance superior to its competitors. We recognize more or less competent exercises of judicial power, more or less satisfactory fulfillments of judicial duty, on the basis of our own judgments about how cases should be decided.

There's nothing mysterious here. Judging legal cases can, no doubt, be difficult, but so can grading student papers. Conscientious graders make an effort to get the grade right because they believe that, while relevant considerations can be complex and mistakes can always be made, the differences between "A" and "C" papers are not arbitrary but real and discernible.

Does Levinson mean to reject even this rather mundane description of the "right answers" thesis? He seems to. The best interpreters can do, he says, is pay "close attention to the narratives by which we constitute our particularistic way of life," and seek to "grasp the deep structures that constitute our political order." It is by no means clear to me how Levinson would have judges decide particular cases. Suppose the "deep structure" of legal judgment in our "particularistic way of life" comes down to the following: judges (more often than not) sift arguments conscientiously and try to discern the strongest among competing positions. Suppose, further, that conscientious sifting and weighing is exactly what, in our society, litigants and citizens (for the most part) expect judges to do. In that case, Levinson's interpretive move leads us right back to the conscientious sifting and weighing of evidence and arguments.

Of course, Levinson might well dismiss my characterization of "our" expectations about judicial behavior as more idealistic and naive than that of most lawyers, judges, and even citizens. Perhaps, but what would the point of such an observation be? Whether the question we are interested in is what judges do, or what judges should do, in neither case does the answer depend on what most people think. The fact is that some (not all) lawyers, judges, litigants, and citizens would approve of my

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26See, e.g., Levinson, supra note 1, at 132, 154.
28Levinson, supra note 1, at 156.
29Levinson's interpretive stance raises a host of problems, some of which I have tried to address elsewhere, in the context of a discussion of the "anti-foundationalist" claims of Rorty, Walzer, and others; see Macedo, Liberal Virtues, Constitutional Community, 50 Rev. Pol. 215 (1988).
description of our legal practices. And my description would, furthermore, actually fit some (not all) of our legal practices. By this I could only show that my description is not wholly utopian; that is a start, but only a start, on the path to justification.

Let us assume that the question we are interested in is the practical issue of how judges ought to decide cases (Levinson himself seems to say, after all, that they ought to take the ninth amendment more seriously). Levinson apparently thinks that “skeptics” like himself can still speak about interesting practical questions by adopting “a quite different tone of voice,” one that is “interpretive,” that is, one that pays close attention to “narratives.” But if Levinson thinks that “interpretation” is a way of combining a broad skepticism with a capacity for practical judgment, he is mistaken. Interpretations of social practices have normative implications only when they are normatively based, or normatively defensible. The reason is simple: interpretations are controversial, and controversial in many of the same ways that “abstract” moral arguments are controversial. If we want to be governed by “interpretations” of our shared practices, as Dworkin points out, we still have to decide which among a range of competing interpretations is the best one. The racist, after all, has his interpretation of the equal protection clause, and of our political practices and “deep structures” and whatever else you care to name. He can tell a story or narrative about what America means, about what our country stands for. If the skeptic thinks he can separate better from worse narratives or interpretations without sifting moral arguments and evidence, he needs to tell us how. If, however, rejecting the racist’s interpretation of America depends in part on rejecting racism, then interpretation leads us back to the enterprise of moral argument.

Levinson adds a suggestion that echoes Michael Walzer: if the interpretation of shared meanings is what constitutional interpretation is (should be?) about, “why would one believe that the judiciary is the better interpreter of our political tradition than a legislature?” The interpretive move might shift authority from the judiciary to the legislature if all of “us” shared the same interpretation of “our” tradition. That, however, is manifestly not the case. People disagree about their interpretations.

Establishing the superiority of the integrationist to the segregationist interpretation of our constitutional tradition will require more than the counting of heads, more than history, and more than anthropology: it will require just the sort of normative engagement that Levinson flees from. And so, adopting an “interpretive” tone of voice does not undermine the usual arguments for judicial review: political majorities should not be allowed to judge the merits of their own case (I mean “interpretation”) when minority rights are at stake.

I have much more sympathy with Levinson’s final claim that Supreme Court interpretations of the Constitution should not be respected as final interpretations, not only for the judicial branch of government, but for Members of Congress and the President as well. Judicial finality is, indeed, an unjustified claim that helps discourage more widespread participation in the process of constitutional interpretation. Constitutional institutions, including legislatures, the executive office, and elections, should be thought of as the settings for a genuinely public process of constitutional interpretation: a process in which Members of Congress, the President, and citizens themselves play a vital role. In our system, this public process should be animated by the responsibilities of three constitutionally coordinate branches each to interpret the Constitution for itself in carrying out its assigned functions.

There is, as I said above, much to recommend in Sanford Levinson’s excellent analysis of the ninth amendment. His skepticism is, however, ultimately half-hearted and unconvincing, serving mainly to introduce confusion. If Levinson’s concern is, as he claims, with “diverse rhetorics of argument,” why does he care to show that New Right types like Meese and Bork get their history wrong? If Levinson wants to read law as literature, why not read the real thing instead? As literature, law is pretty bad stuff. The fact is that Levinson has practical concerns about how the Constitution should be interpreted, and he clearly believes that conscientious argument and attention to reasons and evidence helps us better address such concerns.

31Levinson, supra note 1, at 156.
33Levinson, supra note 1, at 156. See Walzer, Philosophy and Democracy, 9 Pol. Theory 379 (1981).
34The point is well made by Dworkin. See also Sotirios Barber’s discussion of the distinction between history and tradition in S. Barber, supra note 26, at 84–85.
35Levinson, supra note 1, at 158.
36Expand on this point in S. Macedo, Liberal Virtues: A Liberal Theory of Citizenship, Virtue, and Community (1988), and Macedo, supra note 30.
37Levinson, supra note 1, at 131.
Let me end by suggesting (presumptuously) another interpretation of what Levinson calls his skepticism. Levinson doubts that he or anyone else has secure possession of what could plausibly be thought of as the final or ultimately true theory of what the Constitution means. Perhaps he doubts (don’t we all?) that anyone ever will have the final answer. Perhaps he is struck by the complexity of moral issues and the tendency of moral judgments to be colored by personal feelings, culture, and a host of other factors besides reasons. Human fallibility, moral complexity, and the difficulty of impartial judgment, all argue in favor not of skepticism but of measure, modesty, and moderation in the insistence on what seems to one personally to be the best argument. But if, when we survey the moral or constitutional landscape, we believe that the serious application of self-critical thinking helps us progress from limited to less limited understandings, to discover and correct errors and shortcomings in our own views, then we also have good reason not to fall into the embrace of skepticism.

Levinson’s substantive arguments are characterized by an admirable measure and moderation. And at many points, Levinson’s article displays too obviously the benefits of careful argument, research, and reflection to allow us to accept the skepticism that he puzzlingly and half-heartedly insists upon.

6. Comment on Macedo*

Sanford Levinson

Professor Macedo amply demonstrates¹ that he has carefully read and thought about my essay. Given his generally complimentary remarks, it would be churlish to take significant issue with them. More to the point, I do not have the time to engage in an equally careful analysis of his argument. These brief paragraphs, therefore, should in no way be taken as a “response.” I do think it worth saying, though, that the differences between us may be of less operative import than may otherwise appear to be the case.

I accept Macedo’s point that one cannot play the game of “thinking like a lawyer”—by, for example, offering an interpretation of the Ninth Amendment—and remain a full-scale skeptic (whatever that might mean). That is, to adopt the role of lawyer, law professor, judge, onlooking citizen, or whatever requires that one accept one’s presence “within” the existing grammar of legal argumentation. Moreover, analysts indeed present what appear to them the “best” arguments available within that grammar. It is also clearly the case that what one thinks “best” will inevitably depend on the normative views, implicit or explicit, that one has.

However, we might indeed disagree on the importance placed on the “foundation” offered for one’s normative views or the particularities of “internal” legal interpretation. As a “skeptic,” I doubt that we can achieve any kind of firm foundation; more importantly, I doubt that this inability matters very much. After all, life goes on, pragmatically. Professor Macedo may believe both that foundations are attainable and that it matters whether one accepts these foundations. In any case, it is wholly unclear that our “meta”-differences have much to do with our

*Reprinted, by permission, from 64 Chi.-Kent L. Rev. 175 (1988).
¹Macedo, Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson, 64 Chi.-Kent L. Rev. 163 (1988) (reprinted as chapter 5 of this volume).
interpretations of the ninth amendment. One does not discover the answer to concrete cases by learning that I am a “skeptic” or that Professor Macedo believes in natural law.

7. The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*

Andrzej Rapaczynski

Introduction

This article is about two things; one general, the other specific. The general point is about the nature of interpretation and of the constraints that the text places on interpretation. The specific is about the ninth amendment.¹

My general claim about interpretation is that no textual provision by itself seriously constrains how it is going to be interpreted. This, I argue, is true not just about the open-ended provisions like the ninth amendment, but quite generally, about all textual provisions. The fact that no text by itself constrains interpretation, however, does not mean that interpretation is unconstrained; only that constraints operate within a particular context in which the text is interpreted. In this context, there is always a number of easy interpretive questions which, under particular circumstances, are answered exactly as if the text by itself controlled the process of interpretation.

But easy questions are easy, I argue, only because others are not, and there is no way of either avoiding complex questions or reducing them to the simple ones. Hence, the open-ended provisions (and, in the struggle about interpretation, all controversial provisions are bound to become open-ended, even if they did not start as such), will never be decisive for resolving controversial issues of interpretation. The ninth amendment is no exception here, and I begin by arguing that for every interpretation that sees it as support for judicial activism there is another, respectable one, that does not.

*Reprinted, by permission, from 64 Chi.-Kent L. Rev. 177 (1988).

¹"The 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.
Much of the recent theory of constitutional interpretation has been focused on the problem of "interpretivism" versus "noninterpretivism," and the ninth amendment is sometimes thought to legitimate the latter. I argue at some length that the dispute is dominated by what I view as mistaken assumptions about the role of the text in constitutional interpretation and that expansive judicial review need neither devalue the role of the text nor go beyond its interpretation.

Good interpretations of open-ended constitutional provisions do not rely on dictionary-like reading of words, but rather on overall theories concerning the nature and functions of the institutions set up by the document and the values the political system is designed to implement. Placing too much reliance on the mere words of a single constitutional provision can in fact only confuse the task of constitutional interpretation. Similarly, a number of very important constitutional provisions could be absent from the text altogether, and yet the norms they state would be enforced anyway by any fair-minded reading of the text. While many provisions of the Bill of Rights have this character (and the founding fathers initially thought they were unnecessary), some have it to a greater degree than others, and none equals the ninth amendment.

The ninth amendment is void of any substantive content; instead, it states a rule of construction which, even if assumed to entitle a court to engage in expansive judicial review, not only does not add anything to what we would know without it, but is also incapable of doing any real work in the process of actual interpretation. If an unenumerated right is capable of being derived from the overall scheme endorsed by the Constitution, the whole weight of that derivation (its legitimacy) will rest on its own argument, rather than the ninth amendment. If, on the other hand, the right cannot be otherwise convincingly derived, the ninth amendment will not help us either. The only (if any) thing the ninth amendment can do, I conclude, is to lead us astray by changing the discourse of constitutional law from the one shaped by political theory to one dominated by morality and ultimately religion.

I. The Import of the Ninth Amendment

There has been so far a lot of scholarly writing on the ninth amendment. Much of it is quite repetitious, and it is important to begin by establishing what is and what is not controversial about the ninth amendment.

2See Bibliography of Ninth Amendment Scholarship which appears in this volume.

I take it to be quite uncontroversial, both on logical and historical grounds, that the amendment says or implies the following:

1. It is not the case that all rights derive from a constitutional flat; on the contrary, at least some rights antedate both the 1787 Constitution and the Bill of Rights. D

2. The Constitution does not list all of the rights that may exist independently of it; on the contrary, it and the Bill of Rights leave some rights unenumerated.

3. The unenumerated rights are not negatively affected by the listing of the enumerated rights; on the contrary, they continue to exist in full force, and are "retained by the people."

But the moment we begin to unpack any of these statements in order to derive from them some guidelines for the resolution of issues that otherwise occupy our attention, their uncontroversial character disappears. Thus, for example, despite the uncontroversial nature of the statement that the founding fathers believed in the Bill of Rights to have in part codified some preexisting rights, there is much less agreement on what such preexisting rights were, not just in terms of their content, but also (and above all) in terms of their nature and origin.

It seems indubitable that the founding fathers believed in some form of "natural law" and in some basic, unchanging standards of morality and political justice. Nevertheless, the status of this belief in their overall world-view is quite unclear. For although the founding fathers were revolutionaries, inspired by the rationalistic theories of the Enlightenment, they were also lawyers, for whom rights had always been something that existed within a particular legal system. Thus, while their revolutionary rhetoric inclined them to speak in terms of values conceived as universal and pertaining to man as such, their legal training made them uncomfortable with references to natural law, inasmuch as the latter could be incompatible with the law of the land.

Not that the tradition of common law did not have its own way of affirming the fundamentality of certain basic principles of individual and political morality. Some parts of the "English Constitution" were clearly conceived as rooted in something more fundamental than a simple judicial or legislative flat. The basic "rights of Englishmen," for example, were thought of as an immemorial, unalterable, and inalienable part of
the English tradition, and, at least prior to the eighteenth century, there had been a strand of common-law thinking that affirmed the supremacy of judge-declared fundamental law over parliamentary enactments. But there was no room in the common-law jurisprudence for an argument appealing to a right deriving from some universal "law of nature," unknown among the immemorial, judicially enforced common-law "rights of Englishmen." On the contrary, to the extent that the common law admitted of the existence of some "fundamental" or "natural" law, it was to be revealed in and through the traditions and legal institutions of a people, and not through a "scientific" or "philosophical" investigation.

When the founding fathers acted in their capacity as revolutionaries, they had been forced to emphasize their rationalistic, Enlightenment rhetoric in order to justify the ultimate break with England: their rights as Englishmen, which they claimed had been repeatedly violated by the British authorities, were ultimately not enough to justify a separation from England. But when they came to write a constitution for their new country, they were establishing a new legal order, and insofar as this order was to be based on the principles familiar to the common law, it is not likely that, even to the extent they believed in a purely universal law of nature, the founding fathers intended to include the possibility of an appeal to it among the ordinarily admissible legal arguments.

In practice, the difference made by this distinction affects the possibility of discovering "new" rights, i.e., rights previously unknown to the common law. If the rights retained by the people were to be those which a student of the common law would consider "fundamental," then the ninth amendment allows at most for a "closed list" of rights, known to the eighteenth-century system. Common-law fundamental rights were, as I said, viewed as having existed immutably since time immemorial, so that even the Magna Carta had not established them for the first time, but only codified them after they had been attacked by a "bad" monarch. To be sure, the common law had de facto evolved historically, but such was not its self-understanding. Insofar as the rights referred to in the ninth amendment were supposed to be the common-law types of fundamental rights, therefore, the idea of bringing in, at some point in the future, new rights, not previously enforced at common law, was unlikely to have been in the minds of the framers. If, on the other hand, the rights retained by the people were to be conceived as the laws of nature to be discovered by the application of human reason, the matters stood quite differently. The law of nature was also thought of as eternal and unchanging by most of its eighteenth-century exponents. But the knowledge of this law certainly was not: as the human reason progressed (and the belief in progress, rather than tradition, was the hallmark of reason for the men of the Enlightenment), new "discoveries" could be made in the area of the rights of man as much as in any other area.

This is not to say that the framers had a clear vision of the ninth amendment as affirming either the unenumerated fundamental rights recognized at common law or the natural rights spoken about by Grotius, Locke, Pufendorf, or their eighteenth-century followers. Most likely they did not in fact see clearly the distinction itself, believing, along with a number of their contemporaries, that there was no conflict between the two, and that the common law and the Englishmen's traditions were, in their fundamental features, merely specific manifestations of reason and natural law in human history. But if they did have such a vision, then it is quite likely that it contained a number of elements pulling in different directions.

With all due respect to the founding fathers, our veneration of them should not make us assume that they had a ready answer to every problem that we may have with their views, even if the same problem was not one to which they perceived any need to give much thought. Moreover, even if we assume that an objective answer could be given to the question

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4For the revolutionary generation's understanding of the "rights of Englishmen," see generally J.P. Reid, Constitutional History of the American Revolution: The Authority of Rights (1986).


6For a claim that "natural rights based on the authority of nature only, and not also said to be positive, were not a factor in the revolutionary debates," see J.P. Reid, supra note 4, at 91.

7All this assumes that the founding fathers contemplated the possibility that the meaning of the ninth amendment may be determined and implemented in judicial proceedings—something far from uncontroversial.

8That the list has been "closed" as of 1791 is suggested by Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 367 (1981).
of what were in fact their views, it might be improper to make any such answer decisive with respect to resolving some of the most important normative problems of contemporary constitutional interpretation (which many feel lie at the bottom of the debate about the ninth amendment). The perspective of making constitutional interpretation crucially dependent on the outcome of what, if it is to carry any authority, must be an arcane discussion among professional historians is not something that we should lightly contemplate. I am very far from underestimating the need that lawyers have for the collaboration of their colleagues from the other branches of the academe, and from historians in particular, but I would find it strange if their conclusions were to serve as more than a starting point in a proper constitutional analysis.

It is also unclear that all the rights referred to in the ninth amendment would be viewed by an eighteenth-century observer of common law as equally “fundamental” as the rights enumerated in the first eight amendments. One of the uncontroversial things about the ninth amendment is that it was motivated by a fear that the enumeration of certain federal constitutional rights might amount to an implicit repeal or renunciation of the other, unenumerated rights. But if the most fundamental common-law “rights of Englishmen” (as well as at least some of the natural rights in the idiom of the Enlightenment ideology) had been viewed as inalienable, then it is not clear that they could have been renounced or repealed. We cannot exclude, therefore, that the amendment refers not to the most basic rights (the most important of which were, after all, enumerated, while others may have been thought of as secure enough without the protection of a ninth amendment type of saving clause), but to a panoply of legal practices that were considered to exist as a matter of some form of social agreement between the governors and the governed, rather than as an immutable principle.11

Part of the reason why any enumeration of rights had to be necessarily incomplete12 may have been that the totality of the existing rights in the relatively complex society of the time included a very large number of diffused common-law rights, particular guarantees contained in the state constitutions, as well as perhaps some more amorphous traditions. But if this is so, then it is not clear that the rights “retained by the people” were intended to become constitutional rights in the full modern sense of the term (entailing immunity from legislative repeal). Some of them, even though quite important, could have been conceived as less than unchangeable—perhaps the people themselves, acting through their representatives in legislature, could renounce or revoke them, without requiring the supermajorities necessary for a constitutional amendment.13 It in no way “denies” or “disparages” these unenumerated rights that the Constitution leaves them in exactly the same status relative to the enumerated rights as they had prior to the enactment of the Bill of Rights.14

A somewhat more serious problem of possible “disparagement” of the unenumerated rights would perhaps arise if the very fact of nonenumeration were to confer on them an inferior relative status, in comparison with the enumerated rights, even if their absolute status were to remain unchanged. Thus, for example, were the enumerated rights to be singled out for special protection—say, if they were to become judicially enforceable against otherwise properly enacted statutes—simply by being included in the first eight amendments, while the others remained only morally binding on the legislature, then the unenumerated rights could conceivably have been viewed as being “demoted” or branded as “unimportant.”

It is unlikely, however, that this line of argument would lead us very far, especially if made in abstraction from a discussion of the concrete rights in question. First of all, it is doubtful that a right is being denied or disparaged if another right is promoted. For example, the Supreme Court jurisprudence of the last few decades has clearly conferred a somewhat

11See id. at 75–76 for a distinction between those laws that were “fundamental” (and thus immutable) and those parts of constitutional law which the sovereign legally could, though should not, change.

12For statements to the effect that it was impossible to enumerate all the rights of men, see 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (2d ed. 1836) (Wilson); 4 id. at 166–67 (James Iredell).
privileged position on the guarantee of free speech, as compared with many other enumerated rights. Does this entitle one to say that the right to counsel guaranteed by the sixth amendment has been ipso facto either denied or disparaged? Most people would say, I suppose, that the right to counsel was in fact enhanced in the same period, although perhaps not as much as the right to free speech.

Furthermore, certain unenumerated rights may not be capable of the same kind of enhancement as some of the enumerated rights, and that may be another reason why they remained unenumerated. Suppose, for example, that the fact of inclusion among the enumerated rights indeed made the rights so included judicially enforceable against legislative enactments, while the unenumerated rights remain only morally binding. Suppose further (quite plausibly, we might add) that among the unenumerated rights are to be found rights such as the right to rebel against an unjust government. Clearly, rights of this kind could not, by their very nature, be transformed into full-fledged legal rights. Nevertheless, the founding fathers considered the right to rebel to be, from a moral point of view, at least as important as any of the enumerated rights; indeed, the right had been crucially implicated in their own separation from Great Britain. Moreover, unlike some other rights, such as the right to life, for example, the right to rebel is not necessarily unwaivable. It is

15 Not only are the protections of free speech interpreted very broadly to cover such areas as commercial speech, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), or libel, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but also a number of techniques for attacking laws burdening freedom of speech, such as the "overbreadth" doctrine, see, e.g., Schauburg v. Citizens for a Better Env't, 444 U.S. 620 (1980), have been made available to those who make first amendment claims, even though the same techniques are usually not available when infringements on other rights are involved.


17 The right to rebel against a tyrannical government was commonly affirmed in the eighteenth century. See, e.g., article 3 of the Virginia Declaration of Rights of 1776, which states that "when any government shall be found inadequate or contrary to these purposes (i.e., common benefit, protection and security of the people), a majority of the community hath an indubitable, unalienable and indeeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." See also sources (including Wilson, Adams, and Paine) cited in B.L. Wright, American Interpretations of Natural Law 79-99 (1931). The right to rebel was commonly thought to have been affirmed by Locke, J. Locke, Second Treatise of Government 119-39 (J. Feardon ed. 1986), though Locke's text is somewhat ambiguous. For other antecedents in English political thought, see C.F. Mallett, Fundamental Law and the American Revolution 60-61 (1933).

predicated on the assumption that government is instituted for certain purposes and that a breach of trust by the governors justifies disobedience. But a written constitution might perhaps be reasonably interpreted as a contract superseding all previous arrangements and promising obedience to any constitutionally established government. Should then, perhaps by a series of imprudently adopted amendments, an otherwise tyrannical government be established, the right to revolt might be unavailing, unless it is understood to have been retained.

Finally, the very notion of denial or disparagement may have had a different meaning for the founding fathers than we tend to attribute to it today. The Constitution seems to be predominantly the preserve of the legal profession in America. The reason for this may lie partly in the importance of judicial review (which makes the legal analysis of the Constitution a necessity for the legal profession) and partly in the fact that lawyers play such a predominant role in our political life. Be that as it may, most of the discussion of the Constitution, and of the Bill of Rights in particular, centers on its significance as a legal document. Thus, the meaning of such broad provisions as the guarantee of free speech, the free exercise of religion, or equal protection is most often analyzed in terms of their legal significance, to be determined in the process of adjudication, and expressed in the form of clearly stated, practically applicable legal rules. But the constitutional precepts could also be understood as basic norms of a more political nature—necessarily vague statements of the aspirations of the American Republic. To be sure, we are not entirely forgetful of this, but whenever the question of such a broader understanding of the Constitution arises, we tend to think of it as conferring on our judges (and the Supreme Court Justices in particular) a somewhat broader role of moral arbiters, in addition to their more mundane function of bureaucrats trained to resolve technical legal disputes.

Only rarely, if ever, do we consider that the primary task of interpreting the Constitution could, as it does in some other countries, such as France, belong to political scientists, philosophers, and professional (rather than lawyers-turned-) politicians.

While many of the founding fathers were indeed lawyers (turned-politicians), their understanding of the Constitution may in
some respects have been closer to the “political” rather than “legal” interpretation, since their views on the subject of judicial review were probably still quite unformed. There has been a lot of dispute about whether judicial review had or had not been practiced on the state level prior to the enactment of the federal Constitution, and about whether it was contemplated by the framers or the ratifiers. I do not have any new evidence to present on this, but the whole issue may be largely irrelevant if we assume it is at least not outlandish to believe that the founding fathers did not view the Constitution as primarily a legal document.

To begin with, the founding fathers’ initial idea that a bill of rights was unnecessary is, in this context, significant in several respects. The explanation, widely given at the time, that the federal government would not possess the powers necessary to violate the basic rights seems to make little sense, unless we assume that the constitutional guarantees of these basic rights were conceived as primarily political, related to the governmental structure and processes established by the Constitution. The natural inclination of a twentieth-century lawyer, to be sure, is to understand the claims about no need for a bill of rights as implying that an interpretation of the main text of the Constitution would allow one (read: a judge interpreting the text in the process of adjudication) to “deduce” the guarantees of the basic rights from the structural provisions of articles I–VI by an ordinary process of legal reasoning, much as the right of an indigent criminal defendant to have an attorney paid by the state is interstitially derived from the sixth amendment right to the assistance of counsel.

But if we think about it for a moment, it would be a very strange idea that all of the guarantees of the Bill of Rights are derivable in this way. Even in the case of the first amendment guarantee of free speech, which one of the most “strict constructionist” scholars thought to be so derivable, it is not self-evident that the derivation would be uncontroversial, at least to the founding fathers themselves. After all, many state governments at the time had all kinds of laws regulating freedom of speech (and the founding fathers did not seem hostile to them). Furthermore, Congress does not seem to be reasonably precluded by the enumeration of its powers in article I, section 8, from introducing a censorship law, at least with respect to some matters, such as national defense. But suppose we grant that freedom of speech would have to be guaranteed even without the first amendment, what about the right to a jury trial? I take it that “deriving” this right, especially in civil cases, from the structure of the government set up under the Constitution would be, in most circumstances, an act of breathtaking legerdemain on the part of even the most activist judge. It seems to me quite self-evident that without the seventh amendment, the United States would need no constitutional amendment to introduce a system resembling, say, the German one.

To be sure, it may be said that the founding fathers believed that a bill of rights was unnecessary because even in the absence of a constitution, judges had an obligation to enforce basic rights, even against legislative enactments. But to say this is to assume a lot: among other things, that the rights guaranteed against the United States were also guaranteed against state governments, without any state or federal statutory or constitutional enactments (and without the fourteenth amendment in particular), since the same argument would apply to the states. It is to assume, in other words, that the basic rights did not in any way derive from the Constitution, but rather bound the states regardless of how the new Republic chose to organize its affairs. That the founding fathers had no reason to believe that all of the guarantees of the Bill of Rights are derivable in this way, or that the guarantees were derivable in this way, is very probable.


20 It may be objected here that my argument that the founding fathers understood the Constitution as a primarily political, rather than legal, document contradicts my earlier argument that the founding fathers were writing the Constitution primarily to establish a legal order based on the common law, rather than as a document expressing their rationalistic, revolutionary, Enlightenment ideas. In the first place, I would not be overly worried if the objection were true: it is not my intention here to present a single coherent argument, but rather to give a series of unrelated, and possibly mutually incompatible, arguments tending to show that the meaning of the ninth amendment is very problematic (so that very little additional mileage can be derived in citing it in support of expanded judicial interpretations of the Constitution). But the two arguments made in the text do not seem in fact to contradict each other. The founding fathers may have intended the Constitution (and especially the Bill of Rights) to express the common-law philosophical perspective on the rights of men, and yet not to contemplate that the constitutional principles were directly enforceable in court as against ordinary legislation. It was quite compatible with the common-law-based English tradition of political theory to say that something could be legal (i.e., not subject to judicial change) and yet “unconstitutional” precisely in the sense of violative of a traditional right underlying the legitimacy of the political system. See J.E Reid, supra note 4, at 75–76.

21 Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 23 (1971).


23 I doubt that the due process clause of the fifth amendment would change much here. After all, the right to a jury trial in civil cases has not been incorporated in the fourteenth amendment guarantee of due process. See G. Hazard, Jr., Civil Procedure 452 (1985).
fathers subscribed to some such strong affirmation of the independent validity of basic rights (natural or otherwise) we have no reason to doubt, but that they believed that the basic rights so understood were legally self-executing, to the point of not needing any further support as authority in the courts of law, I at least would find extremely surprising.

The founding fathers’ position on the Bill of Rights becomes much more plausible, however, if we suppose that they did not think of the constitutional guarantees as primarily legal. To be sure, they did think that the rights enumerated in the Bill of Rights would in fact be enforceable in the courts of law, but there was nothing new in this: most of them had been similarly enforceable in England. What was to make the United States different was not that the American judges would be given the power to invalidate legislation inconsistent with the Bill of Rights, but that the American Constitution would set up a system of government in which the respect for the basic precepts of natural justice would be more secure, and the legislature and the executive would be less likely to be able to violate them. In this sense, by specifying its system of limited government, the Constitution implicitly spells out a whole system of values and a commitment to a system of rights. Because of this, as well as because these basic rights express the principles of natural justice which are binding on all governments, and only a corrupt ruler, breaching the trust of the people, can violate them, their separate listing might be unnecessary, in the same way as it might be unnecessary to list the Ten Commandments to a Christian prince. On the other hand, the mere decision so to list them does not necessarily have any additional legal consequences, such as making the courts able to enforce them in preference to statutes enacted by a popularly chosen legislature.

Assume then, at least for the moment, that the founding fathers did not, indeed, foresee the kind of judicial review which we have come to take for granted, and that they thought of the significance of the Bill of Rights as primarily a specification of rights that might otherwise be subject to debate or as a restatement of political truths “inscribed for greater caution.” That the basic rights of man in a legal sense cannot be properly enumerated is a proposition difficult to accept, since legal rules are by their very nature supposed to be articulated. But the proposition that rights in this modified, political sense cannot be fully articulated is another matter; in fact, many of the things traditionally embraced under the rubric of “natural rights” had been rather vague and amounted to a basic guarantee of a decent government, responsive to the needs of the people. In this context, whatever “disparagement” might have been feared to result from the nonenumeration of the more amorphous rights included in the ninth amendment disclaimer, it could not have had very much to do with any of the issues relating to the so-called “noninterpretive judicial review” that the ninth amendment came to be used to justify. Judicial review was simply not at issue.

II. The Ninth Amendment as a Rule of Construction

It has not been my purpose in the foregoing discussion to convince the reader that the ninth amendment should be understood as indeed referring to a closed list of common-law rights, rather than as enshrining the rationalistic concept of natural law, or as dealing with rights less fundamental or more vague and resisting definition than the rights enumerated in the first eight amendments, or as a repository of political and “inspirational,” rather than legal, principles. In fact, it has not been my purpose to convince the reader that the ninth amendment should be understood in one particular way rather than another. On the contrary, I merely wanted to show that the hope of using the ninth amendment as a decisive trump in the main contemporary disputes concerning the nature of the rights guaranteed by the Constitution, or the scope of judicial review, or the particular constitutional controversies, such as the one surrounding the concept of privacy, is by and large illusory. The amendment might be (and often is) taken to mean that there are rights not specified in the first eight amendments that the courts are obligated to enforce, but it might also be (and often is) explained away as having no such import at all. It might be (and often is) read as a license for judicial development of constitutional doctrine in response to our developing moral knowledge and the changing historical circumstances, but it might also be read as referring to the limited arsenal of eighteenth-century rights. Both interpretations seem to me to have respectable historical and logical evidence behind them and, as is the case with most genuinely

24 It is in this spirit, rather than as some very precise legal rules, that we must understand such precepts as “no taxation without representation” (for clearly no universal taxpayer suffrage was meant), the already mentioned right to rebel, or the general principle of “republican form of government” ultimately enshrined in the Constitution. Indeed, both the English Declaration of Rights of 1869 and the English Bill of Rights contained many provisions, such as guarantees against executive lawmaking, or a prohibition against marrying a “papist” by any member of the royal family, which did not sound like individual rights at all. For an analysis of the rights contained in one of these documents, see L. Schwoerer, The Declaration of Rights, 1869, at 58-101 (1981).
important disputes, there seems to be no good way of deciding between them.

Like every important "open-ended" provision, dealing with a problem that has no easy solution, the ninth amendment fails to provide such a solution. But the ninth amendment is not only different from the so-called "specific" provisions of the Constitution, such as the requirement that the President must be at least thirty-five years of age, or that there will be two Senators from each State. It is also arguably different from the other "open-ended" provisions, such as that no one shall be deprived of life, liberty, or property without due process of law, or that no state shall deny the equal protection of the laws to any person within its jurisdiction. The amendment seems to have no substantive content at all, stating instead a second-order rule of construction. The amendment refers to some rights that are supposed to exist independently from the amendment itself; it indeed presupposes that they are valid. Possibly, they are rights implicit in the structural provisions of the Constitution, in which case the amendment states a rule of construction concerning the relation between the explicit and the implicit provisions of the Constitution. Or the unenumerated rights derive their validity from some sources outside the Constitution, in which case the amendment states a rule of construction concerning the relation between some constitutional provisions (or the mere fact of their inclusion in the Constitution) and something outside the constitutional text altogether. One way or the other, it does not say what rights we have, but only how the Constitution is to be interpreted.

It is the second of the two mentioned possibilities that interests many commentators today. If one understands the amendment as concerning the relation between the Constitution and other sources of authority, and if one accepts (as by now one must) that the Constitution is a legal document, then the ninth amendment states that something more than the written language of the document is to be taken into consideration in the process of constitutional interpretation. Read in this way, the ninth amendment seems to provide textual support for perceived departures from the constitutional text that came to be known as "noninterpretive" or "supplemental" judicial review. What I want to argue is that even if it is admitted that the amendment does indeed authorize a more open process of review, it does not add much, if anything, to an argument that could be made in favor of "supplemental" review independently of the ninth amendment, and that its effect in some contexts may in fact be deleterious to the quality of such review.

A. "Noninterpretivism" and Constitutional Interpretation

The general dispute about the nature of constitutional interpretation centers around a problem formulated by Thomas Grey in his by now famous article Do We Have an Unwritten Constitution? and analyzed by him and others in a number of other publications. The problem, as posed by Grey, focuses around the legitimacy of judicial review that is not, or is not primarily, based on an interpretation of the text of the Constitution, but rather draws from other sources, such as judicial precedent, tradition, prevailing morality, natural law, or the personal predispositions of judges. A number of analogies between constitutional adjudication and literary interpretation or religious exegesis have been

29 The term probably originated with Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975), even though Grey himself later abandoned it in Grey, supra note 5. Others who supported the idea of "noninterpretive" review include J. Ely, Democracy and Authority, M. Perry, The Constitution, the Courts, and Human Rights (1982) (Perry abandoned his allegiance to noninterpretivism in Perry, supra note 18).


See J. Ely, supra note 29, at 34-41; Grey, supra note 29, at 709. While I shall be most interested in the methodological problems raised by the idea that the ninth amendment authorizes textual departures from the Constitution, there is by now quite a substantial literature inquiring into what kinds of concrete rights could be supported in this way. See, e.g., C. Black, Decision According to Law 43-83 (1981); Bertelsman, The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights, 37 U. Conn. L. Rev. 777 (1968); Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L.J. 309 (1936) (reprinted in volume 1); Kent, Under the Ninth Amendment What Rights Are the Others Retained by the People?, 29 Fed. B.J. 219 (1970); Kirven, Under the Ninth Amendment, What Rights Are The "Others Retained by the People?", 14 S.D.L. Rev. 80 (1969); Kritzer, The Neglected Ninth Amendment: The "Other Rights Retained by the People," 51 Marq. L. Rev. 121 (1968); Ringold, The History of the Enactment of the Ninth Amendment and Its Recent Development, 8 Tulsa L.J. 1 (1972).

31 See Grey, supra note 29.

drawn by various scholars, the most popular among them being the analogy between the legal disputes concerning the role of the constitutional text and the theological dispute between the Protestants and the Catholics concerning the role of the Bible in discovering the divine truth. But what seems to be at the bottom of most of these disputes is the fundamental question of what constraints are placed on judges in their exercise of judicial-review power. Those who argue that the constitutional text is the only authority under which judges can invalidate the outcomes of a legislative process are the most likely to believe that otherwise judges would enforce their personal or class preferences and destroy the objectivity of the process of constitutional adjudication. The proponents of "supplemental" review respond, in turn, that the Supreme Court has been engaging in "noninterpretive" review for many decades and that most of our constitutional law would have to be thrown out if we suddenly decided to go back to what the constitutional text by itself would legitimately allow. The fact that we would not want to take such a drastic step means that, by and large, we approve of what the courts have been doing and, by implication, would like them to continue. The problem of subjectivism could not, then, be as serious as the textualists imagine.

There is undoubtedly considerable strength to the noninterpretivist position. There are, however, also a number of problems with it, and we should look at two among them. The first is that, whatever they actually do, judges never say they engage in a noninterpretive review, and the "supplementers" have no satisfactory explanation of why it is or must be so. Second, the supplementers make their job too easy: they simply take over from the textualists the latters' narrow concept of interpretation and claim that judges do not engage in that when they exercise judicial review. Under a more expansive concept of interpretation, however, it might very well be that judges' own descriptions of what they are doing—i.e., their claim that they are actually interpreting the text of the Constitution—may turn out to be true (or at least defensible).

Concerning the first problem, judges sometimes admit that constitutional interpretation is sensitive to historical evolution and that history adds a "gloss" on the text. But they never admit to deriving the authority for their decisions from outside the constitutional text and they never say, as one scholar did, that the text is "important but not determinative" and that "[i]ke an established line of precedent at common law," it creates "a strong presumption, but one which is defeasible in the light of changing public values." Instead, any new result is unafailingly presented as a new and better interpretation of the text itself. It is precisely because judicial precedents, including those in constitutional law, do not have the ultimately infallible status of the constitutional text that they are occasionally said to have been wrong, but the Constitution itself stands on an entirely different footing. This behavior of judges is very significant because it expresses their belief that a pure noninterpretive review would constitute an abuse of their power and undermine the legitimacy of judicial review. In this belief, moreover, they are very likely to be right, and the supplementers reveal their own partial adherence to it by devoting a considerable amount of energy to showing that noninterpretive review is simply another mandate of the Constitution.

Still more serious is the second of the two mentioned problems of noninterpretivism, concerning its narrow concept of interpretation. It is not surprising that the textualists subscribe to a narrow concept of interpretation. The dispute between the textualists and the supplementers is

35Brest, supra note 33, at 229. It must be noted, however, that Brest may have used the word "text" in a rather restricted sense referring to the meaning that the text had for the 18th century speakers. Whether or not Brest should be read as intending to restrict the meaning of his claim in this way depends on what we make of the possibility of an "evolutionary textualism." See id. at 206 n.122, 236 n.122. An interesting exception to the rule stated in the text may be found in the recent case of Taylor v. Illinois, 108 S. Ct. 646, 651-52 (1988):

The State's argument is supported by the plain language of the [Compulsory Process] Clause. ... by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law, by some scholarly comment, and by a brief except from the legislative history of the Clause. We have, however, consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions.

(citations omitted).

Even here, however, (as well as in some other contexts) the constitutional provision is extended rather than contradicted. For other references concerning the relationship between the constitutional text and judicial precedents, see Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 767-72 (1988).

36Much of the literature on the ninth amendment belongs in this category. See works of Grey and Ely cited supra note 29. But there exists also a number of studies which argue for the same conclusion by examining the founders' theories of constitutionalism and interpretation, rather than the words of the Constitution. Grey, supra note 5; Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985); Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987).
not a mere philosophical quarrel. Underlying it (and conferring on it more reality than philosophical disputes usually possess) is a quarrel about the proper role of the judiciary in our system, and in particular about its ability to interfere with the wishes of the legislature. In this quarrel, the textualists usually occupy the more pro-legislative position and their insistence on judges' staying within the four corners of the constitutional text is a weapon in their struggle against judicial supremacy. It is thus very important to keep a little sense of political realism in assessing the textualist position. Textualism is born out of opposition to certain decisions. The first step in the struggle against them is to delegitimize them by showing that they are not derivable from the constitutional text, and this is done by proposing a narrow or "strict constructionist" concept of textual interpretation. The next step is to delegitimize any form of judicial discretion. The dispute concerning the role of judges in our system is a quarrel about the constitutional text. The textualists usually also identify the wishes of legislatures with the wishes of the people themselves. That this is often quite a heroic assumption much of modern political theory believes to have established.

There is no reason, however, for those who do not share the textualists' narrow view of the judicial role to accept their narrow view of interpretation. The dispute concerning the role of judges in our system is a genuine one, and the textualists' preference for legislative supremacy (whether one agrees with it or not) is a respectable and defensible political position. Their desire to argue that, in view of the political position which they consider to be right, judges should read the constitutional text narrowly is also defensible. But the textualists do not simply defend their view of constitutional interpretation as a matter of political theory ("judges would have too much power if they could exercise expansive review"); they defend it as a matter of philosophy: a narrow reading of the text, they argue, is capable of providing meaningful guidelines and curbing judicial discretion, while a more expansive reading necessarily ends in judicial subjectivism. The philosophical presupposition of this view is that it is the text itself that controls the process of interpretation, so that a more expansive reading, which brings in other authorities, such as morality or tradition, leads in principle to an absence of controls on judicial discretion.

This last claim is, from a philosophical point of view, quite unfounded. This is not the place to argue the issue in detail. But the idea that the text controls its own interpretation, that it is a closed world which can be read without recourse to anything outside of itself, is out of tune with any respectable philosophy of language or theory of interpretation. And so is the idea that if the text cannot control its own interpretation, it can be firmly controlled by a finite number of rules, a comprehensive methodology, which makes the process of interpretation into something "truly objective." There are reasons to be concerned about the scope of judicial discretion, of course, and this makes the issue of constraints to be imposed on judges very serious. But the textualists' (and not only textualists') impulse is to ask too much of those constraints and, in the process, to misunderstand their nature.

When interpreting a given text, there are nearly always some things that are simple and obvious. For example, a person who is thirty-four years old cannot, under the United States Constitution, be elected President of the United States. But with regard to many other issues, especially in the context of actual adjudication, interpretation is a complex and frustrating task. And it is frustrating precisely because it is complex. The temptation is to try to reduce the complex to the simple, thus making, say, the abortion issue as simple as the issue of the already mentioned presidential qualification. But the question is: why are the simple issues so simple? One (and, I believe, correct) answer is: because neither the issues themselves nor the rules and authorities used to resolve them are seriously contested in those contexts. If we adopt this answer then it follows that while every interpretive practice in which people regularly engage and which they find useful will surely have a number of such simple issues, there is nothing inherently or a priori simple about them, and each such simple issue can suddenly or gradually become more problematic.

Thus, to go back to the example of presidential qualifications, imagine that, as a result of a number of factors, such as demographic imbalances, the extremely heavy burden of supporting the nonworking part of the population, and changing public morality, the United States gradually becomes polarized along generational lines, to the point at which generational conflicts become one of the most important political issues of the time. Imagine a big movement to rejuvenate in a radical fashion the whole of the federal government, including the election of

33. Some forms of textualist objectivism do not come from the politically conservative end of the spectrum. For example, Fiss argues for the objectivist position in order to defend the legitimacy of Warren Court judicial activism. See Fiss, supra note 33.

40. U.S. Const. art. II, cl. 5.
Congressmen and the President who are below what we now consider the constitutionally mandated age. Imagine further that the “young party” is in a position to build a majority coalition, but it is not strong enough to push through a constitutional amendment. Over time, a mounting pressure, backed by large financial resources and great political influence, is staged to reinterpret the constitutional provisions in the light of changing beliefs. Literalism, as a mode of interpretation is severely criticized by scholars. A great number of studies appear to show that the founding fathers meant only that the leading public figures were to be mature people, that the custom of counting the age of a person was very different (and less accurate) in their day, that they never intended for the Constitution to be read in the originalist fashion, that the average person, according to all available psychological and medical research, matures much earlier today than in the eighteenth century, that the new modes of communication and new educational methods make the young much more suited for holding office than was the case two centuries ago, etc., etc. Those who have doubts that the issue of age qualifications, first for Congressmen and then for the President, would become clouded, problematic, and very difficult would be well advised to try to look at the Supreme Court case of Daniel v. Paul41 with the eyes of a nineteenth-century expert on the commerce clause or (perhaps more appropriately, in the light of our hypothetical) at the case of Carey v. Population Services International42 with the eyes of a specialist on state police power of the last century.43

Simple issues are thus simple only relative to the context in which they arise; they are simple because any time we want to question something in a productive fashion, we must always take something else for granted, or else conduct our inquiry in a vacuum. Starting from this pragmatic answer to the question of simple issues, it becomes clear that it is a vain hope to make all interpretive issues simple; in fact, some issues are

41395 U.S. 298 (1969) (commerce clause allows the federal government to apply its antidiscrimination laws to a remote 232 acre recreation area in Arkansas because some of the food served in the snack bar had moved in interstate commerce).

42431 U.S. 678 (1977) (the state cannot prohibit sale or distribution of contraceptives to minors under 16).

43That the reader may not agree with either of the decisions cited in the text is beside the point. All that is claimed here is that it would be hard to argue that both of these cases are obviously, uncontroversially wrong, as a holding that a 34-year-old may become President would be wrong. (That the presidential age qualification could be made controversial is observed independently in Tushnet, A Note on the Revival of Textualism in Constitutional Theory, 58 S. Cal. L. Rev. 683, 686–87 (1985)).

simple only because others are contested. It also becomes clear that the constraints imposed on the process of interpretation can never provide an ironclad guarantee that a given text will be read in the same way at all times and under any circumstances. Constraints always act in less than an absolute fashion and there always exists the possibility that they themselves may be interpreted in such a way that the interpreter will acquire a certain amount of freedom, greater, perhaps, than was intended by the author of the text himself.44 For interpretation always proceeds against a set of background assumptions which might themselves become open for questioning, and there is no way of purifying it of all such influences.

But this pragmatic view of interpretation is precisely the one that the textualists reject. What they seek is a foolproof foundationalist method of constraining judicial discretion through a set of basic rules that leave no room for controversy. Simple cases are simple, according to a textualist, because in resolving them the interpreter applies clear rules of interpretation. The word “applies” is important; the interpreter is basically passive and the rules are basically responsible for the result. The more complex problems, the textualist wants to affirm, either involve a reiteration of a number of simple steps (so that the task may be difficult, but it always has the right solution, much in the same way as a mathematical theorem that happens to be difficult to prove) or they are not really problems of interpretation at all. If the interpreter has to use his discretion, then he is legislating, and not interpreting.

Whatever the reasons that make the textualists adhere to this strong view of interpretation, the view itself is quite implausible and the supplemeters should not feel bound to accept it. The constraints on judicial discretion, they might respond, are not in the nature of guarantees that transform the process of interpretation into a more or less mechanical process of applying some external and objective rules. Interpretation is a complex task, not reducible to a determinate set of rules, and that is why judging (and lawyering in general) is something for which we have a considerable amount of respect. The more contested the problems we ask judges to resolve, the less likely they are to be subject to unique solutions, whether in the form of a mere application of a constitutional formula, a precedent, or any other authority. Discretion is thus the essence of lawyering, and of constitutional adjudication in particular. If it is to be controlled, it can only be by a set of pragmatic constraints, linking
a set of general principles with particular outcomes not so much by infallible rules of logical deduction as by the amorphous and concrete rules of craft, existing, elaborated, and enforced within the context of the profession and the political system.

If we conceive of interpretation in this (pragmatic) manner, then not only do we have no iron guarantees that the same text will always be read in the same way, but there is also no need to view the very concept of the text too narrowly. The textualist wants to restrict the constitutional text to the words of the document, because he thinks that it is the words of the document that constrain judicial discretion. But we see that it is more plausible to view the text as being always interpreted against the background of existing social relations and read in the light of all kinds of contestable theories concerning the meaning and the function of the text. To be sure, for one reason or another, we may want to limit or expand the background in a variety of ways. We may, for example, tell judges to observe (or not to observe) precedent, to look (or not to look) into tradition, to consult (or not to consult) their sense of public opinion, to try to read the text as the founders intended it to be read, or to read it in the light of changing circumstances and as reflecting a dialogue in which the present generation engages with the past. All of these "methodological" injunctions might make a real difference as to how given positions are argued for and, to some extent, what the ultimate outcomes of certain disputes might be. But no set of background rules by itself controls the process of interpretation and no particular set is a priori indispensable. Moreover, there is no a priori reason to believe that adopting one or another set of such rules makes the activity engaged in by judges and scholars any more or less an interpretation of the constitutional text itself. To

It must be noted, however, that it is always the present generation that does the reading and its own perspective (for it is merely its own perspective on what the framers had in mind) can never be eliminated. This is not just a theoretical proposition, but a statement with weighty practical consequence as well: with enough pressure of our own interests on the process of constitutional interpretation, most political controversies can be (and are) pretty quickly reconstructed in the form of differing interpretations of the framers intent. Compare, e.g., Sherry and Powell cited supra note 36 (arguing that the framers intended to allow broad non-textualist interpretations) with Bork, supra note 21; Bork, The Constitution, Original Intent and Economic Rights, 23 San Diego L. Rev. 823 (1986); and Monaghan, supra note 35 (arguing that following original intent is incompatible with most modern extensions of the Bill of Rights). But this does not make the injunction that judges should stick to the original intent meaningless: the dispute between the competing sides will be significantly transformed by the fact that some things which are very easily argued for under a system in which the Constitution is read in light of changing circumstances (say, that the first amendment applies to more than prior restraints) may now suddenly become quite hard to argue for, and vice versa (it would be much easier to argue for capital punishment under the originalist view than under the present system).

be sure, it may very well be that one or another set is de facto (and for good practical reasons) preferred by the profession (so that using another may be unacceptable), but neither the text by itself, nor the general rules of interpretation uniquely determine what background information is to be used in the process of interpretation.

It is thus surprising that the "supplementers" indeed call themselves such, rather than "true interpreters"—i.e., admit that the type of review they recommend is, at least in part, "noninterpretive." The dispute about what background materials judges are to use in interpreting the Constitution is a legitimate and important one; many issues may indeed depend on it, so that in purely professional terms, the question of whether or not we should adopt, say, the originalist position, even if it does not yield any unique answer to most contested problems, may cut in favor of (give a rhetorical advantage to) one or another solution. But whether or not one adopts the originalist stand or some other one (such as reading the Constitution in the light of changing circumstances or the enduring national tradition) does not by itself exclude a reading from being an interpretation. The pure textualist position (only the text itself should be looked at in reading the Constitution) is an impossibility; the interpreter must, inter alia, be an English speaker, he must be able to consult dictionaries and common usage, and he must probably (for the textualists' purposes) be a lawyer (with all that this involves in terms of training, having read certain cases, books, and articles, as well as having imbibed a plethora of norms of professional behavior bearing on the activity of interpretation). What exactly to use from this and other repertoires of tools may be the subject of a legitimate dispute about a (socially or professionally) approved mode of interpretation of a particular text (in this case, the Constitution), but a general philosophical theory of the nature of interpretation does not provide any answer to these kinds of questions.

I see a number of reasons why the supplementers may concede that their view of judicial review is (at least in part) not "interpretive." The main of these reasons is that the supplementers do indeed share with the textualists their fear that a broadening of the very concept of interpreta-

It may be "unacceptable" in a number of senses: a person who does not conform may lose cases, earn less money, lose the respect of his colleagues, fail to be promoted, be ridiculed, adjudged incompetent (with all that this judgment entails, such as malpractice liability or exclusion from the bar, etc.). Judgment of this kind, while never possessing the certainty of mathematical propositions, can be viewed as quite objective and uncontroversial.
tion along the lines suggested here might lead to an erosion of the accepted standards of legal reasoning, and distort the proper role of judges in the process of constitutional review. One version of this view, which I am not sure can be safely ascribed to any particular representative of noninterpretivism, would be to say that the pragmatic conception presented here implies that the meaning of any text is so fluid as to make no difference between there being a text and no text at all. Unless we stick with the textualist conception of interpretation, the argument would run, we might just as well give up on the idea that it is a text that judges are interpreting. It is better therefore to accept the textualist view of interpretation and defend what judges actually do when they are engaging in activist judicial review by appeal to some other practices.

The first thing to say about this view is that it is simply another side of the same philosophical confusion of which we have been speaking all along. The textualist, after all, adheres to his foundationalist views precisely because he claims that a more expansive view of interpretation necessarily leads to unbridled judicial subjectivism. The textualist must in part be forgiven for his confusion, since a number of followers of what I called the pragmatic view of interpretation might have indeed presented the claim that the text by itself does not constrain interpretation as a form of relativism which undermines the very concept of constraints.47 But the pragmatic theory entails nothing of the kind. If there are no absolute constraints, or that the text by itself does not constrain, does not mean that “anything goes.” On the contrary, interpretation is a practice that takes place in some social context, and in that context there are always some more or less definite limits on what can pass as a competent move within that practice. All that the pragmatist affirms is that no set of general principles can constrain the process of interpretation independently of the context within which interpretation occurs, and that at least some part of what constrains the interpreter is a matter of craft rather than a general rule. Thus, the pragmatist maintains that the constitutional requirement that the President must be at least thirty-five years old cannot be fixed in such a way that it will always, under any circum-

47Much of the fear of “nihilism” or “relativism” comes from reading the fashionable but perniciously vague works of the so-called “deconstructionist” school of philosophy and literary interpretation. For example, Fiss, supra note 33, at 741 n.9, seems to be fending off H. Bloom, P. de Man, J. Derrida, G. Hartmann, & J.H. Miller, Deconstruction and Criticism (1979), and J. Derrida, Of Grammatology (1976). For a sociological explanation of the strange career of J. Derrida, see Lamont, How to Become a Dominant French Philosopher: The Case of Jacques Derrida, 93 Am. J. Soc. 584 (1987).

stances, yield exactly the same result. But he does not deny, indeed he thinks it absolutely normal, that anyone who would propose that today a thirty-four-year-old could be constitutionally elected President would be legitimately declared incompetent to interpret the Constitution. That this proposition is not guaranteed to hold true in every possible world does not mean that it is any less certain, true, or predictable in the world in which we do live. Under normal circumstances, there is thus nothing relative or arbitrary about interpretation, according to the pragmatist; it is just that the guarantees against arbitrariness demanded by the textualist are unrealistic and unnecessary.

But a sophisticated supplementer might still resist. He might accept that from a purely philosophical point of view, the Constitution could be read against a very broad background of tradition, public opinion, precedent, and so forth, and that there is nothing that would a priori disqualify such a reading from being an interpretation of the constitutional text. But still, there are, as we have seen, various pragmatic concerns, specific to the practices of the legal profession, that mitigate against conceiving of what judges do when they engage in expansive judicial review as a species of textual interpretation. Basically, what is at stake here is not a philosophical but a legal problem: that of a danger of blurring the distinction between what passes for textual interpretation in most legal contexts other than constitutional review and what would have to be accepted as faithfulness to the text in the Supreme Court’s constitutional jurisprudence.

Something like this argument lies, I take it, at the bottom of Grey’s opposition to what he calls the “rejectionist” theories of interpretation. Following Levinson,49 Grey likens the dispute between the textualists and the supplementers to the controversy between the Protestants and the Catholics concerning the role of the Bible as a source of divine revelation. While the Protestants adhered to the view that only the Bible (sola scriptura) is the authoritative voice of God, the Catholics believed that tradition was an independent source of theological knowledge. Recently, however, a number of theologians have adopted a “hermeneutical

48Outside of the context of the dispute about the nature of interpretation, N. Redlich had argued that using the ninth amendment to anchor certain broad rulings, such as those involved in the privacy area, would preserve a narrower interpretation of the first eight amendments. Redlich, Are There “Certain Rights . . . Retained by The People?,” 37 N.Y.Y.L. Rev. 787 (1962) (excerpted in volume 1).

49Levinson, supra note 34.
approach, which, like the approach described here, rethinks the very concept of interpretation and represents both the Protestant and the Catholic views as essentially converging in the more modern view of reading the Biblical text. It is this approach that Grey calls "rejectionism."

The hermeneutical approach may be appropriate in the domain of theology, says Grey, but not in constitutional law. The Constitution is not quite like scripture, according to Grey, in that the new hermeneutical theories make scripture into a text that attempts to interpret the ineffable and mysterious, while the Constitution simply "puts in writing" an agreement on the nature of a human artefact: the institutions that make up our political system. Judicial review could be justified as a priestly rite in our civil religion of the Constitution, but this would be undesirable; it is better to view judges as bureaucrats solving complex legal problems. In this context, it is better to admit freely that the text is not always the sole source of their decisions. Grey admits, of course, that the Constitution cannot be read as a statute, but the fact of its "writtenness" and the precision that this was supposed to confer on it as a legal document cannot be dissolved in a purely symbolic representation. While Grey knows that "literal" interpretation cannot mean a reading that excludes reference to the function and purpose of the document, he nevertheless wants to preserve a somewhat more limited, professional sense of the notion of literal interpretation.

I sympathize with Grey's opposition to blurring the distinction between the Constitution as a legal text and as an object of religious veneration. I also agree that the existence of a written text must be seen as making some difference in terms of pragmatically constraining legitimate judicial discretion. But all of these things are still perfectly compatible with the fact that the text is interpreted according to professional legal standards—that its interpretation, while less literal than that of a statute, contract, or a will, is nevertheless more constrained than would be a mandate to spell out de novo a set of moral values for the nation or even a simple injunction to follow what seems to be the best solution compatible with the background (common law) of the existing judicial decisions.

To give a simple example, the Constitution mandates a jury trial in civil cases arising at the common law. While this is one of the more specific provisions, it is still very vague, and the prevailing interpretation (that the clause gives a right to trial by jury in cases which gave rise to an action at law, rather than equity, at the time of the adoption of the Constitution) is certainly not the only possible one. It is quite conceivable that under a series of pressures, threatening the collapse of the judicial system, the civil jury system could, for most practical purposes, be "interpreted out of existence." In this sense, the Constitution is quite different from some statutes (but not others, such as the Sherman Act), which, even if often quite elastic as well, could not according to the existing standards be manipulated quite to the same extent. But this is only because the function of statutory interpretation is quite different. Statutes are easy (or at least easier) to amend, and clarity and predictability are considered more important than flexibility in their interpretation. Still, the fact that the interpretation of the Constitution is more flexible, does not mean that the text does not make a difference. Vague as the seventh amendment may be, every lawyer knows that a judiciary reform akin to that adopted in Britain, which for all practical purposes abolished the

51 Grey, supra note 30, at 16.
52 Id. at 14. But see infra note 58 and accompanying text.
jury in civil cases, could not pass muster in the United States, even in the face of very strong evidence that the present system is less accurate or more wasteful than the alternative. In fact, it is rather easy to picture a situation in which the existence of the seventh amendment would be the decisive reason why the civil jury system would not be reformed. It is this kind of difference that the writtenness of the text makes, and I am not sure why one could realistically want it to make any more of a difference.

Moreover, if Grey is right that the constitutional text must be read more literally than what I described (say as literally as some strict constructionists or some originalists would want it to be read) or else the value of the writtenness of the text is debased, then the idea of a genuinely external supplementation of the constitutional text, which Grey proposes as an alternative, leads to a no less problematic situation. The picture one might get from Grey is that when judges interpret the Constitution they should function as scribes; when supplementing it, on the other hand, they should suddenly be transformed into something else. This something else involves certainly more than looking into precedent: judicial innovation in constitutional law cannot stop at any given point. The background into which judges look must involve such things as a theory of the constitutional design, tradition, a set of values which they commit us, and so on. Nothing short of this will correspond to that "professional and... popular culture" that Grey thinks judges should consult. But if judges can look to these sources, is there something that constrains them in the outcomes with which they come up? If the answer is no, then supplementation is indeed more problematic than expanded interpretation; it comes close to the textualist's nightmare. If, on the other hand, there are some professional constraints that make supplementation tolerable, and indeed useful, then the same constraints will only operate more effectively as brakes on the arbitrariness of expanded textual reading. For it seems to me that an acceptably broad interpretation of the constitutional text is by far preferable to the prima facie illegitimacy of extraconstitutional authorities.\(^57\)

Thus, while Grey is certainly right that judicial inquiry should be a secular enterprise, his tying the concept of secular professionalism to a narrow interpretive literalism (to be supplemented by other extraconstitutional authorities) seems without foundation.\(^58\) It is a very good question, of course, why judges, by virtue of their professional legal training, have any special expertise in either the secular or the sacred constitutional matters. But it is not much less a question for Grey than for the rejectionists he criticizes.

B. Do We Need the Ninth Amendment?

It is time to return to our main subject, the ninth amendment. As I said already, the supplementers sometimes view this provision as an explicit constitutional statement that there are some extraconstitutional commands that the Constitution itself acknowledges and sanctions.\(^59\) The amendment states, the argument goes, that something more than the written language of the Constitution is to be considered in the process of constitutional interpretation and specifically authorizes judicial departures from the text itself.

Let us assume that the ninth amendment does indeed say something of this kind (although we have seen that this interpretation is anything but uncontroversial). Does the fact of its saying so make any difference?

Our assumption contains a number of threads and we need to take them one at a time. Insofar as the amendment is taken to mean that the words of the Constitution are not by themselves controlling, and that we must go beyond them to understand the totality of the system of rights

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\(^{57}\)Grey, supra note 30, at 25.

\(^{58}\)This illegitimacy may, of course, be lessened by arguments that using extraconstitutional sources of authority is itself constitutionally permitted or even mandated, and thus not extraconstitutional after all. See sources cited supra note 36.

\(^{59}\)See sources cited supra note 31.
that the Constitution in fact recognizes, the amendment does not say anything we would not know without it. This is nothing more than rejection of the textualist philosophical confusion concerning the nature of constraints on interpretation. With or without the ninth amendment, we would have to approach the task of constitutional interpretation with some basic understanding of the sources from which the document derives (i.e., the political philosophy of the founding generation, its overall purpose and design (i.e., the political philosophy of the founding generation), and its view of the relation of the government to the individual (i.e., a more general philosophical view of the meaning of life and the place of the political community within it). It is quite important to note that the reason why the amendment is unnecessary to tell us all this is that it is not a matter of choice; it would be simply impossible to read the Constitution without an “extrinsic” background of some sort. Should we go no further than originalism, all this would still be true. Should we treat the Constitution no different from an ordinary statute, it would be true as well.

This, however, cannot be all. The amendment is also taken to mean that we should not be niggardly in interpreting the guarantees of rights. Granted that every, even the most restrictive, interpretation of the Constitution that would see it as no better than a statute must read it against some background, or else the words will not make any sense. But it might perhaps be possible to read it as literally or as narrowly as the accepted canons of legal interpretation would allow, and the amendment seems to say we should not do that. But I think that the view that the Constitution should be read in such an extremely narrow fashion, while not theoretically impossible, would be extremely implausible even in the absence of the ninth amendment. After all, Chief Justice Marshall did not quote the ninth amendment (or any other explicit provision) when he said that “we must never forget that it is a constitution we are expounding.” Given that this extremely short document was conceived as a blueprint for a government that was supposed to endure for “ages to come,” it seems extremely unlikely that it was meant to be read very narrowly. Moreover, since the preservation of the benefits of freedom for themselves and

their posterity was the main object of the framers, since they had justified their revolt against the British chiefly with reference to the violation of their basic rights, and since they were widely known for their liberal beliefs, it would seem inconceivable that they meant to mandate, or even allow, a narrow interpretation of the rights recognized by them and guaranteed by the Constitution.

The ninth amendment also seems unnecessary to point out that there exist implicit or peripheral rights, derivable either from the rights enumerated or from the structure of the government set up under the Constitution. In fact, the framers original claim that a bill of rights was unnecessary, even if it cannot be taken to mean that a judicial derivation of exactly the same configuration of liberties as is listed in the first eight amendments could be taken for granted, must mean that the implications of the Constitution with respect to individual freedoms involve a possible derivation of at least some rights.

It might be objected at this point that the same kind of argument could be used to claim that the first amendment is also unnecessary. To an extent this is true; after all, the framers did think so at first. But the situation is not exactly parallel. The first amendment, even if it did no more, specified a substantive right that otherwise would have to be derived from the rest of the document (or some other sources). This made it, at least in some obvious cases, unnecessary to go beyond the explicit provision. The ninth amendment on the other hand, because it has no substantive content, did not do even that; it simply negatived a possible inference that the listing of some rights had made it no longer legitimate to infer others (in the same way as, say, freedom of speech would have had to be inferred if there had been no first amendment). But the same process of inference must be still gone through in each case in which the existence of an unenumerated right is being claimed. The ninth amendment is thus a second-order specification, the need for which arises only because some rights are indeed specified in the first place. If, instead of

60 This does not say very much about whether the courts or the Congress were meant to be the main interpreters of the Constitution or about whether the founders meant for the courts to police the Congress through judicial review. But there seems to be no doubt that whoever was meant to do the authoritative reading should not give a narrow view to the role of rights.

61 It is also clear that some amendments did more. I argue above that the seventh amendment did. See supra text accompanying notes 12 and 23. The same is true about all those instances (particularly amendments five and six) in which the Constitution commits us to the peculiar institutions of the common law, as opposed to arguably equally good arrangements in the civil law system.
listing some rights explicitly, the clamor for a bill of rights had been dealt with by a unique amendment, saying that "[t]he absence of a bill of rights in this Constitution shall not be construed to deny that the people have rights or to disparage the rights retained by them," then the position of this amendment would indeed have been similar to that of the ninth.

But assume that without the ninth amendment we would indeed be disposed to read the constitutional guarantees of rights in a niggardly fashion, and that it was only the presence of the amendment that admonished us not to do that. Even then I believe the amendment would be very close to vacuous. For to say that we should not be niggardly, without specifying either how generous we should be or how we should go about finding the appropriate level of generosity, would not tell us much of anything. There is nothing in the abstract theory of interpretation (as an activity of being capable of reading symbols) that imposes any limits on what results an interpretation may yield. It can be as broad as to make the text of hardly any relevance at all, as in the case of the recent ecumenical dissolution of the Bible that Grey feared would spread into constitutional text of hardly any relevance at all, as in the case of the recent ecumenical dissolution of the Bible that Grey feared would spread into constitutional law, or as narrow as the American courts' probate jurisprudence. Any limits must come from an appropriate practice (professional, political, or whatever), and if those limits are to be expressed in terms usually acceptable to the legal profession, they must be framed in terms of a set of principles based on theories governing the role of judges in regulating the concrete subject at hand.

Thus, even if the ninth amendment were to be read as empowering judges to develop some kind of constitutional common law of rights, that law would most appropriately be based on a theory of the relation between the individual and the government set up under the Constitution. But any such theory would have to be implicit in the Constitution, and we must assume that the document would support a reading of itself that accords best with the goals it sets out to accomplish. But this, in turn, negates our initial assumption that, but for the ninth amendment, we would be disposed to interpret the constitutional guarantees in a niggardly way. If the Constitution in fact provides us with a set of ideas which may appropriately serve as guidelines for a broad interpretation of rights (including inferences to unenumerated rights), then the ninth amendment does nothing to facilitate such an interpretation; the whole burden of deriving new rights would rest on the defensibility of the interpretation itself. If, on the other hand, the Constitution did not support an expansive interpretation, the amendment would be nothing but an invitation to go beyond what could be made reasonably consistent with the Constitution—surely a supposition not to be indulged in.64

There is only one reading of the ninth amendment that could go beyond what is obvious and make some difference. That is if the amendment were to be understood, somewhat along the "noninterpretivist" lines, as inviting not an expansive reading of the Constitution (i.e., allowing for inferences to unenumerated rights on the basis of the text read in the light of a broad background of history and political theory), but a reading which would derive the unenumerated rights from sources that could not otherwise (given the repertoire of interpretive tools sanctioned by the relevant professional community) be legitimately tied to the document itself.

It is difficult to give examples here that are uncontroversial and at the same time not ludicrously unrealistic. But then what matters is more the mode of justification than the result itself. Take the contraception cases, for instance. One way of justifying them would be to ask whether or not using contraceptives is morally permissible, where "morality" stands for what most of us refer to when we say it is wrong to lie or to cheat (whether it be a religious morality, or some set of eternal norms we believe in, or just a class of social conventions). Another would be to argue that regardless of the moral rightness or wrongness of contraception, the system set up by the Constitution is based on the liberal idea that, except for special areas in which paternalism is justified (something that must be separately established), governmental prohibitions must always be justified in terms of the prohibited action's impact on third parties, other than its mere offensiveness, and that the prohibition on contraception is not justified on such grounds.

Neither of these arguments need persuade us (and there may be other, better ones), but there are obvious differences between them. The second argument begins with a basic idea that is claimed to underlie the whole constitutional arrangement, and appeals to (what it claims is) the fact that the privacy violated by a prohibition on contraceptives, while not mentioned explicitly in the document, is akin to a number of other rights

64It might be objected here that the Constitution could be indifferent with respect to some matters, not favoring one solution or another. I would think, however, that in such a case judges should leave the ultimate decision to the political process. Thus, if without the seventh amendment the Constitution were to be interpreted as indifferent with respect to using the judge or the jury to find facts in civil cases, it would seem to me wrong (inconsistent with the Constitution) to constitutionalize the issue beyond the elements basic to the concept of a fair trial.
explicitly guaranteed, and is itself essential to the maintenance of the proper limits on the state's natural propensity to shrink the individual's zone of personal freedom. The first argument, on the other hand, does not make any such elaborate connections to the aims that can legitimately be ascribed to the constitutional design, but rather assumes that the ninth amendment makes unconstitutional every governmental action which but for the amendment would not violate any constitutional principle, but is wrong for some otherwise important reasons.

Now, I believe that it would be quite dangerous to understand the ninth amendment in this way. The danger is not so much that judges will suddenly start inventing all kinds of rights that the society at large would not be prepared to recognize; the normal restraints on judicial willfulness would still continue to operate. The danger would rather be that the nature of the constitutional discourse would change quite dramatically. Instead of concentrating on legal, institutional, and political kinds of arguments, which are backed by technical legal expertise, political theory, and political philosophy, the language of constitutional law would gravitate toward morality and religion. Without overly indulging in the usual truisms about the absence of any special competence on the part of judges in matters of general morality, it is proper to keep in mind the grain of truth in these clichés, as well as the cost in terms of the legitimacy of having judges resolve general ethical controversies.

But there are also other very important reasons why such a shift of emphasis in constitutional law would be undesirable, and they have something to do with the possibility of relative dispassion and progress in matters of morality and in political science or constitutional theory. This judgment may in part be merely a reflection of my own prejudices, but I believe that it is easier, among contemporary Americans, to achieve a higher degree of consensus about the basic values underlying our political system and its institutional commitments than it is to come to an agreement in matters of morality, especially those concerning religiously inspired ethical convictions (such as may be at stake in the controversy about abortion or contraceptives). Moreover, it may well be that the field of political theory is generally somewhat more conducive than ethics to disciplined thinking, cumulative theoretical elaboration, and the use of empirical information.65 And most importantly, even if, objectively speaking, political theory is otherwise no less subject to disagreements than other areas, the special professional training and socialization of lawyers may produce a degree of consensus among them that would allow for a smoother functioning of the review process, and that would not exist if lawyers were invited to engage in disputes over purely moral questions.

III. Conclusion

It is my view that much of the attention on the ninth amendment has been misplaced. Not because judicial review should be confined to crabbed literalism, but because there is no substitute for the hard work of deriving concrete decisions from the text of the Constitution and the political vision which it expresses. "Substantive due process" became a dirty word at some point and it was thought that giving it a new name would magically save the old trick. But substantive due process had been bad law only when it resulted in decisions that were perceived as insufficiently grounded in a legitimate constitutional discourse. At other times, when its outcomes had firmly resonated with what was thought to have been the political values of the document, substantive due process produced decisions of surprising durability.66 Some people will be unavoidably disappointed by some Supreme Court decisions, regardless of whether the Court follows an activist or a passivist road—it is an illusion that leaving a homosexual open to criminal prosecution67 is any less controversial than giving a woman a right to abortion.68 Those who believe that the Constitution does not guarantee a basic individual immunity against the states' regulating decisions about procreation,69 or that it does not give parents the right to send their children to private schools or

65This, of course, is a claim that many will dispute. But I think that recent advances in social choice theory, decision theory (which has also obvious applications in ethics, to be sure), and empirical political science have made the subject of political theory advance at a much brisker pace than ethics. While political theory is basically a domain of experts about which laymen are woefully uninformed, it is still by and large true, despite an increasing sophistication of philosophical arguments about the nature of ethical judgments, that a person's moral sense, his ability to work his way to the "right" moral solution, is basically unrelated to special education. It may be also worth noting that a number of theorists of judicial review, representing quite diverse segments on the political spectrum, but unified in their hostility to judicial subjectivism, have in fact advocated nonliteral judicial review based on the structure of the Constitution and a political theory of the institutions it established. Compare Bork, supra note 21 with J. Ely, supra note 29.


have them instructed in foreign languages will be no more persuaded by references to the ninth amendment than they were by the invocation of the due process clause. Those who can be persuaded that these decisions are rooted in the Constitution will remain so, without the amendment. And those in-between, I have argued, are simply confused.

8. The Uses of an Unwritten Constitution*

Thomas C. Grey

We in the United States certainly have a written constitution, one that is enforced by judges, among others. I want to defend a view I have stated before, that we have a judicially enforceable unwritten constitution as well, made up of certain constitutional customs and practices, and their associated values and ideals.

The question whether we have such an unwritten or “common law” constitution became a matter of public concern last year during the Bork confirmation hearings. The debate centered around the legitimacy of the independent constitutional right of privacy, and at a more general level around the interpretation to be given to the ninth amendment and to the protection of liberty in the due process clauses of the fifth and fourteenth amendments. Judge Bork’s nomination was rejected by the Senate after his vigorous and articulate statement of the official Reagan administration position on constitutional adjudication, a position for which he had been the most important theoretical spokesman. I interpret this position as consisting of two separate premises: first, that for purposes of judicial review, American practice should recognize only a written, not an unwritten, constitution; and second, that this written constitution must be construed according to the meaning intended for it by its framers.

In what follows, I want to stress the separate character of these two premises, which I call respectively “textualist” and “originalist.” I will mainly be considering the first and more defensible of them—the textualist premise. To it I oppose the view I hold, which I call “supplemen-

*Reprinted, by permission, from 64 Chi.-Kent L Rev. 211 (1988).

that much American constitutional adjudication, including but not limited to decisions under due process liberty and the right of privacy, involves the interpretation of an unwritten and essentially common law constitution, which supplements the primarily authoritative and essentially statutory written one. Supplemental adjudication is authorized but not significantly guided by the written constitution. In the course of discussing the choice between textualist and supplemental approaches, I will have a few things to say in passing about originalism, including some reasons why it should be treated as a doctrine distinct from (though not incompatible with) textualism.2

Two quite separate kinds of constitutional theorists oppose the supplemental position. First, there are textualists like Judge Bork, constitutional conservatives who argue that activist decisions whose normative major premises are not firmly grounded in relatively determinate text are illegitimate. Second, there are those like Professor Rapaczynski, who is joined on this point by many other distinguished constitutional theorists; these writers generally accept the liberal activist decisions of recent years, but regard them as genuinely derived from the constitutional text itself, when the text is read with an appropriately generous context. For these theorists, we do not have an unwritten constitution because we do not need one; the written constitution we do have gives judges all the room for activism that is required.3 It is mainly this latter view that I propose to criticize here, though it is a friendly quarrel, and mainly about method or rhetoric rather than results in the usual sense.

Professor Rapaczynski makes a number of practical points against my proposal that we should admit (or readmit) talk of an unwritten constitution into our standard constitutional discourse.4 These points are interspersed with considerable valuable theoretical discussion of legal interpretation, but in my view the differences between us lie along the practical dimension, and indeed are mainly political in character. Philosophically, Professor Rapaczynski and I share a pragmatist approach to the theory of interpretation. In politics, on the other hand, while we are both liberals and democrats, there is this difference between us: liberals who worry more about the excesses of democracy are likely to prefer Professor Rapaczynski’s way of looking at judicial review, while democrats who worry more about the shortfalls of liberalism may prefer mine.

I. Theoretical Preliminaries

Before getting to my main points, let me note a few things that Professor Rapaczynski and I seem to agree on. First, we both treat the question whether the United States has an unwritten constitution as itself a question of constitutional interpretation. But neither of us think it is one that can be answered by looking hard at the text—even at the part of it that reads “[t]he enumeration in this Constitution of certain rights shall not be held to deny or disparage others retained by the people.” The ninth amendment sounds like a straightforward affirmation of the supplemental position, but it need not be understood that way. It might only be a statement of constitutional aspiration, like the preamble; in which case the unenumerated rights would be only moral or political rights not meant to be judicially enforced.

A second area of agreement has to do with the bearing of the “original understanding” on the question of the unwritten constitution. For more than one good reason, legislative history cannot decide the question any more than can unaided text. First, as is so often the case on interesting questions, the historical evidence is equivocal whether judges were originally meant to give constitutional force to unenumerated rights. The question was not a very salient one during the founding period; the first joiner of issue on it was the exchange between Justices Chase and Iredell in Calder v. Bull5 in 1798, at which point both positions were certainly legitimate competitors for acceptance.6 Second, the founding period does not supply the whole original understanding on the

2 See my view, Robert Bork’s own writings show him to be a serious textualist; he works hard to link constitutional doctrines to text in a fairly formal or deductive manner. By contrast, and unlike, say, Raoul Berger, Bork is an indifferent originalist, not much interested in historical investigation into the actual original understanding of constitutional provisions. In my own earlier essay Do We Have an Unwritten Constitution?, supra note 1, I blurred together textualism and originalism under the rubric of “interpretivism.”

3 These are the theorists I have elsewhere called “rejectionists,” because they reject the distinction between written and unwritten sources of constitutional law. Grey, The Constitution as Scripture, supra note 1, at 2. (A better name would be welcome.) The group includes, along with Professor Rapaczynski himself, such other distinguished theorists and commentators as Michael Perry, Harry Wellington, David Richards, Owen Fiss, and Ronald Dworkin; see id. at 2 n.2; as well as Laurence Tribe; see L. Tribe, American Constitutional Law 771 (2d ed. 1988).


5 U.S. (3 Dall.) 386 (1798).

6 Suzanna Sherry argues that the original understanding cuts strongly in Chase’s favor in The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987); I interpret the same evidence as leaning that way, but less decisively so, in The Original Understanding and the Unwritten Constitution, to appear in Toward a More Perfect Union (N. York ed. forthcoming 1988).
question of the unwritten constitution; one must take account of the view embodied in the Reconstruction amendments, a view whose ambiguities are suggested, for example, by the majority and dissenting opinions in the *Slaughterhouse Cases* and *Loan Association v. Topeka.*

In any event, quite apart from history's complexities and ambiguities, neither Professor Rapaczynski nor I are originalists. We agree that even when ascertainable, original understandings have no final authority in constitutional law today. Post-enactment practice makes its own contribution to the present meaning of the Constitution, as does the cultural and political situation that forms the current interpretive context.

I have already mentioned my agreement with Professor Rapaczynski on our shared pragmatic approach to constitutional theory, but on the matter of the relation between theory and practice I must say a few more words. In general, I think that theory must collaborate with practice rather than rule over it. In particular, my proposal that we admit to having an unwritten constitution does not descend deductively from any philosophical theory I hold about the nature of textual interpretation, in law or more generally. On the subject of the general theory of interpretation, especially because I agree with almost everything Professor Rapaczynski says, I can sketch my own position in a few banal slogans: interpretation always involves ascertaining the meaning of a focal text (or text-analogue) against the background of a context; no text can by itself so constrain interpretation as to make reference to context unnecessary; on the other hand, context (which generates inferences of communicative intent) never establishes meaning by itself, so as to make focus on the text itself irrelevant. In short, unless both text and context have some constraining force, the process is not one of interpretation at all.

Within this loose and boringly uncontroversial framework, I offer my distinction between written and unwritten sources of constitutional law as nothing more than a working interpretation of "this constitution"—of American constitutional practice, that is, in the light of its central texts, and the context provided by their origins, their development, and the demands of the present legal, political and intellectual situation. I believe my proposal reasonably connects up and helpfully clarifies our official and popular practices and ideals as they are and have been, while tending to nudge current practice in the right direction. In a certain sense, then, what I have to say is not "theoretical" at all.

In another sense, though, this is an exercise in what is commonly called "constitutional theory" as that genre has proliferated in recent years. What makes this kind of work theoretical is only that it proceeds at a higher level of generality than is usual with the doctrinal commentary lawyers and judges cite and consult. Such theory should be judged, like more down-to-earth commentary, by whether it is useful, as heuristic device and political guide, in the teaching of constitutional law and the practice of constitutional government. We always have to remember that very general remarks about a complex body of practice are more likely to be vacuous than profound.

On the heuristic side, the constitutional theorist can be understood as both teacher and debate moderator. The teacher's job is to supply a framework of concepts through which a newcomer can usefully survey the field of constitutional law. Frameworks absorbed in this way can be influential because they tend to remain in place, unconsciously structuring (and slanting) the way the experienced practitioner conceives and categorizes problems that arise within his field. The moderator's job is to supply terminology and conceptual structures that perspicuously frame embattled subjects for debate. This means, first, identifying those "essentially contested concepts" around which controversy can most usefully be organized; and, second, supplying rival conceptions of those contested concepts, conceptions that express persistently conflicting ideals, passions and interests in a way that is intelligibly structured and that both sides can accept as reasonably fair.

Of course constitutional disputes, unlike debate contests, are not just for fun and mental exercise. They can substitute for immediate violence only because violence lurks behind them; they are part of a game in which clubs sometimes indeed are trumps, as Hobbes said they always were. In these circumstances, the metaphor of the moderator presents too neutral and technical a picture of the constitutional theorist's role.

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73 U.S. (16 Wall.) 36 (1873).
87 U.S. (20 Wall.) 655 (1874).

*See Van Alstyne, Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review, 35 U. Fla. L. Rev. 209 (1983).*


11 The late Robert Cover put the point dramatically by saying that constitutional interpretation took place upon "a field of pain and death," as it certainly does in many cases, most pointedly those involving the death penalty. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986). Alongside Hobbesian observations like these, true as they are in limited contexts, I would always want to place Hume's point that the world is ruled more by opinion than by force; Hume keeps us clear on the most important link between interpretation and power.
After all, the way a question is stated will affect, sometimes predictably, how it is answered, and knowing this the theorist will frame the debate not only to clarify matters but also to promote the better values, and make more likely the victory of the better side. This is why constitutional commentary is unavoidably political and "result-oriented" as well as heuristic.

As I read Professor Rapaczynski, he has three main practical objections to framing current constitutional debates in terms of the question "Do we have an unwritten constitution?" In the first place, he points out that judges and lawyers do not talk this way now—the implication being "if it ain't broke, don't fix it." Second, he argues that any division between written and unwritten sources of constitutional law leads to a narrow or rigid, even a strictly originalist, approach to textual interpretation. Finally, talk of an "unwritten constitution" tends to undermine the legitimacy of useful forms of judicial activism by portraying them as subjective and unguided. Behind these objections lies a single theoretical point: we can press very far with the importance in interpretation of context, the point that social and professional practices and ideals inevitably color constitutional interpretation even when it tries to stick to the text. The further one takes this point, Professor Rapaczynski argues, the less use there is for a revisionist (and potentially misleading or scary) proclamation that these practices and ideals make up an "unwritten constitution."

In what follows, I make the case for my proposal with these sensible practical objections in mind. I argue that the distinction between written and unwritten sources of constitutional law serves both as a helpful heuristic device and as a politically sound guide to judicial practice. Heuristically, it connects current controversies both to a debate about constitutional interpretation that has persisted throughout American history, and to similar debates about the interpretation of authoritative texts in other contexts, both legal and extralegal. Politically, when properly understood, recognition of an unwritten constitution also connects professional usage more closely to the popular understanding of the constitution as written law, and thus makes constitutional adjudication more subject to critical public scrutiny. If that makes adventurous judicial activism more problematic, such a result is not an unmixed evil; the positive side is the promotion of a republican vision of citizenship and government—and it is here that Professor Rapaczynski and I perhaps have our main differences.

II. Making Connections: Constitutional Tradition

It remains true that for judges and practitioners today, talk of an "unwritten constitution" has an unfamiliar and somewhat jarring sound. The British have an unwritten constitution; we have a written one—so most people familiar with our practices would say. I want to say that we have both. I do put my proposal forward as a reform; it is meant to sound a bit unfamiliar, and hence draw attention to phenomena that I think should be noticed more than they are.

But it is also meant to fit reasonably well with our familiar practices, and one of its strong points is its roots in American constitutional tradition. The tracing of these roots could support a long book, but here must be compressed into a short story.

To begin with, the American Revolution was made by a generation of lawyers and pamphleteers who believed in and were used to arguing on the basis of a legally supreme and yet unwritten English or British constitution. This generation accepted a binding body of higher law, conceived as an amalgam of the rights of man and the birthrights of Englishmen. This conception then appeared in the earliest exercises of judicial review, immediately after independence. Five years before Marbury v. Madison, Supreme Court Justice Chase issued an opinion in Calder v. Bull that claimed the power of judicial review even over legislation that was not "expressly restrained by the constitution," and yet violated "certain vital principles in our free Republican governments." The unwritten constitution made up of these principles was likewise invoked as an alternate ground of decision by John Marshall in Fletcher v. Peck, and it was widely affirmed by orthodox judges and commentators, promi-

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13Id. at 193.
14Id. at 190-91.
15Many would add that the British Constitution is not enforceable by way of judicial review because it is unwritten.
16For the early history, see Grey, Origins of the Unwritten Constitution, 30 Stan. L. Rev. 843 (1978); see also, Grey, supra note 6, and Sherry, supra note 6.
175 U.S. (1 Cranch) 137 (1803).
183 U.S. (3 Dall.) at 388 (emphasis omitted).
nently including James Kent and Joseph Story, during the early and middle years of the nineteenth century. On the other hand, the conception of a supplemental unwritten constitution has been, at least since Justice James Iredell's answer to the Chase opinion in *Calder*, subject to criticism by those who thought that judges should only enforce positively enacted constitutional limitations. As time passed, these criticisms were heard more frequently, so that by the beginning of this century invocation of constitutional principles that claimed no anchor in the text had become rare. This history gives pause to proponents of a living and partially unwritten constitution. Even if we originally had judicially enforceable unenumerated constitutional rights, might we not have gradually lost them through a process of interpretive development driven by the movement toward a more democratic ideal of legislation and a more positivistic conception of law?

But other historical developments make any simple conclusion along these lines untenable. As Edward Corwin accurately summarized the upshot of the Chase-Iredell debate, while Iredell won the victory in form, Chase won in substance. Accompanying the decline in direct appeal to unwritten sources during the nineteenth century was an ever-expanding conception of the range of limitations that took shelter within the general clauses of the text. The principles protecting private property and vested rights, earlier claimed as intrinsic and unenumerated, came increasingly to be referred to the federal Constitution's contract clause, and to state constitutional provisions that affirmed inalienable rights, prohibited retrospective laws, or required the separation of powers.

The law of the land and due process clauses of state constitutions (always treated as equivalents) also served, ever since the founding period, as yet another constitutional general clause. Substantive due process long predates the "Lochner era." In fact it was around 1840 that the due process provisions gradually began to outstrip the other general clauses in popularity as a vehicle for invalidating laws that violated vested rights, or "took from A to give to B." The adoption of the due process clause of the fourteenth amendment advanced this development, under the tutelage of lawyers, judges and commentators who sought a central role for the federal courts in protecting property and the market against the "democratic excesses" of the state legislatures. The "property" and "liberty" protected by the due process clauses supplied the textual basis for constitutionally protected unenumerated rights, and there was no further need for any explicit doctrine of an unwritten constitution.

For much of the period before 1937, the interpretation of the due process clauses as incorporating an unwritten constitution including "certain immutable principles of justice which inhere in the very idea of free government" was not itself controversial. What was controversial was the content of that constitution and the degree of deference courts should show to legislatures in formulating and implementing it. Even Justice Holmes' dissent in *Lochner* affirmed the common understanding of the period; he conceded that a piece of legislation consistent with all of the explicit restrictions of the written constitution would still violate due process.

22See *Lindsay v. Commissioners*, 2 S.C.L. (1 Bay) 38 (1796); *University of North Carolina v. Foy*, 5 N.C. (1 Mur.) 53 (1809); *Little v. Frost*, 3 Mass. 106 (1807). Corwin, The Doctrine of Due Process of Law Before the Civil War (pts. 1–2), 24 Harv. L. Rev. 366, 460 (1911), which remains the best known historical treatment of this question, understates the degree to which we would call "substantive due process" was common during this period, though lawyers of the time did not typically make our distinction between substantive law and procedure.

23The decision in *Taylor v. Porter*, 4 Hill 140 (N.Y. 1840) became the leading precedent in the spread of substantive due process.

24For the most influential commentary, see T. Cooley, Constitutional Limitations 351–413 (16th ed. 1888); and see also T. Sedgwick, Statutory and Constitutional Law 138–44, note a (2d ed. 1874). Comparison of the cited footnote, written in 1874 by John Norton Pomeroy, the editor of the second edition of Sedgwick treatise, with Sedgwick's text written in 1857, illustrates how far the consolidation of the doctrines of the unwritten constitution under the due process clauses had gone forward during the intervening period.

25The early Supreme Court cases did reject the broad reading of the fourteenth amendment due process clause. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Davidson v. New Orleans*, 96 U.S. 97 (1877). That Justice Miller's opinions were based on considerations of federalism, and not on any opposition to the idea of a judicially enforced unwritten constitution, is shown by his opinion for the Court in *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1874), a diversity case in which a state statute was invalidated for violating "general principles."

process if it offended “fundamental principles as they have been understood by the traditions of our people and our law.”

Frontal assaults during this period on the very idea of a judicia\ally enforceable unwritten constitution were rare, and when they occurred, were thought to require such drastic action as that proposed by Felix Frankfurter: “The due process clauses must go.”

After 1937 many commentators began to assert that the due process clauses properly governed only matters of procedure. But few followed out the implications of this claim, which was qualified by the doctrine that the fourteenth amendment due process clause imposed at least some of the substantive requirements of the Bill of Rights on the states, while the fifth amendment clause similarly transferred to the federal government at least some of the restraints imposed on the states under the equal protection and contract clauses. Though logically these doctrines certainly meant the continuation of “substantive due process,” many commentators and judges convinced themselves that they merely involved the enforcement of “specific” provisions of the Constitution, and hence did not entail the kind of judicial invention-concealed-as-enforcement of wholly extra-textual rights that had come to be seen as an anomalous departure of the “Lochner era.”

Even between 1937 and 1965 there was some continued explicit defense of judicial development of unenumerated rights, for example, by such “old believers” in the traditional conception of due process as Justice Harlan. Further, this period saw the rise of what has sometimes been called “substantive equal protection,” the openly revisionist invocation of changing conceptions of equality in support of doctrines that were well removed from the issues of racial discrimination and its near relatives. But it was not until 1965 in Griswold v. Connecticut that a revived version of the old Chase–Iredell debate came into prominence, and only in 1973 with Roe v. Wade, the most controversial judicial decision of the last generation, was the debate guaranteed to stay in the forefront of attention for many a day to come.

There was a right of privacy, the Court said in Roe, broad enough to protect a woman’s decision to terminate her pregnancy, “whether [that right] be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, on the Ninth Amendment’s reservation of rights to the people.” The tone was appropriate to the Court addressing an issue of merely terminological import: whether to call privacy a due process liberty or an entirely unenumerated right. The constitutional text was quite avowedly supplying not the normative content but only the taxonomical nomenclature. It is a story familiar to constitutional lawyers how we came from that point to the Bork hearings, which made “interpretivism vs. noninterpretivism” part of the public discourse.

Though I used to pose the division in those terms myself, I now think that “noninterpretivism,” besides being stylistically barbarous, is a misleading term for the view that accepts the legitimacy of judicial enforcement of an unwritten constitution. It is better to treat all approaches to constitutional adjudication as constrained to the interpretation of the “sources” of constitutional law, and then to argue about what those sources are and how much relative weight they should have.

As I would frame the debate now, some interpreters, textualists (Judge Bork and his allies for example), treat the constitutional text as the sole legitimate source of operative norms of constitutional law. Other interpreters, supplementers (my crowd, the good guys), treat the text as the overriding source where it speaks clearly, but supplemented by an unwritten constitution made up of principles that underlie precedent

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30Frankfurter, The Red Terror of Judicial Reform, The New Republic, Oct. 1, 1924, reprinted in F. Frankfurter, Felix Frankfurter on the Supreme Court 158, 167 (P. Kurland ed. 1970). In the same essay, Frankfurter wrote that “it cannot be too often made clear that the meaning of phrases like ‘due process of law,’ and of simple terms like ‘liberty’ and ‘property,’ is not revealed within the Constitution; their meaning is derived from without.” Id. at 163.

31See, e.g., Hamilton, The Path of Due Process of Law, in The Constitution Reconsidered 167 (C. Read ed. 1938). There were precursors for this view; see Corwin, supra note 22; Warren, The New “Liberty” Under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 441–42 (1925); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

32For a good statement of the orthodox post-1937 view of the relevant history, see Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85.


35381 U.S. 479 (1965).

36410 U.S. 113 (1973).

37Id. at 153.
and practice as seen from the perspective of the present. The text itself authorizes resort to these unwritten sources through provisions like the ninth amendment and the due process clauses.

Much more could be said to show the approximate congruence of this account with our traditions as well as our present practices and understandings, but this must suffice for now. The story reveals two themes. On the one hand, for reasons derived from the spread of democracy and the rise of legal secularism and positivism, judges prefer to rely on a written constitution when they invalidate legislation; this explains the long-run tendency to bring what were once avowedly unwritten general principles within the shelter of the general clauses of the text, most notably the due process clauses. On the other hand, there is the vigorous survival of the American tradition that if a law is seriously unjust it must somehow be unconstitutional; this explains the expansion of the general clauses, as well as the judges’ intermittent frankness about the lack of guidance those clauses give in establishing the content of the doctrine developed under them.

III. More Connections: Legal Writings

My proposal would add some further structure to the standard conceptual framework of debate about constitutional interpretation. I suggest seeing two kinds of disputes where others see only one, drawing a line where others see only a continuum. Everyone recognizes the continuum: it gives rise to the familiar disputes about how much account should be taken of context in interpreting the text, disputes that we put in terms of strict against free construction, verbal meaning against framers’ intent, fixed against changing meaning. But when all is said and done on these issues, I think there is a further question: whether at some point judges rightly shift their interpretive focus outside the text altogether, as in my view they do when they decide cases like Bolling v. Sharpe or Roe v. Wade. In these cases, the text—even the text freely interpreted—seems to me to be no longer supplying the norms that guide decision. It is rather authorizing the courts to seek operative norms in extra-textual sources of law—perhaps the book of nature (“immutable principles of justice”), today more likely the social text (“evolving standards of decency,” basic traditions, and the like).

Before coming to the political case for this view, I want to point out some of its additional heuristic advantages; these go beyond the historical connections it draws between current debates and the tradition of constitutional dispute going back to the Chase-Iredell exchange in *Calder*. The written-unwritten distinction also connects constitutional interpretation to other kinds of interpretation of authoritative texts, both in the law and beyond. When we apply this distinction to our constitutional disputes, we can see a pervasive structural feature that they share with other such controversies. This can give us a fresh perspective and some new argumentative resources. The textualist-supplementer division appears, for example, in the discourse of scriptural interpretation. “Religions of the book” seem invariably to give rise to an opposition between textualists, who regard the sacred writings as the exclusive source of divine revelation, and supplementers, who treat unwritten traditions as an additional source. In Christian history, this phenomenon appears in the conflict between the Protestant doctrine of *sola scriptura*, “scripture alone,” and the Catholic *scriptura et traditio*, “scripture plus tradition.” Similar oppositions have arisen in connection with the Jewish and Islamic sacred writings. The tradition of constitution-worship makes Americans in a sense a “people of the book,” like Christians, Jews and Moslems, and we gain a revealing perspective when we look at our constitutional debates against the framework provided by the long tradition of controversy over sources of revelation in scriptural interpretation. The point is not to apply the scriptural framework mechanically to constitutional disputes; rather we can learn practical lessons from both the similarities and the differences between scripture and constitution. Priests, prophets and believers are structurally parallel to but—given a secular conception of law and politics—importantly different from judges, politicians and citizens.

The comparison of constitutional interpretation to scriptural exegesis illuminates certain important aspects of our practices, but it does so by stressing the aspects of the constitutional enterprise that set it at some remove from lawyers’ ordinary activity with legal documents. And yet a crucial argument for judicial review is the Constitution’s claim to be a formal legal instrument, a writing of the kind lawyers and judges construe in the regular course of their work. True, the Constitution is supposed to be our national sacred Book, the scripture of our civil reli-

33. *U.S.* 497 (1954). This case, which imposes the “anti-discrimination principle” of equal protection doctrine upon the federal government under the due process clause of the fifth amendment, is a striking example of the quite explicit and virtually uncontroversial invocation of an “unwritten constitution.”


tion; but at the same time it is a legal document like others. And it is the Constitution's status as a legal writing that is often said to make it subject to authoritative construction by judges, government officials whose primary training and experience is not in statesmanship, prophecy or political philosophy, but in the application of legal language to the resolution of disputes.

When we look at the conceptual framework used for ordinary legal interpretation, we find that the contrast between textualist and supplemental approaches is as pervasive as in the scriptural realm. For example, the so-called “parol evidence rule” generates opposing approaches, textualist and supplemental, that are structurally identical to those found in constitutional theory.

Stated in its most general terms, the parol evidence rule governs when and how a legal transaction expressed in writing may be supplemented by terms drawn from outside the document. Typically it applies to private law instruments such as wills, leases, deeds, and written contracts and trusts.41 Regarded as an evidentiary doctrine bearing on interpretation, the rule purports to exclude extrinsic evidence (particularly “parol” or oral evidence) of context that, if believed, would contradict or vary the terms of a transaction embodied in a written instrument. So read, the rule favors interpretation of writings strictly, for their plain meaning.

But modern commentators almost uniformly reject reading the parol evidence doctrine as an exclusionary rule governing the evidence to be used in interpreting a writing. They treat it rather as involving the substantive question whether a document embodying a legal transaction may properly be supplemented by unwritten terms. On this view, the doctrine does not directly speak to questions of evidence or interpretation at all. It comes into play only when the writing has been properly interpreted by the use of all relevant and otherwise proper evidence, “parol” or written. At that point, the rule protects the transaction as embodied in the (properly interpreted) writing against being “varied or contradicted” by extraneous or inconsistent terms. This may indeed involve the exclusion of parol evidence—for example, testimony proffered to show agreement on an oral term inconsistent with the provisions of an integrated written contract. However, the evidence is excluded not under any special exclu-

41As my discussion aims to show, the general conceptual framework developed to deal with these subjects can in principle be extended to issues involving “public law writings,” issues such as whether there may be common law crimes, a common law of anti-trust—or constitutional rights beyond those enumerated in the written constitution.

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We see the substantive operation of the (misnamed) “parol evidence rule” in modern contract law, which freely admits contextual evidence of negotiations, prior dealings and the like, as an aid to interpretation. Only when a writing has been interpreted to include an agreement to make itself the exclusive expression of the entire contract, does the rule exclude evidence introduced to establish independent unwritten terms.43

When we turn to parol evidence doctrine as applied to wills, we see quite a different picture. Whereas unwritten contracts and contractual terms are generally accepted, an undisputed governing axiom of the law of succession is the textualist requirement that every valid term of a will must be in writing.44 There is a fundamental similarity, though. With wills as with contracts, a distinction is recognized between the two questions I have been insisting on keeping separate: first, are unwritten terms allowed? and second, how freely are written terms to be interpreted? From the undisputed requirement that every term of a will must be in writing, it does not follow that the writing must be construed without reference to (often unwritten) context. Textualism does not practically or logically require a “plain meaning” rule governing interpretation, any more than it requires an “originalist” approach that focuses on authorial intention. The traditional approach to the interpretation of wills is quite literalist, proclaiming that the interpreter is not to go outside the four corners of the will unless an ambiguity appears on the face of the writing. But more modern approaches receive evidence of context to challenge apparent “plain meaning” as well as to resolve ambiguity. On the other

42A good summary version of the contemporary views on the problem of interpretation and the parol evidence rule, with citation to the main authorities, is J. Calamari & J. Perillo, Contracts 132-83 (1970).

43A written contract may be also be a “partial integration,” which excludes inconsistent but not additional terms. (Supplementers treat the Constitution as a “partial integration” in this sense.)

44A very narrow exception is recognized in some jurisdictions for “nuncupative wills,” oral testamentary declarations by dying persons. See generally T. Atkinson, Handbook of the Law of Wills 363-67 (1953). In contract law, the Statute of Frauds requires a writing as a precondition to the validity of certain kinds of contracts, but the writing need only be a memorandum of the contract, not its complete expression, so that once the evidentiary requirement of the writing has been met, courts will recognize additional or inconsistent terms on the basis of the oral agreement of the parties. J. Calamari & J. Perillo, supra note 42, at 480-81.
hand, the requirement that every term of the will must be in writing con-
tinues to be universally recognized and quite strictly
completely unrelated. The point behind the prohibition of unwritten
wills needs to be reinforced by a requirement that the
written terms must give some definite guidance.

Imagine a will whose words by themselves give no such guidance, for
example, by providing only “Do what is right with my property.” There
might be extensive evidence about the testator’s values and preferences,
particularly concerning his property and the potential objects of his
bounty, which would support a finding of what the testator would have
wanted done. If a court were allowed to interpret the will in the light of all
this evidence, characterized as interpretive “context” to the words, this
would not be very different in substance from giving judicial effect to the
inferred wishes of a decedent who had never executed a written will at all.
Who doesn’t want “what is right” done with his or her property at death?
(What nation doesn’t want its laws to be consistent with justice, fairness,
the right?) In fact, any court would treat the will as void for indefinite-
ness, and the estate would pass by intestate succession—much as certain
indefinite constitutional provisions, including the guarantee of republi-
can government, are treated as nonjusticiable in constitutional law
because they do not supply “judicially manageable standards.”

The point is not that the process of ascertaining a testator’s inten-
tions from biographical evidence cannot be considered interpretation. A
life or course of action has or can have meaning, and so it is a text-anal-
logue, something interpretable. But inquiry into that meaning is not
interpretation of a text in a sense that responds to the reasons the law
requires certain arrangements to be reduced to writing. When we con-
side what these reasons might be, we can move toward a rough practical

45On this point as on others, I have found illuminating the discussion in Langbein
& Waggoner, Reformation of Wills on the Ground of Mistake, 130 U. Pa. L. Rev. 521
(1982). Langbein and Waggoner argue that this aspect of the law of wills should be
changed, so that as long as there is some written will, courts should be empowered to
“reform” them, adding terms meant to be included but omitted by mistake. Id. at 566–77.

46An important difference, which suggests that our constitutional law is not really
textualist in character, is that judicial enforcement of verbally vague provisions such as
the equal protection clause is uncontroversial at least with respect to applications that
contextual evidence shows their framers would have approved.

sense of the limits that bound the process of genuinely textual interpreta-
ion in law.

The strict textualism of the law of wills is based on a strong prefer-
ence for what might be called errors of formality over errors of informal-
ity. An error of formality occurs when someone wants to dispose of her
estate in some substantively unobjectionable way, but this desire is not
realized because she failed to reduce her wishes to a testamentary writ-
ing. An error of informality would occur, if oral wills were allowed, in
those cases in which a genuine testamentary intention was wrongly deter-
mined to exist, by virtue of fraud or mistake, on the basis of informal evi-
dence; or in which effect was given to an ill-considered intention that
would have been changed had it been subjected to the “sober second
thought” induced by the solemnity of writing.

Presumably the reason we do not allow informal wills is that, with
respect to transmission at death, we picture errors of informality as likely
to be frequent and costly, and errors of formality as rare and of tolerable
cost. It is easy for someone to make an informal statement of testa-
mentary intention without taking it seriously, one that she would regret if
she had to think it over. Further, a potential beneficiary can easily man-
ufacture such a statement; there is often a lot at stake, and the alleged
declarant is not around to refute the testimony. On the other side, in the
absence of a will, the law provides an alternative regime of intestate suc-
cession, an off-the-rack will substitute based on legal stereotypes of the
social relations that most often shape testamentary plans. Where some
claimed intended disposition is frustrated in favor of the intestate regime
by the writing requirement, the losing beneficiary is likely to fall in the
categories where suspicions of frivolity, spite and undue influence arise,
while the winners will be “natural” objects of bounty,” surviving children and spouses. Any person whose considered intentions really do depart from the standard regime can easily formalize them; indeed most people with significant property would make a will either or not the law required it. For reasons like these, the law requires wills to
be in writing.

The contract regime is quite different. By contrast to the textualist
law of wills, its basic framework is supplemental; it stresses the legally

47I have drawn on the excellent discussion of the policies behind the formality of the
law of wills in Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 490–503 (1975). Langbein argues for relaxing the degree of formality required,
believing that the policy of effectuating the testator’s actual intent should be given greater
weight.

489, 490–503 (1975). Langbein argues for relaxing the degree of formality required,
believing that the policy of effectuating the testator’s actual intent should be given greater
weight.
binding quality of the “unwritten contract,” the agreement rather than the writing. Thus a leading commentator describes as one of the “unassailable rudiments” of contract doctrine the principle that a contractual writing is “not the contract but merely . . . evidence thereof.”48 Some textuelist elements, for example, the requirement of a written memorandum for certain contracts under the Statute of Frauds, survive in the face of this overall supplemental thrust. But the very fact that the law recognizes unwritten contracts puts these textualist elements under strain. Conceptually, at the root of every “written contract” is an (unwritten) agreement of the parties about what effect to give any writing; the more seriously this point is taken, the more difficult it becomes to enforce formalities in the face of demonstrated agreement, or to give exclusive force to the document in the process of determining the legally effective terms of the contract.

The main practical dispute about documentary exclusivity within contract law arises over the issue of how readily courts should infer from the existence of a “written contract” the legal conclusion that it excludes additional unwritten terms. Judges and commentators of the classical “Williston school” treat a contractual writing that looks complete on its face as creating a strong presumption that the writing is a complete integration, embodying the whole agreement. In the absence of specific evidence negating integrative intent, they then will exclude testimony tending to establish additional or inconsistent terms. By contrast, those of the modern “Corbin school” treat the question whether an apparent written contract is a complete integration as a question of fact about the intent of the parties, to be determined case by case. This approach would admit all evidence relevant to that question, which may include oral evidence of agreement on additional or inconsistent terms insofar as such evidence tends to negate integrative intent. Corbinians will also sometimes admit parol evidence of additional or inconsistent terms in the face of a “merger clause,” which explicitly provides that the writing shall express the whole contract; in such cases, there still remains the issue whether the party who did not draft the writing knew of the clause and actually assented to it.49

From this brief summary, we can assign a textualist tendency to Willistionians, and supplemental leanings to Corbinians. The difference between them is over the same kind of issue involved in the debate over the unwritten constitution: How readily should one infer that a written document is the exclusive expression of the terms of a legal transaction or agreement? Here again, as with the law of wills, there is broad agreement that the question whether there are unwritten terms (the parol evidence problem) is separate from the question how to discern the meaning of the writing (the problem of interpretation). And yet here again, the two kinds of question intersect. The law of contracts treats the exclusivity of the writing as a matter subject to agreement by the parties. But any such agreement can only be established by external manifestations that require interpretation, and here traditional divisions between strict (relatively acontextual) and free (relatively contextual) approaches produce predictable disagreements. More often than not, free interpreters are likely to be Corbinians on the parol evidence question, while strict constructionists will typically be Willistionians.

The centrality of the unwritten agreement in contract law is based upon the notion that a contract is not typically an isolated transaction between strangers who share only what they make explicit. Rather most contracts are embedded in a web of social relations and shared tacit understandings; the contract takes its main content from these underlying relations as they are modified or sharpened for a particulars transaction by negotiation and explicit agreement. This is the Corbinian view, and it bears clear analogy to the organic and social view of constitutional government held by those of us who subscribe to the slogan of the living constitution. The Willistonian approach, with its greater willingness to let the plain terms of a contractual writing override evidence that it does not express the actual understanding of the parties, places more stress on the separateness and mutual distrust of contracting persons, and hence emphasizes the explicit and the transactional as against the tacit and the relational aspects of contract. It bears natural kinship to the more Hobbesian views of the social order typically held by constitutional textualists.50

48 Murray, The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts, 123 U. Pa. L. Rev. 1342 (1975). If the writing departs from the intent of the parties, it is the intent that controls, and courts will grant the equitable remedy of “reforming” (that is, rewriting) the text of a written contract shown to misstate the terms of the underlying agreement, as a result, for instance, of a typing error. See Corbin on Contracts 568–69 (one volume ed. 1952).

49 See the summary of the Williston-Corbin debate, with citations, in J. Calamari & J. Perillo, supra note 42, at 79–85.

While the Willistonian approach to contract doctrine contrasts with the supplemental informality of the Corbinian approach, it falls short of the full textualist formality of the law of wills. An important difference between the testamentary and contractual situation is that the will modifies an underlying default regime of intestate succession, a regime that already approximates widely shared views of how property should be distributed at death. The regime of wills is then conceived as an additional allowance for individual variation from the social construction. As such, it is readily conceived as “a privilege not a right,” legitimately to be given effect only when the testator turns the prescribed square corners. By contrast, the default regime upon a finding of no contract is not a socially designed scheme of allocation, but rather a reign of chance that lets losses lie where they fall.

The relation between the intestate regime and the terms of a will bears some analogy to the relation between the body of ordinary (statute and common) law on the one hand and the constitution on the other. Constitutional textualists always stress the strong presumptive legitimacy of “ordinary law,” which is conceived as made through, or readily alterable by, republican processes, and with “counter-majoritarian” constitutional restrictions bearing a heavy burden of justification. By contrast, supplementers resist the equation of democracy with “ordinary” law-making; we tend to think that while majoritarian legislative institutions are fundamental to democracy, they also create anti-democratic tendencies that courts are equipped to counter.

The analogies between private law and constitutional interpretation could be developed further, and much more could be said about the (very great) dissimilarities that have to be taken into account between wills and contracts on the one hand and written constitutions on the other. For now I will leave the topic, having made a point that I would summarize thus: In law, a written constitution might be treated either on the analogy of a will or a contractual writing, as in political theory a contract.

The analogy of the will portrays the written constitution, the instrument submitted for ratification, as the sole limitation on the default regime of ordinary law. It further presses forward a strong requirement that only the document’s more definite terms are to be judicially enforced, supplying the requisite “judicially . . . manageable standards” for decision.53 By contrast, the analogy of the contract stresses that the Constitution’s status as judicially enforceable higher law persists only by virtue of a continuing and necessarily unwritten social agreement to give it that authority. If the judges supply so crucial a term as this by interpretation of the social text, it is hard to condemn them as usurpers when they read the Constitution’s warning not to “deny or disparage other rights retained by the people” as addressed to them. The ninth amendment tells us that the Constitution is not a complete integration; not only does it contain no merger clause, but it explicitly disavows its own exclusivity.

IV. Staying Connected: Ordinary Interpretation

Now finally let me turn to the political matters at the center of the debate over the unwritten constitution. The heuristic issue is how best to argue about the legitimacy of decisions like Roe v. Wade and Bolling v. Sharpe, decisions that do not follow from the text in any obvious or straightforward way. The related political issue is how easy we should make it for courts to justify decisions like these. We can assume that, other things being equal, the easier they are to justify the more of them we will have.

The question is not whether judges’ basic values and ideas of justice should play any part in constitutional adjudication. Sensible supplementers and textualists should agree that judicial values can and inevitably do enter in, at least as part of the context of decision, part of the lens through which, or the background against which, a constitutional interpreter scrutinizes the text. How explicit the acceptance of such contextual factors should be is what is at stake in the debates between strict and free construction, debates that can take place between textualists.

For example, consider the implications of the three-way comparison that might be made among (a) “living” or nonoriginalist approaches to constitutional interpretation, (b) the modification of charitable trusts under the judicial doctrine of cy pres, and (c) the doctrines governing modification of written contracts by the parties’ subsequent course of dealing.

One difference is that most contracts and wills are conceived as affecting only a few readily identifiable individuals or businesses, whereas the Constitution affects the whole society; another is that private law instruments like contracts and wills are conceived as having their legal force determined by a controlling body of law, while the Constitution is conceived as itself the primary source of fundamental law.

The further question of the unwritten constitution arises when, as it seems to me happens in many cases, these extra-textual considerations stop being matters of context and become the focal object of interpretive scrutiny, the figure rather than the ground. This most obviously happens when the Court treats the words of the Constitution as essentially irrelevant to its decision, as, for example, in *Roe* and *Bolling*.

Many constitutional theorists, Professor Rapaczynski among them, think that there is no good reason to go beyond the familiar questions of strict versus loose construction to deal with the issue whether we have an unwritten constitution. In their view, the Court makes a mistake whenever it signals that the text gives no real normative guidance toward the decision reached. Their point is that the range of possibilities within the notion of textual interpretation is broad enough to cover any defensible exercise of judicial review. They see decisions like *Roe* and *Bolling* as properly derived from the text of certain broad clauses, those guaranteeing liberty and due process—not, of course, just through the words' plain meaning, or the concrete intentions of their authors, but when they are read with an appropriately broad sense of context.

My main objection to this view is a simple minded one. The public idea of adjudication according to written law derives from the common experience of giving and following instructions in the form of shopping lists, notes for babysitters, memos from the boss, and the like. Instructions or agreements are typically fixed in writing to communicate definite content. This conception of “getting it in writing” underlies the special connection between the *written* character of American constitutions and their judicial enforceability; James Iredell long ago justified judicial review on the ground that a constitution is “not . . . a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse.” Activist judicial review that proceeds without taking account of the popular view of the importance of writings lacks the consent of the governed.

This does not mean that textual interpretation must be narrow, crabbed, and wooden, some grim mixture of originalism and literalism, if it is to avoid deceiving the public. Even though the hermeneutics of everyday life begins with plain linguistic meaning on the one hand and speaker’s or author’s intent on the other, there is still room for a workable public understanding of the role of context in textual interpretation.

In most contexts, a writer or speaker (henceforth “utterer”) is assumed to “mean what he says.” This is a defeasible presumption; everyone also understands that additional context may reveal an actual meaning that differs from the initially evident sense of an expression. Failure to look to the elements, verbal and non-verbal, surrounding the focal utterance is what gives rise to the familiar complaint against isolated utterances being “taken out of context.” The first role of context in interpretation is thus to correct or amplify plain meaning by reference to an utterer’s intention.

Originalists hold that the context of utterance, by which we establish the original understanding, is the only context that should count in the process of constitutional interpretation. In my view this position becomes defensible only when it is qualified in such a way as to take away the constraining force that originalists mean it to have. The point is that part of the original understanding of some writings, those meant to be canonical texts, is a set of indefinite expectations about the future process of interpretation itself. The great advance made possible by the invention of writing was that verbal formulations could be consulted and used in a context remote from their original utterance. In a limited sense, this happens whenever a babysitter reads a parent’s note or a shopper reads a spouse’s list. But the kind of interpretation involved in limited situations like these can be reasonably well understood in terms of verbal meaning and utterer intent alone. It is only when a culture develops canonical texts, writings that are read, interpreted and applied across a wide range of spatial and temporal contexts, that additional factors enter the interpretive process in a really conspicuous way.

The immodest poet writes “Not marble, nor the gilded monuments / Of princes, shall outlive this powerful rhyme.” Similarly, the politicians who frame a constitution intend it “to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” Writers projecting words into an indefinite future in this way foresee and expect that they will be read, and reasonably read, in ways that fit neither the words’ plain meaning at the moment of utterance, nor the writers’ own immediate concrete intentions.

We might fold projective expectations such as these into the idea of authorial intention. But once this is done, originalism no longer strongly constrains future interpreters. For purposes of clarity, I think it is better to confine the concept of “context of utterance” to the factors consulted

54 See *supra* note 3.


by strict originalists, and treat the factors affecting textual meaning that come to bear after the moment of original utterance as collectively constituting the "context of application." The distinction between utterance and application stresses the point that textual interpretation is a joint activity, to which author, reader and text all contribute. (This of course is true, though less conspicuously so, with interpretation of more ordinary writings, and indeed with conversations.)

What are the factors that make up a text's context of application? In the first place, words change even their "plain meaning" over time with changes in patterns of general usage. But as a practical matter this factor is more often a source of correctable interpretive mistakes than of genuine changes in the meaning of texts. Much more important are changing political situations and audience expectations for texts intended to be used to govern, such as laws, and to enlighten or entertain, such as literary and theatrical works; the readings that best serve these purposes will themselves change with these circumstances, as any author must expect. Finally, a legal or literary text that achieves significance gathers a history of application and interpretation which inevitably affects its meaning for later interpreters. It was James Madison who said, speaking of the Constitution, that "all new laws" are "more or less obscure until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."

These points resonate with the experience of those who, like actors, preachers and lawyers, work regularly with much-interpreted and long-lived writings. But most people deal mainly with writings that are not canonical texts, but rather are like the note for the babysitter, the shopping list, or the boss' memo. In interpreting everyday writings like these, the elements constituting the context of application play relatively little role. This fact helps to explain the perennial popular appeal of simple originalist doctrines of legal interpretation—the populace to which these doctrines appeal makes the natural though false assumption that laws are not canonical texts, but ordinary written communications. (This imposes some responsibility on legal writers who know better; they should not exploit the misunderstanding of the process of textual interpretation that arises, inevitably, out of everyday experience.)

But the more complex idea of interpretation as a collaboration between author and reader, involving context of application as well as plain meaning and context of utterance, is by no means completely remote from ordinary life. Everyone, not just the lawyer or the literary scholar, recognizes that an interpretation has something about it of the subjective, something contributed by the interpreter, not simply read off from the page or inferred from evidence of the author's state of mind. "That's your interpretation," we say; or "I want facts, not interpretation." Locations like these reveal our working sense of interpretation as an activity mediating between invention and discovery.

So I believe that even interpretation in the narrow sense, the treatment of the written constitution as a legal rule-book, can take into account context beyond the original understanding, including the past interpretation of the text and the present and imagined future exigencies conditioning its use. One can be a textualist without being an originalist. Nevertheless, for interpretation to be genuinely textual in nature, primary focus must remain on the words; extrinsic factors must remain contextual. When the interpretive focus shifts from the text to the practice generated by it, as in my view it clearly does in substantive due process cases, and no doubt with other constitutional provisions under which an essentially autonomous body of case law has developed, lawyers and commentators should not try to convince the public that judges are getting the basic normative content of their decisions from the text. Supplementing the written constitution is something more than reading it in context.

We should portray the process of decision in these cases as the continued judicial development of an unwritten, common law constitution. This links constitutional adjudication to the past in a way that offers legitimate comfort rather than false nostalgia, for ours is indeed a common law legal and constitutional tradition. This way of portraying the constitutional case law connects the professional practice of judges and commentators more closely to the common understanding. At least it can connect to the understanding of the kind of citizenry—open, informed, concerned, willing to listen—that tradition insists is necessary for republican government.

When we connect governmental processes to common understandings in this way, we take a step in the direction of making government less opaque, and hence toward pulling elites and masses together into a genuine public. The concept of the unwritten constitution can supply a mod-

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est nudge toward achieving or restoring this connection; this is a virtue additional to the pedagogic connections it makes when it links both the constitutional present to the past, and constitutional interpretive disputes to the more general hermeneutics of authoritative texts.

Against the heuristic and long-run political advantages of framing debate in terms of an unwritten constitution, we must consider certain short-run political disadvantages suggested by Professor Rapaczynski. Perhaps talk of an unwritten constitution too much burdens the efforts of judges to continue the good judicial work of the last two generations, work that has on the whole improved the quality of American public life. No doubt there is some such burdening. For example, the theme of the unwritten constitution connects *Lochner* v. *New York*, the most famously unpopular case involving unenumerated rights, both to *Roe v. Wade* and to hopes for overruling *Bowers v. Hardwick*; this connection cannot in the short run contribute to *Roe*’s survival or *Hardwick*’s demise. If constitutional theory must be result-oriented, in the sense that part of its justification is its contribution to good government, then why should someone who thinks *Roe* a good and *Hardwick* a bad decision, promote a theory that aids opponents to drape unhappy Lochnerian connotations over desired results?

Let me conclude by offering three answers to that question, answers flowing out of the pragmatic conception of constitutional theory that I articulated at the beginning. The first deals with the “result-oriented” difficulty just posed in its own short-run terms. Pragmatism gets what bad name it has for overvaluing considerations of expediency and short run advantage. Real pragmatists try to give the short run its due, but no more; we know that in the long run we all are dead, but also that our descendants will then be alive, and our interest in them is a genuinely practical one. So let me first give the political short run its due, retiring into the caucus room to address myself to my fellow supporters of “liberal judicial activism,” post-1937 variety.

I accept that talk of an unwritten constitution does make judicial activism somewhat harder to justify to a doubting public that is subject to literalist and originalist appeals; people would object less to our favorite activist decisions if we could convince them that those decisions emerged from a straightforward reading of the constitutional text. My question is how confident we can be that judicial activism over the next generation will have the same political direction it has over the last two: the interpretative and activist decisions if we could convince them that those decisions emerged from a straightforward reading of the constitutional text. My question is how confident we can be that judicial activism over the next generation will have the same political direction it has over the last two: the interpretation of the Constitution in the light of a democratic, egalitarian, citizenship-broadening conception of liberalism. There is now available a contrasting vision of constitutionalism, promoting an alternative brand of activism, which treats democratic politics as a Prisoner’s Dilemma, and proposes to cure its defects by prohibiting wasteful redistributive “rent-seeking” legislation in the name of rights of property and contract.61 A few more right-wing victories in important elections and we will have a judiciary ready for the vigorous pursuit of that vision.

Post-New Deal liberals can argue against this right-wing constitutional vision on the ground that it gives a bad version of our unwritten constitution, one grossly inconsistent with our present best aspirations for the American future. Or we can confine ourselves to an interpretive debate within the terms of the written constitution, a constitution that was written by men who did regard private property rights as sacred, and redistributive democratic excesses as a primary threat to republican forms of government. Of course we are not bound to any narrowly originalist approach to interpretation in debate about the text, but any approach that confines itself to the text as the exclusive source of constitutional rights is handicapped in debating against libertarian activist constitutionalism.

Now let me pass to a second “result-oriented” defense of the unwritten constitution; this is one that I can make outside the liberal caucus room. The job of the constitutional theorist is not just to promote a cause in the short run, but to try to frame debate in such a way that all can take part on reasonably fair terms. The theorist’s or commentator’s objectivity, by contrast to the position of an advocate, consists in a willingness to temper the pursuit of immediate results by concern for the health of the continuing debate, not in some impossible aaperspectivity or point-of-viewlessness. This commitment is itself “result-oriented,” in the sense that it takes the flourishing of the process of debate itself as a “good result.”

Thinking in these terms, I believe that the proposal to debate the current constitutional agenda in terms of whether there should be an unwritten constitution, and if so what its content should be, offers a fair deal to constitutional conservatives. It invites them to move away from the sterile and demagogic formulations of strict originalism, formula-

tions we may hope will go back on the shelf after their failure with the public in the Bork confirmation debate. In return, it gives them a reasonable chance to get their real arguments to the public audience for constitutional controversy. Those on the right who favor judicial restraint can identify themselves as textualists, and attack the legitimacy of the unwritten constitution; they have a lot on their side, including the bogey of Lochner and the public’s natural and healthy suspicions of lawyers’ fancy tricks. (Liberals who fear that they cannot win this argument should remember the Bork nomination debate itself, and the politically effective use opponents made of the ninth amendment in the debates over privacy.)

Those others on the right who favor an activist libertarian constitution can join the liberal establishment for the part of the debate that engages the conservative textualist proponents of restraint. They must then turn to argue with the liberals over the relative attractiveness of the libertarian and the democratic-egalitarian visions of the American future, which is where the real conflict lies between them. Tradition has its important place in constitutional debate, but ultimately it is upon hopes and fears about the future that any serious choice between constitutional visions must turn.

My third and last pragmatic defense of the unwritten constitution accepts the partial handicap it places on liberal judicial activism as appropriate, not just because liberal oxen can be gored by right-wing activist judges, or because we need a reasonable framework within which to debate our disagreements with our opponents, but in the name of republican ideals. In my own picture of the ideal republic, very little of the basic public business would be in the hands of elderly men in black robes who work in marble palaces and hand down decrees from high benches. Much more of that business would be conducted by ordinary citizens discussing and arguing with each other, relying on experts and specialists only where expertise is genuine and specialization necessary. Basic decisions about public morality and justice would not be a specialized or expert matter.

Movement toward this ideal depends on the infusion of a greater degree of public spirit into ordinary politics. Libertarian or “public choice” constitutionalism is founded on the theory that government must be designed as if no one ever acted from public spirit. I doubt that republican government can work at all without some element of disinterested cooperation, and as a pragmatist I would like to hedge my bets on how far this can be achieved, and what is likely to promote it further.

Right now, one of the institutional forces that tends to raise the level of public spirit is still the liberal activist judiciary, or what is left of it. The judges advance this cause when they promote achievement of a working ideal of full and effective citizenship for those who have not realistically had that status, including among others persons of color, women, the poor, and unpopular sexual and religious minorities. Only citizens all of whom are genuinely independent and self-respecting can trust each other enough to cooperate effectively in republican self-government. The goal of effective equal citizenship for those left out of the Constitution’s full protection at the beginning, and not yet brought in by formal amendment, has led judges to construct from the evolving democratic ethos of this country our present unwritten constitution.

I am all in favor of the judges continuing to play that role—at least for the middle-run future. On the other hand, I would like them to do so on the basis of an account of their job that sustains the long-run republican vision, and reminds us that an activist judiciary is a second-best solution, something we would like to be able to do without. If we think of ourselves as having an unwritten constitution whose success depends on the good judgment of judges in discerning and articulating our basic principles, that may help us to keep both points in mind.
9. You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*

Lawrence G. Sager

I.

The ninth amendment is singular in a way that ought to command attention. It is one of a limited number of constitutional provisions that are about rather than of the Constitution. With the preamble, the amendment clause (article V), the supremacy clause (article VI), the ratification clause (article VII), and the tenth amendment, the ninth amendment speaks on a conceptually higher level than the remainder of the Constitution.¹ These provisions address the birth, change, primacy and structural meaning of the Constitution itself.

Even within this special group, the ninth amendment is remarkable. Only the ninth and tenth amendments speak directly to broad issues of substantive content;² and this aspect of the tenth amendment³ is rather unimportant, since it functions merely as a restatement of the what-you-see-is-all-you-get structure of the national power-conferring provisions of the Constitution. But the ninth amendment can hardly be dismissed as

*Reprinted, by permission, from 64 Chi.-Kent L. Rev. 239 (1988).

¹The question of levels is of more than conceptual interest. It is entirely possible, I think, that attempts to change the pertinent parts of article V or article VI so as to alter the amendability or status of the Constitution in a fundamental way would be properly understood as unconstitutional.

²Nominaly, the unhappily-worded eleventh amendment, which I have neglected altogether, also addresses an issue of construction, and does so in terms parallel to the ninth: “The Judicial power of the United States shall not be construed . . .” But the eleventh amendment, even if it is read in something like a straightforward way, is much too particular in focus to be thought of as occupying the same kind of ground as are these other provisions.

³To the extent that the tenth amendment is seen as the textual home of a constitutionally secured principle of state autonomy that is not merely the by-product of the delegated-powers structure of articles I, II and III, then it assumes a separate importance, of course, but not of the special, foundational sort that distinguishes the ninth amendment and articles V, VI and VII.
unimportant or redundant; its terse announcement that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” certainly looks like news, and begs for an explanation.

It does not follow from the singularity of the ninth amendment either that its importance is narrow or that it can usefully be viewed in isolation from the rest of the Constitution. With its suggestion that the whole of the Constitution may not be manifest in its explicit textual stipulations, the great promise of the ninth amendment is what it can tell us about important general features of the Constitution. Indeed, a foundational account of the Constitution which did not reconcile itself in some fashion to the ninth amendment would be vulnerable to question. For just that reason, in turn, a persuasive interpretation of the ninth amendment in isolation is impossible: where the implications of divergent interpretations are so great at the foundational level, the perspectives one brings to the task of interpretation will be especially weighty ingredients in the interpretive process.

II.

The ninth amendment is not, in terms, particularly elusive. There is an obvious way to interpret the stipulation that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” At the conceptual level, it is easy to read this language as an indication that the liberty-bearing provisions of the Constitution are to be understood as prominent and accessible instantiations of a general sense of the proper relationship between a government and its citizens but not as a complete set of the limitations on government necessary to perfect that relationship. At the functional

4A satisfactory understanding of the Constitution requires two kinds of accounts. First, we need an account of the kind of thing the Constitution is, how and what it signifies in our political and legal culture, and how, in quite general terms, it is to be understood and approached. We need, in other words, a foundational account of the Constitution. Questions on the order of whether the Constitution is positive law or merely a collected set of moral principles, whether if law it is accessible by judges in much the same way as other sources of law, whether it is appropriately regarded as a collection of more or less ad hoc stipulations or as an integrated code of governance, or whether its written provisions exhaust or merely represent its operational content, are questions within the aegis of a foundational account. Such a foundational account of the Constitution will very much inform or predispose the second kind of account necessary to a full understanding of the Constitution—a substantive account. In a substantive account, content is supplied to the Constitution as a whole or to specific constitutional provisions by a process that is consistent with the foundational account of the Constitution. The great promise of the ninth amendment is that it ought to be able to shed light on important questions that arise in the effort to give a satisfactory foundational account of the Constitution.

level, this reading has its obvious corollary: the amendment announces that there are valid claims of constitutional right which are not explicitly manifest in the liberty-bearing provisions of the Constitution but which enjoy the same status as do those made explicit in the text. Given a constitutional jurisprudence that long since has secured the judicial enforcement of the Constitution and applied the central provisions of the Bill of Rights to the states, this reading of the ninth amendment would mean in turn that it is appropriate for our constitutional jurisprudence to validate some claims of right that lack an explicit provenance in the text of the Constitution, and appropriate for judges to enforce such validated claims against federal and state governmental actors.

I am not the first person to stumble upon this obvious interpretation of the ninth amendment, of course. Give or take, it was Justice Goldberg’s view in Griswold v. Connecticut, 5 and it has the general support of a thin but venerable line of scholarship, running back at least as far as Justice Story. 6 But for the most part, judges and scholars have labored against this straightforward reading. They have had to labor rather hard. The language and sparsely recorded history of the ninth amendment surely signify this much: that some sorts of things appropriate to the appellation “rights” were perceived to exist without the benefit of explicit textual provenance in the Constitution, that these normative figments could reasonably be thought to be at risk through the introduction into the Constitution of a written Bill of Rights, and that this risk was serious enough initially to forestall—or at least to be a plausible excuse for resisting—the inclusion of a Bill of Rights and ultimately to require the prophylactic guide-to-construction embodied in the ninth amendment. Thus, anyone who resists the head-on interpretation of the amendment has to either find a way of characterizing the unenumerated rights it canonizes which falls short of treating them as orthodox constitutional


rights but which nevertheless satisfies these conditions, or proffer some other grounds for disavowing the amendment's apparent meaning.

There are four possible readings of the ninth amendment which avoid the full force of the head-on interpretation. First, the amendment might not implicate legal norms at all, but rather some other sort of normative animal. Second, the amendment, while involving positive legal norms, might only concern the protection of state law from federal interference. Third, the amendment, while referencing rights in a more or less traditional sense, might nevertheless be judicially unenforceable. And fourth, the amendment, while otherwise involving full-blooded federal legal rights, might not apply to the states. None of these is easy going.\(^7\)

\(^7\)The first and second of these readings center on claims intrinsic to the interpretation of the ninth amendment itself; they try to deflect the basic thrust of the head-on interpretation. The third and fourth readings, in contrast, concede the basic thrust of the head-on interpretation, but make claims involving the intersection of the amendment with other, freestanding notions in our constitutional jurisprudence. My discussion of these claims reflects this difference: the first two claims are dealt with in the terms in which they are offered, with reference to the language, history and logic of the amendment and the Constitution in which it is embedded; the second two are considered in the more conceptual terms apt to the political question and incorporation doctrines.

\(^8\)Speech of James Wilson in Pennsylvania Ratifying Convention (Nov. 28, 1787) reprinted in 2 The Documentary History of the Ratification of the Constitution 388 (M. Jensen ed. 1976). For further discussion of this speech and a sketch of the evidentiary problems concerning it and other records of the state ratifying conventions, see infra note 15 and accompanying text.

A. The Non-legal Animal Thesis

We might understand the ninth amendment as a simple reminder that the text of the Constitution—including the Bill of Rights—does not exhaust the domain of political argument. On this view, the amendment merely affirms the sense of arguments on the order of "It may be constitutional for the state to do that, but it would be deeply wrong."

What there is of an historical record certainly does not support this view of the ninth amendment. The concerns to which the amendment was a response were characteristically expressed in distinctly operational terms. The expressed fear seems to have been that of legal misconstruction, not of the distortion or discouragement of moral or political discourse. Consider these classic and much-thumbed remarks (to which we will return below): "[A]n imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete."\(^8\) Or: "A Bill of Rights] would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out,

\(^9\)1 Annals of Congress 439 (J. Gales & W. Seaton eds. 1834) (Remarks of Rep. Madison). For further discussion of this speech and its context and for a sketch of the evidentiary problems concerning the work of the First Congress, see infra note 18 and accompanying text. Those studying the proceedings and actions of the First Congress should use the Annals with caution, for the records of the debates presented there are of suspect reliability. See Hudson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 35-38 (1986) (criticism of Thomas Lloyd, the principal reporter of the Pennsylvania ratification convention's debates). Further, Leonard White pointed out in his classic The Federalists that there are several editions of the Annals with varying pagination. L. White, The Federalists 18 n.14 (1948). I have used the edition with the running head "History of Congress," the one preferred by White.
The sparse record and constitutional text aside, this view of the ninth amendment is simply far-fetched. To be sure, there is nothing un-ward or improbable about the idea that there is a domain of moral discourse which is not included in the domain of positive constitutional law. What is implausible is the idea that political actors or persons in the population at large would be tempted to the view that arguments of political morality lost all force outside the four corners of the Constitution. It is still more implausible that anyone who was in fact drawn to such a view would be steered away by a simple textual suggestion (for that is what the ninth amendment would be reduced to on this view) to the contrary.

B. The State Law Thesis

The state law thesis holds that the ninth amendment was intended and should be construed merely to protect state law from federal interference of a sort not properly countenanced by the Constitution but nevertheless sustainable by an erroneous understanding of the first eight amendments. In the form most compatible with the language of the amendment, the claim is that the ninth amendment is there to protect rights granted by the states to their citizens—by constitution, statute and common law—against the possibility that the Bill of Rights would somehow unravel these state guarantees.10

How exactly might the Bill of Rights have undermined the rights granted by states to their citizens? Perhaps the Bill of Rights could have been regarded as a canonical rendition of all valid rights, and have persuaded the people in some or all of the states to devalue and eventually abandon other rights against state government; or perhaps it is Congress that might have come to devalue state-granted rights and feel inappropriately free to override them in the course of enacting federal legislation. But these accounts are essentially retellings of the non-legal animal thesis, and it grows less rather than more plausible with iteration. (No one, so far as I know, suggests that the ninth amendment actually immunizes state-granted rights from being undone by Congress as a matter of positive law, or was remotely intended to have such an effect; this would give artful state lawmakers the ability to insulate almost any state law from federal legislative preemption, and thus reshape radically one of the most settled features of our constitutional tradition.11 Also, were this its purport, the ninth amendment would have addressed the enumerated powers of Congress, not the enumerated rights which were plainly intended to limit those powers.)

The only other possibility along this line is that the role of the ninth amendment is to avoid a misconstruction of the liberty-bearing provisions of the Constitution pursuant to which these provisions themselves would be understood to constitutionally preempt the rights granted by states to their citizens. But this seems fantastic. How would the preemption villain of this story have proceeded? Consider the possibility that, in modern parlance, the Bill of Rights would somehow be seen as having “occupied the field” of personal rights altogether, divesting the states of all power to extend personal rights to their citizens. The “occupying the field” metaphor actually gives this line of the state law thesis a more plausible gloss than it deserves. In the classic preemption situation of this sort, the federal government is seen as having taken over some regulatory enterprise and having thereby ousted the states from the same enterprise. But it was clear to the framers that the Bill of Rights only restricted the federal government; it did not assume any role of restricting the states. Hence, no one could have thought that the Bill of Rights was taking over the enterprise of “regulating” the states in the name of personal rights. Moreover, the scope of such a preemption would have


11It is possible that some states wanted the Constitution to be amended in this radical way. The first amendment proposed by Pennsylvania’s ratifying convention to its ratification of the Constitution included a stipulation that could be so read: “[E]very reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.” Proceedings of the Meeting at Harrisburg in Pennsylvania (Sept. 3, 1788), reprinted in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 545 (J. Elliot 2d ed. 1863).

Compare the first of a series of proposed amendments offered by the Maryland ratifying convention’s Antifederal minority (these amendments were rejected by the full convention but appeared in Baltimore newspapers after Maryland’s vote to ratify the Constitution):

1. That Congress shall exercise no power but what is expressly delegated by this constitution.

By this amendment, the general powers given to Congress, by the first and last paragraphs of the 8th sect. of art. 1, and the second paragraph of the 6th article, would be in a great measure restrained: those dangerous expressions by which the bills of rights and constitutions of the several states may be repealed by the laws of Congress, in some degree moderated, and the exercise of constructive powers wholly prevented.

been awesome: it would have devastated the states as independent law-making entities, since virtually any state legal norm could be understood as granting persons rights against the state.

Whitting down the scale of the preemption does not much help things in the plausibility department. Suppose only those matters "germane" to the Bill of Rights were at hazard. (Note that it makes no sense to say that the feared preemption would be limited to the exact content of the Bill of Rights; the whole point is that somehow the states would be prevented from exceeding the scope of the Bill of Rights.) Could it really have been feared that provisions in the Bill of Rights—plainly intended to restrict only the federal government—would be understood as placing a federal cap on the protections that persons could enjoy against their respective states? There is simply no reason at all why anyone would have foreseen this construction; least of all is it plausible that the federalists—whose manifest fears first stayed the Bill of Rights and then induced the ninth amendment—would have had this extravagant concern on behalf of the states.

Understandably, the most popular version of the state law thesis takes a different tack altogether. The Bill of Rights, the argument runs, was thought to pose a threat to national authority, thus expanding a federal cap on the Bill of Rights—which was thought to pose a threat to national authority, thus expanding a federal cap on the body of the Constitution (see the Ninth Amendment). Thus, the ninth amendment would have had this extravagant concern on behalf of the states.

Understandably, the most popular version of the state law thesis takes a different tack altogether. The Bill of Rights, the argument runs, was thought to pose a threat to national authority, thus expanding the domain of the federal government far beyond its intended bounds. On this telling, the ninth amendment is merely a reminder that the Bill of Rights adds nothing to the power of the federal government as delineated in the body of the Constitution proper.

The tenth amendment is a daunting obstacle to this version of the state law thesis. Not only does the tenth amendment do exactly the job that this claim assigns to the ninth, but the language of the tenth indicates that the framers were capable of expressing themselves quite clearly when they wanted to negate the possibility of implied or unenumerated federal powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." This version of the state law thesis thus requires us to treat the ninth amendment as a colossally bad first draft of the tenth.

There clearly were serious concerns on the part of a number of the states that the Constitution submitted to them for ratification in 1787 could somehow be construed to confer powers on the national government beyond those enumerated; but these concerns were not excited by guarantees of personal rights in the Constitution, of course, since there were virtually no such guarantees in the Constitution submitted to the states. (Virtually none, because the prohibitions against ex post facto laws, bills of attainder and the suspension of habeas corpus are surely rights-bearing provisions.) Thus, the calls from Pennsylvania, Massachusetts, South Carolina, New Hampshire, Virginia and New York for amendments to the Constitution all included draft proposals that made explicit the enumerated powers rule of construction. These proposals

13 This point, of course, has been made before. See, e.g., J. Ely, supra note 6, at 34-35; Kelley, The Ninth Amendment of the Federal Constitution, 11 Ind. L.J. 309, 310 (1936) (reprinted in volume 1).

14 The proposals for amendments recommended by the several state ratifying conventions, which were those received by the First Congress from states ratifying the Constitution before the launching of the new government, also appear in 4 Documentary History of the First Federal Congress (C. Bickford & H. Velt eds. 1986); (Massachusetts—"That it be explicitly declared that all Powers not expressly delegated by the said Constitution are reserved to the several States to be by them exercised." Id. at 12; (South Carolina—"This Convention doth also declare that no Section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union." Id. at 13); (New Hampshire—"First That it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercized." Id. at 14); (Virginia—"First, That each State in the Union shall respectively retain every Power, Jurisdiction and Right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Federal [sic] Government. . . . Seventeenth, That those Clauses which declare that Congress shall not exercise certain Powers be not interpreted in any manner whatsoever to extend the Powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater Caution." Id. at 17, 19); (New York—"That the Powers of Government may be reasserted by the People, whenever it shall become necessary to their Happiness; that every Power, Jurisdiction and Right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution." Id. at 19-20); I do not discuss the proposals offered by the 1789 North Carolina ratifying convention and by the 1790 Rhode Island ratifying convention, because these conventions submitted these proposed amendments after the First Congress proposed the Bill of Rights to the states for ratification. See R. Bernstein with K. Rice, Are We To Be A Nation? The Making of the Constitution 261-72 (1987) and sources cited therein.)
naturally predated the Bill of Rights and were responsive to the draft Constitution itself; they did not depend upon the prospect of such a listing-out of rights. They speak, as we would expect, in the language of federal and state power, not of personal rights.

In contrast, the concerns of those who—at least initially—opposed the inclusion of a bill of rights in the Constitution centered on the impact that such a specification of rights would have on rights not specified. A bill of rights was not resisted as a threat to the containment of federal power, but as a threat to the full realization of the liberty it sought to protect. It was, after all, the federalists who initially opposed the inclusion in the Constitution of a bill of rights, and the anti-federalists whose real and tactical concerns about possible abuses of citizens by the national behemoth led them to press strenuously for such an explicit statement of rights against the federal government. Prominent quotations from the federalist stalwarts are familiar, but two especially well-known statements are worth setting out, in part because of some confusion which is latent in modern readings of them:

James Wilson, at the Pennsylvania convention on ratification: In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.\(^{15}\)

\(^{15}\) Antifederalist minority blocs from the Pennsylvania and Maryland ratifying conventions proposed their own sets of amendments which they could not persuade the conventions to endorse formally. These proposals are presented in The Complete Anti-Federalist, supra note 11. Pennsylvania's proposal appears in 3 id. at 150-52 and Maryland's appears at 5 id. at 94-98. See especially 5 id. at 94-95 (proposal and explanation by Maryland ratifying convention's AntiFederal minority, quoted supra note 11). See also 2 The Documentary History of the Ratification of the Constitution, supra note 8, at 599 (convention debates, Dec. 12, 1787) (15th proposed amendment, submitted by Antifederal delegate Robert Whitehill: "That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States in Congress assembled.").

(15th proposed amendment offered on the floor of the Pennsylvania ratifying convention is omitted from the list of 14 proposed amendments in The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, (Dec. 18, 1787), reprinted in 2 The Documentary History of the Ratification of the Constitution, supra note 8, at 618-40, and in 3 The Complete Anti-Federalist, supra note 11, at 147-67).

\(^{16}\) James Madison on the floor of Congress, arguing for the amendments which he had been moved to introduce, echoing the general federalist and his own previously announced concern\(^ {16}\) that a bill of rights would do more harm than good to liberty, but assuaging that concern by reference to his draft of what was to become the ninth amendment (even fathers of constitutions have their share of labor pains):

An enumeration of the rights of the people would be dangerous—for what are omitted are supposed to be excluded. (Yeates)

A bill of rights not even thought of in the Federal Convention; it was absurd. If we undertake to enumerate and omit any part of the rights of a people, their liberties are abridged or incomplete; and what is not expressly mentioned is taken for granted or ceded. (Wayne)

[It] was not only unnecessary, but on this occasion, it was found impracticable; for who will be bold enough to undertake to enumerate all the rights of the people? And when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted. So it must be with a bill of rights, and an omission in stating the powers granted to the government is not so dangerous as an omission in recapitulating the rights reserved by the people. . . . In short, sir, I have said that a bill of rights would have been improperly annexed to the federal plan, and for this plain reason, that it would imply that whatever is not expressed was given, which is not the principle of the proposed Constitution. (Dallas)

2 The Documentary History of the Ratification of the Constitution, supra note 8, at 390-91 (emphasis in original).

Readers who find themselves involved with the surviving documentary evidence of the ratification conventions should be aware of the disputed reliability of Jonathan Elliot's compilation of the debates. The Debates in the Several State Conventions on the Adoption of the Federal Constitution supra note 11, at 1-639. See also supra note 9. Quotations in text above generally follow the Lloyd version, because it is deemed the most complete and reliable by the editors of The Documentary History. 2 The Documentary History of the Ratification of the Constitution, supra note 8, at 324-25.

\(^{16}\) Gentlemen apprehend, that by enumerating three rights, it implied there were no more. The observations made by a gentleman lately up, on that subject, convince me precisely with my opinion. That resolution declares, that the powers granted by the proposed constitution, are the gift of the people, and may be resumed by them when perceived to their oppression, and every power not granted thereby, remains with the people, and at their will. It adds likewise, that no right of any denomination, can be cancelled, abridged, restrained or modified, by the general government, or any of its officers, except in those instances in which power is given by the constitution for these purposes. There cannot be a more positive and unequivocal declaration of the principles of the adoption, that every thing not granted, is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied, that every thing omitted, is given to the general government? Has not the honorable gentleman himself, admitted, that an imperfect enumeration is dangerous? Does the constitution say that they shall not alter the laws of descent, or do those things which would subvert the whole system of the state laws? If he be, what was not excepted, would be granted. Does it follow from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power.
It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments that I have ever heard urged against the admission of a bill of rights into the system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.\footnote{Speech of James Madison at Virginia ratifying convention (June 24, 1788), reprinted in 5 The Writings of James Madison 231 (G. Hunt ed. 1904) (reprinted in volume 1). Compare this statement with Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) reprinted in id., at 271–72: As far as [alterations to the Constitution] may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. ... My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission of a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disadvantage. I have not viewed it in an important light—1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in the question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power. 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. because experience provides the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. (emphasis in original). Madison seems to have been heavily pragmatic about the question of a bill of rights—a question which, in fairness to him, was one of strategy rather than principle.}

By contemporary lights, there is a shuffling of the language of rights and the language of power here, and that circumstance has been conceived by some to support the state law thesis that the ninth amendment was all about the cabining of federal authority, not the preservation of unenumerated personal rights.\footnote{See, e.g., Griswold v. Connecticut, 381 U.S. 479, 519–20 (Black, J., dissenting); Berger, supra note 12, at 7.} These commentators are able to take further solace from the language of Madison's draft of what was to become the ninth amendment, which perpetuates the shuffle:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.\footnote{Annals of Congress, supra note 9, at 435.}

But even at face value, these formulations on fair reading indicate that the central concern leading to the ninth amendment was the potential loss to the "rights of the people": these were the rights that Wilson feared would "be rendered incomplete" by the effort of specification, and these rights were the rights that Madison acknowledged would be left "insecure" by a bill of rights which did not include an amendment preserving as did his draft of the ninth the "just importance of other rights retained by the people."

Beneath the surface of the words of Wilson and Madison as they appear to the modern reader, this understanding becomes even more clear.\footnote{Madison's notes for his speech of June 8, 1789 are given in 5 The Writings of James Madison, supra note 16, at 389–90 n.1 (reprinted in volume 1). One can get beneath the surface of Madison's remarks in another sense. In his notes for his speech to the House of Representatives on the Bill of Rights (from which speech the quote at supra note 16 is taken) Madison indicates, as he did not in the speech itself, that he saw state bills of rights as posing the same kind of risk to unenumerated rights that a federal bill of rights would pose. This seems contrary to the view that what troubled Madison about a federal bill of rights was the possibility that such a listing out could preempt explicit state personal rights, but entirely consistent with the idea that it is unenumerated federal personal rights that Madison saw as in peril. Caplan, supra note 10, at 255, cites the Madison notes, but seems to overlook their negative significance for his view.} Madison (and quite probably Wilson) used the language of rights and power in a perfectly sensible way, but in a way different than that common among contemporary constitutional commentators. For Madison the power of a government was the net authority of that government to act. In the case of the national government, this meant that power was restricted by two forms of withholding: the withholding in favor of the states implicit in the enumerated powers structure of the Constitution (made explicit in the tenth amendment) and the withholding in favor of personal rights. In such a linguistic scheme, it makes perfectly good sense to speak, as did Madison, of concern lest the Bill of Rights give rise to the implication "that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure," and mean simply that you fear for the loss of rights
not specified; and in such a scheme it makes perfectly good sense to provide against such a misconception by stipulating that the specification of rights “shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution.” But things do not run in the opposite direction: that is, it does not follow from this linguistic scheme that Madison would be led to speak of “rights retained by the people” as a means of referencing withholdings of federal power in favor of the states. Finally, lest we lose sight of the true object of our attention, it is worthy of note once again that the final text of the ninth amendment—which closely tracked the draft generated by the House of Representatives’ “Committee of Eleven” on which Madison sat—is all about rights; the language of power was reserved for the tenth amendment.

C. The Judicial Unenforceability Thesis

The unenumerated rights memorialized by the ninth amendment might be just what they seem to be—personal constitutional rights which enjoy the status of positive law—yet not be enforceable by the judiciary. That, after all, is the fate of those few, exotic matters that the federal judiciary treats as falling within the ambit of the political question doctrine; and not altogether different than the judicial restraint prescribed by the doctrine of deference with which the federal judiciary approaches a considerably more generous range of constitutional questions. But while deference is a familiar part of the constitutional landscape, its invocation requires some explanation; and the radical non-justiciability of the political question doctrine remains a rare deviation from the Marbury v. Madison norm, a deviation requiring powerful justification. The assignment of the whole lot of unenumerated rights referenced by the ninth amendment out of the hands of the judiciary before we have even considered what rights these might be demands a warrant that is far from obvious.

The apparent impulse behind the judicial unenforceability thesis is the sense that somehow democratic theory is better served if electorally accountable officials are the exclusive guardians of the unenumerated constitutional rights of the people. But remember the context in which this notion arises: presumably, we are not fighting the battle of Marbury v. Madison again; and we are assuming for the moment that the unenumerated rights addressed in the ninth amendment have the status of positive constitutional law. (It is certainly true that one brand of democratic theory might seem to encourage a reconsideration of this assumption, even at the cost of turning our backs on the ninth amendment; we will consider this brute force approach to the ninth amendment below in section III.) With these premises in place, the argument from democratic theory is singularly unpersuasive.

Consider what a judicially unenforceable constitutional norm is like: it is legal authority, binding on all persons and institutions that fall within its reach, supreme over competing sources of positive law except those which share its federal constitutional status; it lacks only in its susceptibility to judicial enforcement. If there are unenumerated, judicially unenforceable constitutional rights as promised by the ninth amendment on this reading, those rights command the respect of governmental actors whose conduct could transgress them; in the absence of judicial enforcement those actors are still obliged to wrinkle out these rights and to respect them at the expense of the conflicting impulses of their constituents. The problem from democratic theory thus does not go away, but simply travels with the burdens of obedience and enforcement.

Thus, there is nothing about elected non-judicial officials that qualifies them specially to respond to the rights referenced by the ninth amendment; and conversely, there is nothing about judges that disqualifies them specially. Indeed, just the reverse would seem to hold. Legitimate claims of constitutional right that do not enjoy an explicit textual provenance are especially needy of the independence and coherence best promised by the judicial process: independence because con-
stitutional rights that do not announce themselves may be especially vulnerable to neglect; and coherence because the identification of such rights should depend on the judgment that they are of a piece with the broader jurisprudence of the Constitution.28

D. The State Immunity Thesis

The rights encompassed in the ninth amendment's allusion to "others, retained by the people" might be members of the constitutional pantheon in good standing, but signify only as restraints on the federal government. This comparatively modest reservation about the ninth amendment shifts the discussion from doubts about the proposition that there are valid claims of constitutional right which lack an explicit textual provenance to the question of whether such claims should run against the states as well as the federal government.

None of the rights-bearing provisions in the Bill of Rights run against the states of their own force, of course.29 But under the impulse

28This last observation might be met with a contrary argument, as follows: In the end, Marbury and our sustained commitment to judicial review are premised on the empirical judgment that the risk of constitutional courts running amuck (Lochner) is less to be feared than the risk of unrestrained elected officials cheating on the Constitution (e.g., Margaret Thatcher banning the Spy-Catcher). But in the absence of a textual tether the running amuck risk grows so large as to reverse our ordinary judgment about these competing institutional hazards. Hence the justification for treating claims of unenumerated rights as political questions.

But, in the end, it is the good judgment of judges and structural limitations in and on the judicial process that we depend upon in our post-Marbury institutional arrangements, not the tether of constitutional text. The Lochner era, of course, makes this point from one direction: between the contracts clause, the takings clause, the substance gloss on the due process clause, and the enumerated powers structure of the power-conferring provisions of the Constitution, the Supreme Court had more than enough textual support to make any amount of trouble. Conversely, the great restraint which characterizes the Court's treatment of economic regulation and federal power issues in the modern era does not emanate from textual excess of the Constitution, but rather from judicially developed theories of the Constitution's project of just the sort required by any sensible use of the ninth amendment.

It is not the case that every sane society would opt for our institutional arrangements per Marbury. Many have not. But those arrangements have served us quite well on the whole and evasive changes are not on the table. Within the framework of those arrangements, the case for exceptional treatment of unenumerated rights simply has not—and I believe cannot—be made.

29In some hands, the argument for the state immunity thesis turns instead on the historical observation that the ninth amendment, like all of the provisions in the Bill of Rights, was not about limiting the states, nor about increasing federal power; rather it and they were about restricting federal power. See Berger, supra note 12, at 8–14. But of course this is persuasive if at all as an argument against incorporation in general, not about the rights referenced by the ninth amendment as special candidates for non-incorporation. Professor Berger sees incorporation as a colossal and reversible error. See, e.g., id. at 12–13. I am inclined to see incorporation as the laudable result of our correct understanding of the status of the Constitution, not as an embarrassment. See infra text at p. 257.

to spread the constitutive norms of constitutional justice to all governmental entities, we have construed the fourteenth amendment to incorporate most of the Bill of Rights and make them applicable to the states. (The same impulse has led to the conclusion that the due process clause of the fifth amendment makes the norms of the equal protection clause applicable to the federal government.) The question, then, is whether there is any good reason to treat the claims of right referenced by the ninth amendment as ineligible for incorporation by the fourteenth amendment.

An argument to this effect might proceed as follows: "What distinguishes those norms in the Bill of Rights which we deem to have been 'incorporated' into the fourteenth amendment and hence made applicable to the states from those which we deem not to have been transmutated in this fashion is the centrality of the incorporated norms to the project of personal liberty to which the Constitution in general and the Bill of Rights in particular is committed. Notions of constitutional right which do not derive from the ratified text of the Constitution can be, at best, of only peripheral significance. Accordingly, if there are rights that pend to the ninth amendment, they surely do not qualify for application to the states."

Selective incorporation is a rather awkward doctrine, but it is easy to see how we got to it. Most of the Bill of Rights' provisions seem to be central elements in a common understanding of constitutional justice; this is especially true because many of the provisions we would be inclined to think of in this light are pitched at a rather high level of generality, and in the act of interpreting them we conform them to a common understanding. Some provisions, however, while germane to the enterprise of constitutional justice, are at once particular in their demands and peripheral to the understanding which drives the enterprise. These latter provisions are not an embarrassment, since they do no real conceptual harm, but neither do they commend themselves for insertion into the fourteenth amendment by force. Hence the impulse to parse among the provisos in the Bill of Rights.

But matters are different in the realm of extratextual rights, where there is no pre-analytical stipulation of nominal rights. A claim of constitutional right unsupported by explicit text should not commend itself except upon a showing that it shares in the essence of our constitutional enterprise; there is no other justification for the embrace of such a claim. It gets things just backwards, therefore, to reason from the absence of textual support to the conclusion that a claim of right is marginal to the
organizing vision of political justice underlying our constitutional jurisprudence.

III.

The implausibility of any of the interpretive options returns us to the head-on interpretation of the ninth amendment—to a metacostitutional understanding of the liberty-bearing provisions of the Constitution as significant but incomplete instances of a general vision of the boundaries of legitimate governmental behavior. But we would gain little if we rested our examination of the ninth amendment without a consideration of the foundational impulse that has driven so many constitutional analysts to avoid the amendment’s obvious meaning. That impulse, I think, is majoritarianism.

Majoritarianism holds that the grounds of legitimate governmental choice is the conformity of that choice with the popular will. For the majoritarian, the Constitution itself must be reconciled with popular will; typically, this has drawn majoritarians to a view of the Constitution which centers on its status as enacted law. On this account, the legitimacy of the Constitution depends upon the majoritarian bona fides of the process through which it was originally adopted and subsequently amended. This in turn has led many majoritarians to view the Constitution—Bill of Rights and all—as a closed system of more or less free-standing textual stipulations. For majoritarians of this stripe, principles of constitutional justice must be endorsed by explicit provisions in the Constitution’s text: textual explication is essential because it alone is a durable tether to the will of the populace that blessed the Constitution with ratification.

There may well be other theoretical constructs than majoritarianism which lead to the view that constitutional interpretation must be confined to explicit text as the essential tether to the ratifying will. If so, the problem of reconciliation with the ninth amendment that we are about to consider will dog these theories as well. So the comments which follow, while addressed to majoritarianism, can be generalized over the family of theories that have this common meta-interpretive payoff.

Taken straight, the ninth amendment raises obvious difficulties for the text-as-tether view: it flatly contradicts an insistence on explicit constitutional text. We ought to take a moment to focus on just why this contradiction is troubling. It is not the case, after all, that documents or persons which announce that they are to be interpreted in a certain way necessarily have to be listened to. The command “follow my orders precisely!” is logically presumptuous in a remarkable sense: it presumes exactly what it purports to direct, namely that the commander is entitled to be listened to strictly.30 (There is a notorious example of this sort of conundrum in our constitutional jurisprudence. In round three of a famous nineteenth century dispute over land title,31 the high court of Virginia held that the Supreme Court of the United States lacked constitutional authority to review state court decisions; in round four—which we know as Martin v. Hunter’s Lessee—32—the Supreme Court reversed, solemnly assuring the Virginia tribunal that the national court could indeed exercise this power under article III of the Constitution. The problem, of course, is why the high court of Virginia should listen to a Supreme Court which it had already determined had no authority over the matter at hand.)


31In brief (and to many readers, familiar) sketch, the litigation involved a dispute between Martin, who claimed title by devise from Lord Fairfax of a large chunk of Virginia, and Hunter, who claimed title by grant from the state of a mere 788 acres of that land. Hunter’s claim depended on the lawfulness of the seizure of Fairfax’s land by the state, and Martin’s claim on the immunity of those lands against seizure by virtue of two treaties. Crucial to the force of the treaties was a question of the timing of Virginia’s purported seizure. In round one, the Virginia Court of Appeals ruled for Hunter (Hunter v. Fairfax’s Devisee, 15 Va. 218, 212 (1810)). In round two, the Supreme Court of the United States reversed, finding for Martin (Fairfax’s Devisee v. Hunter’s Lessee, 11 U.S. (7 Cranch) 603 (1813)). In round three, the outraged Virginia Court of Appeals disputed the authority of the Supreme Court itself. With separate opinions by each of the court’s four judges, the Court of Appeals unanimously held that the Supreme Court of the United States was not superior to the high court of Virginia or any other state, and was not constitutionally empowered to direct such courts to revise their judgments (Hunter v. Martin, 18 Va. 1, 58 (1814)). Round four is discussed in the text accompanying note 32. The controversy—including the great personal, professional and political rivalry between John Marshall and the President of the Virginia Court of Appeals, Spencer Roane, which was prominent in the background—is detailed in 4 A. Beveridge, The Life of John Marshall 144–67 (1919). The curiosity, of course, centers on round five: surely the Virginia Court had no analytical reason for treating the Supreme Court’s judgment, as to its own power, as binding. (The thought that the question is political rather than analytical is reinforced by the replay of these events in a modern context with very different results, as described infra note 36).

324 U.S. (1 Wheat.) 304 (1816).

33As suggested supra note 31, the ultimate outcome in the Fairfax land litigation was neither analytical nor inevitable. Things went very differently in a modern Rhodesian paraphrase of the Virginia litigation. After its unilaterally declared independence in 1965, the Rhodesian government denied the validity of its earlier (1961) constitution, and rejected all forms of legal subordination to England. The Rhodesian courts endorsed the premise that the new (1965) Constitution was valid, and held that English authority no longer reached Rhodesia. Dhlamin v. Carter, 2 S.A. 467 (1968). But England continued to assert its authority, and the Privy Council—in the course of hearing a criminal appeal from Rhodesian preventative detention (Modzamba v. Lardner-Burke, 2 S.A. 284 (1968))—held the 1965 Constitution and the entire Rhodesian regime to be invalid under the 1961 Constitution. The Privy Council’s ruling of course included the vital proposition...
But the problematic status of interpretive intent or interpretive commands in general can offer no solace to constitutional theorists who have already decided that their job is to obey the textually specific commands and only the textually specific commands of the Constitution. These theorists are unwitting members of a family which you will recognize as soon as I introduce some of its members: the male army barber under orders to shave all those men but only those men who do not shave themselves, his sister, who regularly asserts that “No generalities are true,” and their ne'er-do-well cousin who reluctantly admits that everything he says is a lie. Constitutional theorists who take themselves to be bound to the explicit commands of the Constitution are placed in the same position of self-reference and self-contradiction by the ninth amendment, which textually commands them to abandon their bounds.

As conversation pieces, paradoxes of this sort are amusing, and even instructive. But when dilemmic moments like this crop up within the precincts of a real-world program for interpreting the Constitution, the logical paralysis they carry becomes a matter of no little concern. To appreciate the bleak options open to text-as-tether theorists who confront the ninth amendment, imagine that we had their assignment.

We could, of course, simply ignore the ninth amendment; but, without more, that would be an unjustified lapse from our commitment to serve the explicit provisions of the Constitution. Or we could struggle to interpret our way around what our interpretive methodology would otherwise indicate was the full and fair meaning of the ninth amendment in order to avoid embarrassment to our entire enterprise; but that would simply be another form of lapse, of course. However tempting, these courses could not commend themselves as compatible with our responsibilities.

So suppose we just give in. It might seem instinctually wrong to float away from the text of the Constitution as the ninth amendment dictates, but after all a text-specific order is a text-specific order. Why not simply obey this one? Unfortunately, things are not so simple. If our commitment to explicit text is for some good reason, like the foundational view that the exclusive grounds of legitimate governmental choice is conformity with the popular will, then that reason itself will be confounded by obedience to the ninth amendment’s interpretive command. The majoritarian provenance of the ninth amendment is not sufficient, any more than would be that of a ratified constitutional amendment which created a feudal monarchy. As majoritarians we could not accept the perfectly enacted command to give ourselves over to a monarchy, and as majoritarians we cannot accept the directive of the ninth amendment, since it insists that we consult some source other than the enacted constitutional text to inform constitutional decisions that will prevail over the will of contemporary social majorities.

If we cannot join the ninth amendment, suppose we try to beat it: in light of our foundational commitment, we could disavow the message of the ninth amendment with regret, and continue with our general enterprise of text-specific constitutional interpretation of everything else in the Constitution. We would not be simply ignoring the amendment, but rather making a studied judgment that the same foundational commitment which draws our allegiance to the Constitution requires that we disregard some of its stipulations.

This seems a relatively cheap way out of our bind. True, a piece of the Constitution has to be jettisoned, but this would not be the first time. (The contracts clause is one instance that comes to mind. Even after its second coming it is much reduced from its once vital form.) The model for this proposal is the situation in which a statute provides for \( X, Y, \) and \( Z \), a court finds that \( Z \) is invalid, the court severs and nullifies the invalid part, and then the court proceeds to enforce the balance of the statute. But the ninth amendment, unfortunately, is not a discrete branch which can be pruned leaving the rest of the constitutional tree intact. The ninth amendment has general implications for the liberty-bearing provisions of the Constitution which cannot be ignored without unseating our project of text-specific interpretation.

\(^{34}\)Interested lay readers owe themselves the pleasure of R. Smullyan, What is the Name of This Book? (1986).

\(^{35}\)See Sager, supra note 26, at 443–44.

Let me make the point by shifting the story for a moment. Imagine a game of constitutional interpretation—"The Unenumerated Powers Game"—with the following instructions:

Assume that the tenth amendment has been replaced by an amendment stipulating that the enumerated powers of the federal government are only instances or examples of a general police power possessed by the national government. Everything else about the Constitution is the same. This one change aside, you are to construe the provisions of the Constitution—including, of course, the first three articles—with strict regard to the intent of the framers.

The instructions to this game are not only bizarre, but incoherent. Construing article I "with strict regard to the intent of the framers" is impossible once the enumerated powers structure is turned inside out. The best we could do, in one sense, would be to read the list of congressional powers in article I, section 8 as narrowly and consistently as possible in order to see them as instantiations of a comparatively limited understanding of the "general police power" possessed by the federal government. Even this modest move in the direction of the actual intent of the framers would have its problems, since whatever was gained would be at the expense of the generous spirit of the initial rule of the game.

Reading the ninth amendment out of the Constitution in order to remain faithful to our (assumed-for-purposes-of-playing-this-possibility-out) majoritarianism is futile in the same way as is the unenumerated powers game. The ninth amendment confirms that the liberty-bearing provisions of the Constitution and Bill of Rights were responsive to notions of political morality; that they were not disembodied acts of capricious will that somehow gained widespread support; that they were linked as part of a more general understanding; and that they were not exhaustive of the fabric of which they were a part. To read them as self-contained and exhaustive is to badly misread them, if one is in pursuit of the enacted text as a tether to the will of the enacting generation. To be sure, it is logically possible to blind ourselves to the ninth amendment and reject the picture of the liberty-bearing provisions of the Constitution that it advances: we can read and interpret the Constitution clause by independent clause, eschewing links and respecting lacunae. But what could we possibly hope to gain by the exercise? Surely not our majoritarian objective of conformity with the enacted Constitution: the trauma to the interpretive milieu of the liberty-bearing provisions of the Constitution caused by the repudiation of the ninth amendment is simply too great. In effect, we have just pushed the paradox of the majoritarian reader of the ninth amendment to another level; we have not surmounted it.

Somewhat more complicated is the status in light of the ninth amendment of sophisticated versions of majoritarianism. John Ely, for example, has argued for an interpretive regime pursuant to which the explicit text of the Constitution is augmented by judicial doctrine, but only to the limited end of perfecting the majoritarian process. 37 Consider two arguments on behalf of Professor Ely's claim, one foundational and the other substantive: 38

**Foundational:**

(a) We begin with majoritarianism as our foundational account of the Constitution, and conclude accordingly that we are bound to the explicit text of the document as a tether to the will of the ratifying population.

(b) Then we observe the lesson of the ninth amendment that the explicit rights-bearing provisions of the Constitution are instantiations of a broader understanding of the proper relationship between a government and its citizens, a relationship secured in part by unenumerated positive legal rights.

(c) Finally, we conclude that the only way we can make sense of these apparently conflicting demands is to let loose of the text as required by (b), but at the same time to confine our interpretive free-flights to the project of perfecting the majoritarian process, in order to avoid doing violence to (a).

**Substantive:**

(a) We start with a non-majoritarian foundational account of the Constitution, an account which does not bind us to the explicit text of the document, but rather directs us to fit the rights-bearing provisions of the Constitution and the tradition which tends to them into a general understanding of the proper relationship between a state and its citizens.

(b) In response to the metacostitutional mandate of (a), we develop the required understanding of our tradition of constitutional rights, pursuant to which it emerges that the object of the individual rights aspects of the Constitution is the protection of the majoritarian process.

37See J. Ely, supra note 6.

38See supra note 4, for a discussion of the distinction between foundational and substantive accounts of the Constitution.
(c) Accordingly, the project we assign to the constitutional judiciary is the perfection of the majoritarian process.

The problem with the foundational argument should be familiar: it perpetuates the paradox of the ninth amendment and majoritarianism. The move from a majoritarian foundational account directly to an insistence that interpretive access to the Constitution be confined to oversight of the majoritarian process suffers the embarrassment of Procrustes: there is simply too much left over. The majoritarian who follows Ely on foundational grounds remains in much the same quandary as the simple, text-bound majoritarian. By artificially truncating the scope of the interpretive enterprise, this move renders incoherent the ongoing commitment of the majoritarian to pursue the enacted intentions of the framers.

The substantive argument does not suffer from this difficulty. It is logically possible that an unrestricted inquiry into the project of the Constitution—the project of which the rights-bearing provisions of the Constitution are non-exhaustive instantiations—could result in the conclusion that it is all about the perfection of the majoritarian process. Were this the case, an exclusive commitment to that project would of course be entirely consistent with the metaconstitutional mandate of the ninth amendment. But this would not be majoritarianism in the foundational sense, a political theory brought to the Constitution; it would be a substantive interpretation taken from the Constitution. The difference is crucial. Suppose we were taking up the question of whether the constitutional recognition of an autonomy right along the lines of the right of privacy was appropriate. The argument in favor of recognition would have to include a substantive account of the Constitution's project pursuant to which the right of privacy was essential; that account would of course contradict the perfection of the majoritarian process account, and we would have to choose between these competing interpretive renditions of the Constitution. What would not be on the table, though, is a disposing foundational claim from majoritarianism that would rule the right of privacy account out of order.

In the end, majoritarian objections to the ninth amendment simply cannot work. To the contrary, it is majoritarianism which is imperiled by the witness of the ninth amendment. This is an important proposition, of course, since it disqualifies support for a prevalent understanding of the Constitution. (The ninth amendment is not the cause of the difficulty, but merely an insistent reminder of the important structural reality of the Constitution which is the cause of the difficulty—just as the tenth amendment is a reminder rather than a cause of the enumerated powers structure of the Constitution.) If the ninth amendment does nothing more than help defeat majoritarian misunderstandings of the rights-bearing provisions of the Constitution, it will have served well.

It does not follow from the defeat of majoritarianism, however, that the ninth amendment prevails. All we have done is dispatch what may have seemed like a formidable objection to taking the amendment at face value and pursuing the methodology it commends. For the ninth amendment's understanding of the rights-bearing provisions of the Constitution to command our analytical allegiance, we must arrive at a foundational view of the Constitution that leads to an interpretive stance consistent with the amendment's reminder of the nature of the constitutional enterprise. Since we know that majoritarianism and other text-as-tether foundational views are unable to make peace with the Constitution itself, the incentive to develop such a foundational view is great.

IV.

One question is bound to arise from a serious encounter with the ninth amendment: have we (judges, scholars, and other constitutional decisionmakers and commentators) been getting it wrong all these years? After all, the ninth amendment has been relegated to a dark corner of the constitutional closet into which almost no one seems anxious to poke. If such a neglected piece of the Constitution is really as central to the meaning of the rights-bearing provisions as I have suggested, it is reasonable to wonder whether we have bungled the business of constitutional interpretation in some chronic, endemic way. (There lurks the opposite point, as well: namely, that an interpretive adverse possession sets in after 200 years pursuant to which claims that jar settled sensibilities should be barred.)

There is no methodological generalization that holds over the run of our constitutional jurisprudence, of course, but I think that prominent features of our constitutional tradition can best be explained as reflecting rather than defeating the structural understanding of the Constitution for which the ninth amendment stands. The most distinct of these is the

39Ely himself relies on the foundational claim from majoritarianism (though he appears to believe the substantive claim to be true as well). See J. Ely, supra note 6, at 4-9; cf. id. at 88-101.
doctrine of incorporation, which is a chronic conceptual embarrassment to constitutional analysts. Nothing about the due process clause of the fourteenth amendment, of course, offers any comfortable support for imposing Bill of Rights limitations on the states; and the job of explaining ourselves in this regard is made if anything more difficult by the selective nature of the incorporation process, pursuant to which small parts of the Bill of Rights have been omitted. As troubling as these matters may be, they recede in the face of the baldly prochronistic doctrine that the due process clause of the fifth amendment incorporates the principles which underlie the equal protection clause (ratified roughly 100 years later). Salvaging operations have been mounted, in the form of the observation that the privileges or immunities clause would provide a better fourteenth amendment home for incorporation, and the suggestion that we ought in any event live with the mistake of incorporation in the name of stare decisis. But I think these analytical patches miss—indeed obscure—the point. Almost no one really believes that incorporation in either direction is a mistake; and the impulse to affirm incorporation owes little or nothing to a subliminal reading of the privileges or immunities clause message. Rather, we understand the liberty-bearing provisions of the Constitution to reflect a general view, or project, of political justice. In the face of that understanding, we are naturally moved to spread the reach of those provisions to all governmental entities; and in the face of that understanding, confinement to the explicit text of the Constitution is no virtue.

The right to travel and the right of privacy (both of which happen to be infelicitously named are also prime exhibits, of course. Neither has an explicit textual basis in the Constitution. While the right of privacy has been the object of dispute, that dispute on the whole has been about the application of the right, not its basic legitimacy as a strand of constitutional analysis. The right to travel is perhaps a more compelling example for those who have yet to come to terms with the right-of-privacy-based notion that there are some matters of personal choice not involving speech or religion which are simply outside the reach of governmental fiat. No one seems troubled by the right to travel. To the contrary, the Supreme Court—correctly I think—points to the absence of an explicit textual home for the right with pride, as a kind of evidence of the centrality of the right to the constitutional project of which it is indisputably a part.

Beyond discrete prominences like incorporation, the right to travel and the right of privacy, there is a more general pervasive way in which constitutional law is compatible with the ninth amendment. Equal protection has been fortified to bar racial segregation, protect voting rights and apportion electoral power, and restrain discrimination on grounds of gender, legitimacy and alienage; the establishment clause has been rediscovered and given a strangely variegated life of its own; a broad and complex tapestry of speech centered liberty has been woven; the contract clause has waxed, waned, waxed and waned again. Everywhere in the jurisprudence of constitutional rights there runs the sense of a sustained project to define and maintain the proper relationship between government and its citizens. The text of the Constitution itself is seldom more than a point of departure in the effort.

V.

There is a tendency among those who choose to read the ninth amendment to mean what it says to be rather picky with their own choice of language; these concerns with terminology are wrapped up with more basic matters, and merit attention. The phrase “ninth amendment rights,” for example, is disfavored, since what the amendment actually does is offer an interpretive gloss for the liberty-bearing facets of the Constitution as a whole. This raises the question of just where the non-textual claims of constitutional right countenanced by the ninth amendment are to find their constitutional home. It is not at all clear that rights which lack the support of explicit text are advantaged by being assigned to catch-all textual phrases. The right to travel and the right to privacy, for example, do just fine on their own. Claims of this sort cannot float in the air; they are woven into the fabric of constitutional justice, with significant ties to the explicit liberty-bearing provisions of the Constitution. But banding them with text as general as “privileges or immunities of citizens of the United States” or as misused as “due process”

42 See supra text pp. 249–50.
43 The right to travel is close, but Professor Gunther’s “right to interstate migration” is surely more to the point. G. Gunther, Constitutional Law 832 (11th ed. 1985). The right to privacy is simply misleading; it is of course an autonomy right, not a privacy right.
neither aids nor usefully records the process of evaluating these claims in light of our constitutional jurisprudence.

VI.

Our titular point of departure was the question of what you can do with the ninth amendment. The answer, I think, is simply this: you can remember the ninth amendment. (Once you have done so, it is not at all clear what you can do with majoritarianism as a foundational account of the Constitution.)

10. Doing More Than Remembering the Ninth Amendment*

Morris S. Arnold

I.

The recent revival of interest in the ninth amendment is partly due to dissatisfaction with the intrusive bureaucratic state created in this country over the last fifty years. The ninth amendment is, of course, a fairly obvious place to look for protection from the ravages of positivism, for it holds out at least a modicum of hope to those who value liberty and autonomy—those, that is, who would like to locate in the Constitution something like a general right to be left alone. Such people used to be called liberals, but that label has ironically been appropriated by persons with a social vision which requires massive coercion to effect and maintain it. This coercion appears in a large number of forms, but most frequently it manifests itself in two ways: first, in interventionist statutes that prohibit the enforcement of some contracts or compel the creation of others; and second, in takings and redistributions of wealth that have rendered the promise of just compensation held out in the fifth and fourteenth amendments a virtual dead letter. Since the possibility of enforcement is what often, though by no means always, induces obedience to law, guns and jails lurk behind these laws, however subtle may be the camouflage, and however worthy their progenitors think them to be. Much recent ninth amendment scholarship is generated by a desire to find some sanctuary from what is perceived as majoritarian tyranny.

Professor Sager's finely tuned arguments aimed at helping us understand what the ninth amendment might mean raise every plausible possibility and, indeed (deliberately) one or two implausible possibilities.

government, and, moreover, the power of courts to transform societies had not yet been experienced. Lastly, in attempting to understand the vagueness of the ninth amendment, it is well to remember that, at least among that class of persons who were likely to hold power in the government, there was a very general agreement about what government was for and therefore about what individual rights in fact existed. We are dealing with a time in which the way that a moral world was ordered was regarded almost as a palpable fact. This cultural homogeneity, of course, can be easily exaggerated, but its existence explains a number of legal phenomena, such as the great power of eighteenth-century juries and the almost total lack of jury-control devices in colonial America.

There is nothing even approaching a homogeneity of opinion today on what individual rights deserve recognition or on, what is the same thing, the proper role of government in our people's social and economic lives. Indeed, we do not even agree on whether it is useful or honest or logically possible to differentiate between our social and economic lives. This is due, in large measure, to the extension of political power to classes excluded from participation in government in the eighteenth century. It says nothing about the abstract merits of a person's politics to observe that the extent of his or her devotion, to, say, contract and property as ordering moral principles is likely to depend somewhat on that person's economic and social position. But whoever may be right, the accession of large numbers of persons to full political rights has made it difficult, if not impossible, for the time being at least, to recapture the day when there was a consensus about what natural law means. This may lead to the somewhat gloomy conclusion that while the ninth amendment, as a technical legal matter, must mean something, it cannot, as a practical matter, mean anything.

It might be argued that the inability to reach consensus on the content of natural law does not prevent a court from resorting to it to decide cases. After all, judges do not agree with each other now on the meaning of texts, so disagreement over natural law could hardly disqualify it as a source for decisions. This argument has some force, and it is also well to remember that natural law principles might plausibly be found not only in custom and usage or in moral ruminations but also in statutes and state or colonial constitutions. But it would be wrong to attempt to reconstruct what natural law meant in the eighteenth century and pretend that that

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1Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239 (1988) (reprinted as chapter 9 of this volume).

2See Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987) for an excellent development of this and other ideas.
version of natural law is enshrined in the ninth amendment. There are many reasons that this is impracticable, but the most fundamental is that while natural law is immutable, people's understanding of it can improve, and it can be revealed that a previous appreciation of its content was erroneous. One's comprehension of natural law, in other words, is capable of evolution. As a modest example of the kind of evolutionary process that I mean, let us take a look at the amendment immediately previous to the ninth, the eighth, which prohibits cruel and unusual punishment. It commands us not to inflict cruel and unusual punishment, but it does not say that we are bound by the revolutionary generation's view of what is cruel and unusual. It tells us not to be cruel in an absolute, Platonic sense. In other words, we are bound to do as the framers said, not as they did. The same argument can easily be transported into cases invoking the ninth amendment.

Even if we cannot have natural law back, we can give meaning to the ninth amendment, without giving it any particular content, by ascribing to it a kind of supplementary role. The ninth amendment can usefully serve as a directive that rights ought to be taken seriously. It is altogether plausible to take the position that the ninth amendment serves as a direction to us to adopt a broad view and liberal construction of the first eight amendments and to regard the personal liberties enumerated there as deserving the most meticulous, fastidious, and expansive protection. At the very least, this would mean that in doubtful cases the balance ought to be struck against the existence of governmental power. A judicious use of the amendment in this way could create a constitutional jurisprudence that sees government powers "as islands surrounded by a sea of individual rights" rather than seeing "rights as islands surrounded by a sea of government powers." Such a role for the ninth amendment could radically alter the outcome of many cases. It at least satisfies the need to give meaning to everything in the Constitution, not to mention the duty to defend freedom.

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11. Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*

Earl M. Maltz

The ninth amendment plays an important role in the ever-popular sport of originalist-bashing. Originalists believe that judges should follow the intent of the framers in constitutional adjudication. In particular, in individual rights cases adherents to originalism argue that judges should constitutionalize only those rights specifically contemplated by the framers. The theory has been widely criticized from a variety of different perspectives.

The use of the ninth amendment against the standard originalist position is distinguished by its apparent consistency with the basic premises of originalism itself. On its face, the language of the amendment seems to acknowledge the existence of unenumerated rights. Thus, the argument goes, if one is really concerned with effectuating the intent of the framers, he should not adopt a "clause-bound" view of rights, but rather some other, more open-ended approach to constitutional interpretation.

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In order for this argument to justify expansive judicial review of actions by state governments, two preconditions must be satisfied. First, the ninth amendment must be shown to have been intended to be a limitation on state governments. Second, one must demonstrate that the framers of the ninth amendment did in fact intend to constitutionalize unenumerated rights. The remainder of this Comment will show that neither of these assumptions are supportable.

I. The Applicability of the Ninth Amendment to the States

Commentators on the ninth amendment typically concede that, as an original matter, the ninth amendment was only intended to be a constraint on the federal government.4 Thus, their case depends largely on acceptance of the controversial thesis that section 1 of the fourteenth amendment was intended to make the Bill of Rights applicable to the states. Once this premise is accepted, they argue, to exclude the ninth amendment from the incorporation doctrine can only be viewed as a manifestation of the intellectually unpalatable concept of “selective incorporation.”5

The difficulty with this argument is that it rests on an historical definition of the phrase “Bill of Rights.” In modern parlance, “Bill of Rights” does refer to the first ten amendments to the Constitution. During the Reconstruction Era, by contrast, the understanding of the phrase seems to have been somewhat more limited. Both Representative John A. Bingham of Ohio and Senator Jacob Howard of Michigan—the two authorities relied upon most heavily by supporters of the incorporation theory—stated that section 1 incorporated the first eight amendments.6 Thus, from an originalist perspective, incorporation theory should not support the application of the ninth amendment to the states.

Of course, this conclusion does not necessarily end the debate over the ninth amendment. One might still construct some other historical argument that demonstrated the applicability of the ninth amendment to the states.7 Moreover, even if the ninth amendment did not constrain the

4 Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 253 (1988) (reprinted as chapter 9 of this volume).
5 Id. at 253–54.
7 See Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi.-Kent L. Rev. 131, 143–44 (1988) (reprinted as chapter 4 of this volume).

states, the question of its impact on the power of the federal government would remain a pertinent issue. Therefore, even given the failure of the framers of the fourteenth amendment to contemplate its incorporation, the question of whether the ninth amendment was intended to constitutionalize nontextual rights remains important.

II. The Ninth Amendment and Nontextual Rights

Commentators have expressed sharply differing views of the intended scope of the ninth amendment. Russell Caplan has provided the most extensive defense of the narrow view of the amendment.8 Caplan argues that the framers intended only to guard a wide range of state-created rights from the suggestion that they were somehow eliminated by the enumeration of rights in the federal Constitution. He contends, however, that the amendment was not intended to guarantee that these rights would not be invaded by extra-constitutional government action.9 Obviously, this interpretation creates no problems for originalists.

Others, by contrast, take a much more expansive view of the framers’ intent. Drawing on the work of scholars such as Thomas Grey and Suzanna Sherry,10 the proponents of the expansive view note that the framers were operating against the background of a legal culture that recognized the existence of legally-enforceable natural rights. They contend that the ninth amendment was intended to protect this natural law tradition from the potential implication that it was inconsistent with the specification of a list of rights by a written constitution. On its face, the expansive view might seem to create some difficulties for those advocating a clause-bound originalist approach. Closer analysis, however, reveals that these difficulties are more apparent than real.

To appreciate this point, one must begin with an examination of the precise claim advanced by those who take the expansive view. They cannot effectively argue that ninth amendment rights were created by the Constitution itself; indeed, the essence of their argument is that the amendment protects some rights not established by the written docu-

9 Id.
The rights whose existence is recognized by the ninth amendment should be viewed as part of an "unwritten" or "common law" constitution, different from and supplementary to its written counterpart.

This view is antithetical to the core assumptions of originalism, which rests on a positivistic view of law itself. Of course, originalists do argue that courts should follow the "intent" or "understanding" of the framers. But they do not believe that courts should feel constrained by every thing that the framers knew or believed; only those understandings that are incorporated into the constitutional text have the force of law. In essence, originalists believe that judges should be bound by the understanding of the framers because a) the framers had legitimate authority to create constitutional constraints; b) that authority was superior to that of other agencies of government acting at a later date, and c) the framers exercised their authority in a manner consistent with legal norms. In situations where the framers had not exercised their authority, under originalist theory, the courts should be bound by legislative action or common law principles.

Viewed from this perspective, even under the expansive view of the ninth amendment, the unenumerated rights recognized by the amendment do not rise to the level of constitutional norms. The framers of the amendment did not create those rights through operation of the legitimate constitution-making process envisioned by originalists; at most the framers simply assumed that a body of rights existed prior to the making of the written Constitution and resolved that creation of other constraints on government by the framers' constitution-making process should not destroy those rights. But by definition, the body of rights protected by the ninth amendment are not constitutional at all, but rather extra-constitutional. Since the recognized rights are not created by the legitimate operation of the constitution-making process, originalist theory does not mandate their protection.

Some critics of originalism contend that this version of the theory takes an overly narrow view of the framers' intent. They argue that in order to be consistent, originalists must also consider the framers' "interpretive intent"—the question of whether the framers themselves believed that their specific intentions should constrain later judicial action. If this argument is persuasive, then the proper interpretation of the ninth amendment is critical to constitutional theory. For if the expansive view is correct, then the framers plainly did not intend to bind future courts to the rights explicitly guaranteed by the text of the Constitution. Thus, if a consistent originalist must consider interpretive intent, he would be compelled to search for nontextual rights.

As I have suggested elsewhere, this argument misunderstands the source of the appeal of originalism. The flaw in the argument is that it is contemporary judges—not the framers themselves—who are being asked to take political action by deciding cases. Here a statutory analogy is instructive. In searching for the intent of the drafters of a statute, judges do not ask if that mode of analysis was in the minds of those who created the statute; instead, courts search for the relevant intent because modern conceptions of the judicial role require such an inquiry. Similarly, if originalist judges consider the views of the framers important, it is not because the framers themselves believed those views important, but rather because a modern political theory requires fidelity to the framers' views. Therefore, a consistent originalist need not necessarily feel bound by the framers' interpretive intent; instead he can plausibly rely on an independently-derived theory of constitutional interpretation.

Of course, one could easily describe a plausible theory of constitutional adjudication that directed courts to focus on the interpretive intent of the framers. The point is that one can construct equally plausible originalist models that do not embrace interpretive intent. Thus, even accepting the most expansive view of the intent of its framers, the existence of the ninth amendment does not conclusively discredit clause-bound theories of originalism.

III. Conclusion

Ninth amendment aficionados greatly overestimate its significance to contemporary debates over constitutional theory. Admittedly, the amendment does seem to suggest that the framers believed that people possessed rights other than those specifically enumerated in the Constitution. At the same time, however, the language does not indicate that those rights were to be protected by the Constitution, but rather from the remainder of the Constitution. Further, the evidence supporting the view

12 See Brest, supra note 2, at 212. See generally Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985) (arguing that framers did not intend future judges to be bound by original understanding).

13 Barber, The Ninth Amendment: Inkblot or Another Hard Nut to Crack?, 64 Chi.-Kent L. Rev. 67, 76-84 (1988) (reprinted as chapter 1 of this volume), makes a similar argument.

14 Maltz, Foreword: The Appeal of Originalism, 87 Utah L. Rev. 773, 800.
that the drafters of the fourteenth amendment intended to incorporate
the first eight amendments does not support a similar inference with
respect to the ninth amendment. In short, the critics of originalism must
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unequivocally refutes those who would bind courts to the intent of the
framers.

12. Antifederalism and the Ninth Amendment*

Calvin R. Massey

I. Introduction

In this Essay I intend to advance two general propositions about the
ninth amendment1 and several specific ideas that follow from those
propositions. First, the amendment embodies a deep belief that the
individuals composing a political society cede to government only a limited,
enumerated portion of their freedoms; all other individual rights, of
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sially, the amendment is part of an “Antifederalist Constitution,” the
promise of which has been largely ignored due to the political victories of
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enumerated in the federal Constitution. The significance, of course, is

*Reprinted, by permission, from 64 Chi.-Kent L Rev. 987 (1989). For an expanded
presentation of this thesis, see Massey, 1990 Wis. L Rev. 1229.

1The 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.

2I use the term “Antifederalist Constitution” to include the ninth, tenth, and eleventh
amendments. An argument can be made that the term should include the first eleven
amendments since the impetus for the Bill of Rights largely came from Antifederalists
in the state ratifying conventions. See infra notes 5–14 and accompanying text. I limit the
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Constitution itself, and do so in a fashion that unabashedly addresses Antifederalist con-
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that the citizens of a state have the power, through their constitutions, to preserve areas of individual life inviolate from invasion by the federal Congress in the exercise of its delegated powers. Just as Congress is unable to use its delegated powers to compel a criminal defendant to testify against herself, Congress is unable to use its delegated powers to contravene an unenumerated federal right contained within a state constitution.

Standing in isolation, the first general proposition is unremarkable and uncontroversial. It is only when it is considered in the context of a scheme of constitutional law that it begins to assume shape, and carry implications which some may find exciting and others disturbing. Allegiance to the principle that unenumerated individual rights are entitled to the same constitutional protection as any enumerated right has necessary implications for constitutional theory—both foundational and substantive, to borrow Professor Sager’s coinage. On a foundational level, it commits us to an unwritten constitution supplemental to the venerated written document, one which embraces as constitutionally enforceable rights which have never been explicated by the democratic, representative organs of government. On a substantive level, it commits us to location of specific rights which mesh with and further this foundational account. Since the role played by the ninth amendment in foundational constitutional theory is to remind us sharply that there is a domain of private choice with which the state may not legitimately interfere, its substantive import will almost always be as a source of “negative” rights—rights which inhere in individuals to negate the actions of government seeking to invade that individual sphere.

The second proposition seeks to locate the ninth amendment, historically and structurally, as part of a constitutional antidote to the excessive potentiality of national power feared by the Antifederalists. It may seem a misnomer to append the label “Antifederalist” to the ninth amendment, since one of its principal congressional sponsors was James Madison and it was Federalists who opposed adoption of the Bill of Rights on the ground that an imperfect, or incomplete, enumeration

would give rise to a presumption that all individual rights beyond those enumerated had been conveyed to the national government. Yet, it is simply too facile to conclude that the ninth amendment was just another piece of a constitutional mosaic created exclusively by Federalist artisans.

In our current worship of the Constitution, we overlook all too quickly the controversial nature of the original document. The work of the 1787 Convention was not received with anything like acclamation by the early citizens of the nation. In Pennsylvania, for example, the ratification convention was selected by less than ten percent of the eligible voters; this condition came about because the pro-ratification forces called the elections in such a way and on such short notice that, as a practical matter, the citizens of Pennsylvania were disenfranchised in selecting their representatives for the ratification convention. Similarly, in Massachusetts, public opinion was overwhelmingly against the Constitution that some forty-six towns refused to send a delegate to the state ratification convention. Had those forty-six communities been represented, it is a virtual certainty that Massachusetts would have refused to ratify the new Constitution. In Virginia, perhaps the most pivotal state of all, it was acknowledged that, south of the James River, public opinion was at least ninety percent opposed to adoption of the new Constitution. In New York, public opinion was overwhelmingly against adoption of the new Constitution. In all probability, apart from Delaware, Rhode Island and New Jersey, which regarded the new Constitution as a way of achieving enhanced economic and political leverage, public opinion throughout the original states was substantially opposed to adoption of the new document. Opposition to the Constitution’s adoption was rooted in


3See Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 240 & n.4 (1988) (reprinted as chapter 9 of this volume).

4Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 240 & n.4 (1988) (reprinted as chapter 9 of this volume).
deep fear of national power. This sentiment, pervasive throughout the early American states, ultimately compelled proposal and adoption of the first ten amendments to the Constitution. Indeed, ratification was obtained in part by the promise that a bill of rights would be promptly appended to the newly adopted Constitution.

Both the Federalist and Antifederalist factions agreed that the focal point of any bill of rights was to provide certainty that the newly created national government would be disabled from intruding upon the elementary and fundamental rights of the citizenry. Of course, Federalists contended that there was a danger in any enumeration of rights. Nevertheless, the Federalist majority acquiesced to the implicit price of ratification and such Federalist leaders as James Madison assumed responsibility for introducing into the First Congress constitutional amendments responsive to Antifederalist demands for an articulated bill of rights. In an attempt to deal with the concern that an enumeration of rights would imply that the enumeration was exhaustive, Madison introduced his fourth resolution which, after considerable revision, eventually became the ninth amendment.

II. A Foundational Account of the Ninth Amendment

While it is uncontroversial that the ninth amendment was intended to guard against the possibility that individual rights would be limited to those enumerated, controversy attaches to the meaning of that statement. My first general proposition seeks to locate meaning in two dimensions: the political theory which actuated the framers, and the peculiar intersection of a British tradition of an unwritten constitution with the American colonial experience of written declarations of rights.

A. Political Theory

No single theory of political union captured the mind of every American who drafted, debated, voted upon, pondered, or even heard about the 1787 Constitution and the Bill of Rights. But in the richly textured political philosophy of the time, some themes do predominate. It was the zenith of the liberal Enlightenment—maximum individual freedom from governmental control was the polestar of such powerfully influential thinkers as John Locke or Montesquieu. Americans could, and did, quarrel about the most effective means to accomplish that end, but they were largely united in their desire to free the individual from the yoke of state control. Americans plainly rejected the Hobbesian idea that political union required the cession of all individual liberties to an omnipotent state. It is thus a reasonable inference that Americans of the age embraced the ideas of Hobbes’ principal ideological competitor, John Locke. Unlike Hobbes, the defender of absolute sovereign power, who regarded humans as uniformly selfish in a world without external authority to restrain their passions, Locke sought to devise a set of institutional arrangements which would allow individuals to escape the perils of social disorder without having to surrender their entire stock of individual rights. Locke’s goal was to vest all of the benefits created by political

### Footnotes

121 A. Beveridge, supra note 6, at 345–47 ("National Government would destroy... liberties...[and was thought to be] a kind of foreign rule.") Too much cannot be made of the public opposition to the Constitution’s adoption. It was this opposition, which viewed the central government as "foreign," that compelled the First Congress to propose the Bill of Rights. 

123 See generally Patrick Henry’s two remarkable speeches on the penultimate day of the Virginia convention, June 24, 1788. 3 Elliot’s Debates, supra note 5, at 587–96, 649–57.


125 For the Federalist position, see The Federalist No. 84, at 436–45 (A. Hamilton) (M. Beloff ed. 1948); 2 Elliot’s Debates, supra note 5, at 436–37. For the Antifederalist position, see 3 Elliot’s Debates, supra note 5, at 445–49 (Patrick Henry’s remarks in the Virginia convention).


127 The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution, but either as actual limitations of such powers, or as inserted merely for greater caution.
union with the individuals composing the society. Unlike Hobbes, Locke posited that the government merely succeeded to the private rights given up to it by the contracting individuals of society. Thus, the state itself has no claim to new and independent rights as against the persons under its control. As a modern commentator has put it: "The state can acquire nothing by simple declaration of its will but must justify its claims in terms of the rights of the individuals whom it protects." Of course, since "[t]he central purpose of government is to maintain peace and order within the territory," the Lockean sovereign succeeds to private rights of self-defense in order to curb illegitimate, power-based intrusions upon the rights of others. This police power attribute of sovereignty insures that the state can effectively provide peace and order to the individual members of the society but, critically, its theoretical outer limits are the limits of self-defense in private hands. The state cannot prohibit what could not legitimately be resisted or prohibited by private action prior to the Lockean compact.

However disparate the political theories of the framers, these fundamental conceptions dominated the scheme formulated by the 1787 convention. Constitutional limitations upon the national government's power and express diffusion of its exercise were intended to guarantee the liberties of the individuals forming the society by dividing the potential power of the state to seize for itself those liberties. The Constitution specifies precise measures to divide and check the exercise of power but is generally silent about protection of individual substantive rights. The elaborate procedural devices created to limit power were, of course, intended to serve the substantive end of protection against encroachment upon individual liberties. Although Hamilton and Wilson conten-

21 Id. at 16.
22 An apt illustration of this principle is to be seen in the interplay of the law relative to possession of, and trespass upon, real property. At early common law, the essence of possession was the legal concept of "seisin," a term connoting "peace and quiet." 2 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I, at 29 (2d ed. 1903). He who had possession could enjoy his property in "peace and quiet." To vindicate this right, the law of trespass was created. Since allowing "men to make forcible entries on land . . . is to incite violence," the trespass laws' protection of possession is "a prohibition of self-help in the interest of public order." Id. at 41.

ded these procedural safeguards were adequate, it is ultimately the Bill of Rights that "identifies the ends of government, the rights that the system of limited jurisdiction, indirect voting, and separation of power is designed to protect." Included among the Bill of Rights, of course, is the ninth amendment.

B. The English Tradition in America: A Transformation

The English tradition is of an unwritten constitution, one which embodies a constellation of fundamental individual liberties rooted in an historical understanding of such rights. Colonial Americans, who liked to assert that they possessed all the "rights of Englishmen," came to North America with that tradition. After arrival, however, they fashioned a new and uniquely American gloss upon the English conception of unwritten guarantees of individual liberties, for they assiduously adopted written declarations of individual rights inviolate from governmental intrusion. These declarations were, of course, part of the English tradition of restating, during times of political crisis, the "unwritten" fundamental liberties of the citizenry.

Americans, however, departed from the English habit of restatement in two crucial respects. First, they included in their itemizations of fundamental liberties rights which were not recognized in England. Second, Americans drafted their restatements as matters of first princi-
ple, not as reactions to a particular political crisis, as the barons had done at Runnymede or the 1689 Convention had done in the wake of James II’s flight from the throne. The effect of these American innovations was to begin a tradition of looking both to an unwritten constitution (containing the “rights of Englishmen”) and to written constitutions (containing, in the various colonial charters and declarations, the rights of American Englishmen). It should, therefore, come as little surprise that in the confluence of these traditions the ninth amendment, a blend of the written and unwritten, should be produced.

C. The Transition from Foundation to Substance

This foundational account of the ninth amendment demands that its substance have real bite, in order to protect individuals from governmental intrusion not warranted by some independent cession of individual liberties to government made as part of the constitutional bargain. For that condition to obtain it is vital that ninth amendment rights, like rights enumerated in the other portions of the Bill of Rights, be judicially enforceable.

There is no sound objection to judicial enforceability of these rights, for if they exist and judges are denied the opportunity to determine their nature, some other governmental actor will have to do the job. As Professor Sager has observed, the “problem . . . does not go away, but simply travels” from the judiciary to the executive or legislative branches. Only those who contend that democracy is better served by

30See, e.g., the New York Charter of Liberties and Privileges, adopted in 1683, which at the first opportunity granted New Yorkers the right to convene a colonial representative assembly. See 1 Roots, supra note 27, at 162–63.

31For a fuller elaboration upon this theme, see Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987).

32A similar phenomenon may be observed in the Canadian experience. Until 1982, Canada operated under the unwritten constitutional tradition of Britain. Its governmental structure was defined by the British North America Act, 1867, 30–31 Vict. Ch. 3 (1867) (now titled “Constitution Act, 1867”), amendable only by the U.K. parliament. Since the Statute of Westminster, 1931, 22–23 Geo. 5 Ch. 22 (1931), Canada has possessed the power to control all of its statutes save the B.N.A. Act. Under that authority, Canada enacted the Canadian Bill of Rights in 1960, S.C. 1960 C.44, but that act was an ordinary statute, not a constitutional document. In 1982, with the enactment of the Canada Act, Canada acquired a written constitution, amendable only by extraordinary action of the Canadian polity. Part One of the 1982 Constitution consists of the Canadian Charter of Rights and Freedoms. It is not likely accidental that section 26 of the Charter provides that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” Can. Const. pt. 1, § 26.

33Sager, supra note 3, at 252.
power." Or, as another commentator asserts, "it simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality." The first variant is accurate as far it goes, for it recognizes the strongly Antifederalist nature of the entire formulation of a Bill of Rights. The second variant, while correctly recognizing the importance of individual liberties claimed as part of the political union inherent in state constitution-making, inexplicably delivers these rights to Congress for evisceration at its pleasure. But even these skeptics acknowledge the vitality of a core premise: the ninth amendment was intended to hem in the national government, to some degree and in some fashion, from intruding upon rights secured by state law. Since the ninth amendment was created at a time when state constitutional declarations of rights were commonly regarded as the principal bulwark of human liberty against state inundation, this is an unsurprising conclusion.

But the ninth amendment did more than this. Its textual guarantee is that unenumerated rights are not to be "denied or disparaged" by virtue of their lack of enumeration in the federal Constitution. The term "disparage" carries with it the implication that enumerated and unenumerated rights are to be accorded equal status under the Constitution, for to deny unenumerated rights co-equal status on that account would violate the parity principle that infuses the concept of disparagement. If both types of rights are entitled to the full panoply of protections accorded individual liberties secured by the Constitution, and if the ninth amendment had as one of its aims the preservation of individual liberties secured by state constitutions, the necessary conclusion is that individual liberties secured by state constitutions against state invasion were federalized by the ninth amendment. Through the ninth amendment a citizen of North Carolina, for example, could assert her state constitution as a barrier to federal action invasive of her rights secured by the North Carolina constitution.

The claim that the ninth amendment preserves individual liberties secured by state constitutions is rooted in two sources: the foundational account of the amendment and the history of its proposal and adoption. As demonstrated above, the foundational account is one that seeks sharply to limit governmental power as against individuals. Locating the ninth amendment's unenumerated rights in state constitutional guarantees is not only consistent with but furthers that foundational account. Moreover, such a reading is structurally congruent with the ninth amendment's paired cousin, the tenth amendment. The tenth amendment confines the national government to its delegated powers and bars the states from exercising powers either prohibited to them by the Constitution or which have been exercised validly by Congress to preempt state authority. Everything else is "reserved to the States respectively, or to the people." "State constitutions act as the dividing line between rights reserved to the states and rights reserved to the people." State governments exercise authority to the extent that it has been conferred upon them by the people. If state constitutions mediate between the people and their state agents, they do so by defining anew, and on a different plane, the rights retained by the people. Thus, it makes special sense to regard state constitutions as informing the substance of the rights retained by the people under the ninth amendment.

39The draftsmen of the ninth amendment knew what they were about: limiting the delegated powers of the federal government. This declaration of rights, I take it, is intended to secure the people against the maladministration of the [new central] Government.
40Id. at 432.
41Oliver Ellsworth, for example, trusted "for the preservation of his rights to the State Govts. From these alone he could derive the greatest happiness he expects in this life." 1 The Records of the Federal Convention of 1787, at 492 (M. Farrand ed. 1911). In recommending against inclusion of a Bill of Rights in the federal Constitution, Roger Sherman declared: "The State Declaration of Rights are not repealed by this Constitution; and being in force are sufficient." 2 id. at 588. James Wilson asserted in 1791 that our [colonial] assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes." 1 The Works of James Wilson 292 (R. McCloskey ed. 1967).
42See J. Story, 3 Commentaries on the Constitution of the United States § 1900, at 752–53 (1833).
The historical argument proceeds from the premise that the ninth amendment, like the entire Bill of Rights, was responsive to Antifederalist demands for sharp limitations upon possible invasions of individual liberty by the new national government. Explicit support for this reading may be found in such declarations as this constitutional amendment, proposed by the Pennsylvania ratification convention:

"[E]very reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution." 43

The fact that the ninth amendment fails to track this language precisely can be used to argue against the interpretation I have made here, but the contrary argument is unlikely to provide an adequate reconciliation with either the ninth amendment's foundational account or the strong Antifederalist sentiment presented in the state ratification convention pre-cursors to the amendment itself.

If all this is so, why have the courts failed to construe the ninth amendment in this fashion? Is it solely because litigants have not seen the possibilities inherent in the amendment? Is it because too much attention has been focused on the not-easily-located-or-cabined natural law element of the amendment? Or is it because the Antifederalist predisposition to defer to states was swept away in the orgy of judicial nationalism that characterized the Marshall Court? There are no ready or definitive answers to these questions, only speculations. My belief is that all of these possibilities, and probably others as well, account for the dormancy of this dimension of the ninth amendment.

Today, two centuries later, academic and even judicial attention to the ninth amendment is burgeoning. Some of it is skeptical, some of it is focused primarily on the amendment's natural law dimension, but little focus is placed upon its effect of federally constitutionalizing state constitutional guarantees. If anything, this effect is even more important to recognize now than in 1791. Since then, thirty-seven states have entered the Union, Vermont as early as 1791, and Hawaii as late as 1959. No state constitution in existence at the time of the ratification of the ninth amendment is currently operative. In each case the citizens of the state have redefined the relationship between themselves and their state agents. In doing so, the people of the respective states have dealt with some of their rights not enumerated in the federal Constitution. By the textual directive of the ninth amendment, the people's decisions respecting their rights are and ought to be clothed with federal constitutional protection against invasion by the federal Congress.

Skeptics will assert many objections to this partial theory of the ninth amendment's substance. At risk of underestimating the ingenuity of my adversaries, I will hazard an attempt at raising and meeting some of these objections.

The theory violates the supremacy clause. It does not, because the ninth amendment incorporates into the federal Constitution state constitutional rights and secures them against federal invasion in the same manner as all other federal constitutional rights. Just as Congress may not validly mandate religious orthodoxy because of the first amendment, Congress is barred by the ninth amendment from trenching upon an Alaskan's or Californian's constitutionally secured right of privacy.

The theory will turn federal constitutional law into a crazy-quilt of fifty-one different variations. It will, and that is both one of its strengths and part of the legacy of a dual sovereignty system. The citizens of each state are entitled to define the nature of their relationship with their governmental agents, both immediately (with the state via the state constitution) and mediatly (with the national government via the ninth amendment's incorporation of state constitutional guarantees). It has not proven so difficult for the federal courts to manage with fifty-one different legal regimes in diversity cases under the rule of Erie Railroad Co. v. Tompkins; 44 it is unlikely to be much more difficult for the courts to rely on state constitutional law to breathe life into this substantive dimension of the ninth amendment.

The theory will prevent the federal government from overturning obnoxious state guarantees. Suppose, the skeptics will say, that a state secured in its constitution the "right" of all whites to own blacks as slaves. The easy answer is that, in the absence of the Civil War amendments, Congress would be unable to overturn such an odious regime by statute but, in concert with three-quarters of the states, could easily do so by constitutional amendment. The thirteenth amendment is, of course, the living proof. This response, however, invites another skeptical objection.

432 Elliot's Debates, supra note 5.

44304 U.S. 64 (1938).
The theory fails to account for inconsistencies between enumerated constitutional rights and unenumerated rights located in state constitutions. Suppose the people of a state attempted to secure their “right” to own slaves. On what principled basis ought the thirteenth amendment displace the ninth? Or suppose a state provides that its protection against cruel and unusual punishment does not forbid the public mutilation of convicted felons, and the United States Supreme Court has concluded that the eighth amendment forbids such practices. Which provision controls? The answer lies in the interplay between the foundational and substantive accounts of the ninth amendment. Since the foundational account seeks to maximize individual liberty from governmental intrusion, the substantive choice must conform to that account. Accordingly, in those instances of conflict the operative rule must be the one which pays most deference to the individual challenged by governmental authority, or which maximizes individual liberty generally.

Under the theory, some Americans will enjoy more individual liberty than others. They will, and to the extent the package of individual liberty provided by the federal Constitution and a state constitution is insufficient, state citizens will respond by alteration of their state constitutions or individual exit to other, more generous, jurisdictions. This objection is little different from the current situation where, for example, Alaskans possess the right to smoke marijuana in their homes45 while the citizens of every other state face fines or imprisonment for the same conduct.

The theory will make it possible for wily state politicians to evade needed uniform and national policies. This objection assumes that state constitutions will assume meta-statutory proportions or that the ninth amendment right conceived here extends to issues having no plausible connection to individual liberty. I make no contention that state statutory rights are insulated by the ninth amendment from congressional pre-emption. To the extent that a state’s citizens should seek to use their constitution as device to load statutory norms into the federal Constitution the gambit could probably be policed by reference to the foundational account of the ninth amendment: if the “constitutional” guarantee purports to preserve the Rule in Shelley’s Case, for example, it is the sort of provision that speaks most softly, if at all, to the preservation of human liberty from governmental power. Some judicial good sense would be necessary to sort the liberty-bearing norms from the purely administrative ones. Of course, there will be friction at the margins; there always is.

No doubt there are other criticisms which can be levelled. This Essay is a tentative work designed to provoke thought and stimulate discussion. Perhaps in that interchange the ninth amendment will regain some of the vitality that was imagined for it by those earlier Americans who so profoundly mistrusted national power. The ninth amendment has languished in disuse for its entire history. It is time to dust off this Antifederalist relic, put it to use and recognize that the Constitution truly created a Union—of Federalists as well as Antifederalists—that fostered diverse choices concerning the relationship between individuals and their governmental agents.

13. The Ninth Amendment: Righting an Unwritten Constitution

Suzanna Sherry

As the recent Symposium in these pages indicated, the preliminary debate over the meaning of the ninth amendment is essentially over. Despite the diversity of views expressed in the Symposium, all but one contributor agreed that the ninth amendment does protect judicially enforceable unenumerated rights. The real question now must be how to identify those rights.

Only Professor Michael McConnell disputes the conclusion that the ninth amendment allows judges to enforce unenumerated rights. He suggests that neither the history of the Constitution nor sound political theory supports such a reading of the ninth amendment. Using his article as a focus for this Essay, I would like to do two things: (1) to add to the historical work demonstrating the framers’ commitment to judicially enforceable unenumerated rights; (2) to comment generally on the New Right insistence on strict textual limits to judicial activism, which I believe stems from a mistaken view of the judicial process.

I.

As Sanford Levinson points out, the fascination with the ninth amendment began largely as a reaction to the New Right insistence that constitutional interpretation can legitimately rest only on the specific written text and its history—a sharp change from the traditional practices of, and canonical commentary on, the Supreme Court. Until “originalism” became the vogue, there was no need to delve into the forgotten amendment or its history in order to support “non-originalist” review.

This reactive foray into the origins of the ninth amendment—and to an even greater extent, into the eighteenth century idea of unenumerated rights generally—has rewarded historically-minded non-originalists beyond their wildest dreams. And, to the surprise of no one, the New Right is now at great pains to refute the essentially irrefutable historical conclusion that those who wrote, ratified, and initially interpreted American constitutions believed that judges should enforce not only rights specifically enumerated in those written constitutions, but also unenumerated natural rights.

The standard New Right historical argument comes in many guises, but all reduce to the essential contention that the retained rights referred to in the ninth amendment are either redundant or judicially unenforceable. Lawrence Sager persuasively refutes the notion that the ninth amendment is redundant. I will focus on the alternative thesis: that the ninth amendment does refer to additional rights, but that they are not judicially enforceable. New Right theorists sometimes suggest, as Professor McConnell does, that such rights are unenforceable because they are merely aspirational, and sometimes that they are unenforceable because they are political rather than legal. Both of these arguments are historically untenable.

The evidence in favor of attributing to the men who wrote and ratified the United States Constitution a belief in judicially enforceable natural rights is well-rehearsed in several contributions to the Symposium. Virtually the only evidence to the contrary is a few scattered statements in the Federal Convention, in support of a Council of Revision, that judges might not otherwise be able to strike down unjust laws. Two additional arguments are relevant.

First, Professor McConnell’s suggestion requires us to view the framers as virtually dimwitted. As McConnell recognizes, the framers

3Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239 (1988) (reprinted as chapter 9 of this volume).

4Rapaczsynski, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64 Chi.-Kent L. Rev. 177 (1988) (reprinted as chapter 7 of this volume); Sager, supra note 3.

5Grey, The Uses of an Unwritten Constitution, 64 Chi.-Kent L. Rev. 211 (1988) (reprinted as chapter 8 of this volume); Sager, supra note 3; see also Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987).

6Professor McConnell quotes these scattered references and labels them “substantial evidence against” the unwritten rights position. McConnell, supra note 1, at 94 n.32.

viewed their new written Constitution as a form of law. As he also apparently recognizes, they followed Coke in endorsing the idea of judicial review: judges should enforce the law, including the Constitution. Finally, he does not dispute that the framers believed in something that they themselves denominated the law of nature, but he urges us to find that they did not believe that law to be enforceable. He thus requires us to believe that the framers drew a distinction between one kind of law and another: the written Constitution was legal and enforceable, but natural law was neither.

These men were, by and large, lawyers, and they were careful with language and with ideas. For them to speak of the written, judicially enforceable Constitution and unwritten natural law in the same breath—as they so frequently did—without distinguishing between the two, strongly suggests that they thought of unwritten rights as analogous to the written Constitution: legal rights, enforceable through the mechanism of judicial review. To attribute to them any other conclusion strains credulity.

There is also even more significant evidence that the founding generation recognized judicially enforceable unenumerated rights. For the first thirty or forty years after the Constitution took effect, judges did enforce unenumerated rights. At both the state and federal level, courts consistently invalidated statutes that conflicted with unwritten rights. Sometimes they also cited provisions of the written constitution, sometimes they did not. Sometimes there were no written provisions that could even arguably apply.

The early Supreme Court’s role in endorsing unwritten natural law is well known. But that Court was not unique, nor is it even the most illustrative example. In state after state, judges invalidated retroactive laws, uncompensated takings, and other interferences with the natural rights of citizens. Some of these states had no written bill of rights at all; others had written constitutions that lacked ex post facto or takings clauses. Nevertheless, judges used unwritten law to invalidate legislative actions. A review of constitutional opinions in four states provides significant evidence of the prevailing view of enforceable unwritten rights. 7

7The following discussion is a brief summary of my ongoing research into early (1788-1830) state constitutional decisions in four states: Virginia, Massachusetts, New York and South Carolina. Those states were chosen in order to examine both Northern and Southern states, and states both with and without a written bill of rights. One portion of that research, focusing exclusively on Virginia, is S. Sherry, To the Early Virginia Tradition of Extra-Textual Interpretation: Toward a Usable Past: An Examination of the Origins and Implications of State Protections of Liberty (P. Finkelman & S. Gottlieb eds., University of Georgia Press 1990).
Virginia affords the best illustration of the use of unwritten law. Despite the existence of an extensive written bill of rights, Virginia judges relied on unwritten law as well. Moreover, Virginia’s well-developed court system, its long-established tradition of reporting decisions, and its outstanding jurists make it an ideal representative state for studying constitutional decisionmaking in the early nineteenth century. Outstanding Virginia judges and lawyers — men such as John Marshall, Edmund Pendleton, Edmund Randolph, George Wythe, Spencer Roane and St. George Tucker — were influential in the overall development of American constitutional law.8

It is thus enlightening to find that Virginia judges not only enforced unwritten rights, but they also forthrightly declared their obligation to do so. In the 1809 case of Currie’s Administrators v. Mutual Assurance Society,9 counsel for the insurance company had defended a retrospective statute by arguing that the Virginia Constitution of 1776 did not prohibit retrospective statutes:

No doubt every government ought to keep in view the great principles of justice and moral right, but no authority is expressly given to the judiciary by the Constitution of Virginia, to declare a law void as being morally wrong or in violation of a contract.10

Judge Spencer Roane vehemently rejected that textualist assumption. After noting that the legislature’s authority was limited by “considerations of justice” as well as by the written constitution, he continued:

It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boasted omnipotence of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?11

In other Virginia cases between 1788 and 1828, judges also relied on such unwritten fundamental law as “principles of natural justice,“12 and

“Natural Law, Civil Law, Common Law, and the Law of every civilized country.”13

Judges in Massachusetts — another state with an extensive written bill of rights — also recognized their obligation to measure laws against both the written constitution and unwritten law. In Foster v. Essex Bank14 in 1819, Chief Judge Parker of the Supreme Judicial Court indulged in a long dissertation on the nature of fundamental law. He began by noting that laws that “manifestly infringe some of the provisions of the constitution, or violate the rights of the subject,” should be invalidated by the judiciary.15 As an example of the first type of invalid statute, he cited a hypothetical legislative declaration that a citizen was guilty of treason; that statute would be in violation of article XXV of the Massachusetts Declaration of Rights. As an example of the second type of invalid statute, he cited a hypothetical law that would “destroy or impair the legal force of contracts.” Such a statute, he noted “would be unconstitutional, although not expressly prohibited; because, by the fundamental principles of legislation, the law or rule must operate prospectively only.”16

The Massachusetts court also invalidated laws on the basis of unwritten fundamental principles. In 1799, the Supreme Judicial Court considered the validity of the same Georgia statute eventually overturned by the United States Supreme Court in Fletcher v. Peck.17 The Massachusetts court held the statute to be “a mere nullity—a flagrant, outrageous violation of the first and fundamental principles of social compacts,” and then added as an afterthought that it was “moreover declared void, because it was considered directly repugnant to” the contract clause of the federal Constitution.18 Similarly, in 1814, a Massachusetts court invalidated a statute purporting to extend the statute of limitations in a particular case only, noting that the statute was “manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws.”19

916 Mass. 244 (1819).
10Id. at 269.
11Id. at 267–268.
12Holden v. James, 11 Mass. 396, 403 (1814).
Unlike Virginia and Massachusetts, New York lacked a written bill of rights until 1821. Nevertheless, rights were not left unprotected in that state. The most significant unwritten right was the right to just compensation for the public taking of private property. Despite the absence of any written takings clause in the New York Constitution of 1777, a series of cases beginning in 1816 relied on natural justice to require compensation when private land was taken. In 1816, Chancellor Kent held that depriving an owner of property without compensation would be "unjust, and contrary to the first principles of government."20 Similarly, in 1822, Justice Spencer found an uncompensated taking to be "against natural right and justice."21 Although he pointed to takings clauses in both the United States Constitution and the not-yet-effective 1821 New York Constitution, he noted that neither applied to the particular taking at issue—but he deemed both clauses "declaratory of a great and fundamental principle of government,"22 and ordered the payment of compensation.

By 1827, a compensation requirement was included in New York's written constitution, but the New York court nevertheless tested a challenged ordinance against both the written constitution and the unwritten "fundamental principle of civilized society, that private property shall not be taken . . . without just compensation."23 And, as late as 1834, a New York court could write that taking for a private rather than a public purpose was "in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported."24

In South Carolina, the most interesting example of the enforceability of unwritten law is Judge Burke's opinion in Zylstra v. Corporation of Charleston,25 a 1794 case involving a fine imposed without a jury trial. Although the written constitution did guarantee a trial by jury, the City of Charleston had argued that the city Board of Wardens could impose fines without a jury because they had been doing so before the written constitution was adopted, and thus were implicitly exempted from the constitu-

20Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816).
22Id.
23Coates v. The Mayor, 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).
24In re Albany Street, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834).
251 S.C.L. (1 Bay) 382 (1794).
26see also Coates v. The Mayor, supra note 23; and In re Albany Street, supra note 24.
endorse others. It is, as always, a question of whose ox is being gored. Even if it were possible, however, McConnell's search for foundational—especially majoritarian—constraints is misguided.

Professor McConnell does not confine his criticism to the admittedly extreme "anti-constitutionalist" position he attributes to Barber. Most of us would agree—the clear contrary intent of the framers notwithstanding—that "courts are bound by the substantive principles of the Constitution." But McConnell goes further: he would severely limit the methods by which judges may interpret that Constitution.

He defines standard interpretivism—which he apparently endorses—as the view that "judges must look to the text, structure, history, and purposes of the Constitution" in order to determine its meaning. Conspicuously absent from this otherwise unexceptionable list is any appeal to justice or moral reasoning. In fact, Professor McConnell explicitly rejects what he derisively calls the "ratiocination of the judge" as a source of constitutional interpretation. He also notes that the Constitution's "appeal" derives from its congruence with natural right, but that its authoritative appeal comes from its popular ratification. He thus rules out moral truth as either an explanation of the Constitution's legitimacy or a method of illuminating its meaning. Notwithstanding his disclaimer that he is a moral realist, this attempt to limit interpretation is an attempt to elevate consent over truth, and to privilege will at the expense of reason.

Paul Kahn has noted that we share with the framers a basic conflict about what makes an exercise of power (including the commands of a constitution) legitimate. Is a constitution legitimate because we have consented to it (will), or is it legitimate because, and to the extent that, it establishes a moral and just regime (reason)? A non-originalist, who would add justice to the list of things a judge may consult in interpreting the Constitution, would answer that a truly legitimate constitution requires both.

Professor McConnell, however, unequivocally casts his lot with pure will: only the Constitution's popular origins make it legitimate. His commitment to majoritarian will is indeed so overwhelming that he also urges judges to ignore the text and history when those sources direct judges toward moral questions, as the ninth amendment clearly does. Once again, this is both inconsistent with the framers' own inclinations and politically unwise. Even Thomas Jefferson, no friend of activist judicial review, noted that "though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable."37

Professor McConnell's theoretical choice of will over reason has clear practical consequences. If the Constitution is legitimate only because we have consented to it, then the only question judges may ask in interpreting it is what we have consented to. That conclusion, in turn, supports McConnell's restrictive definition of valid interpretive strategies, which focus exclusively on the text and its history.

Professor McConnell's attempt to defend the morality of the Constitution—to reconcile reason and will—fails in two distinct ways. His preliminary argument is essentially just a defense of particular results: he notes that "[t]he most fundamental and important rights are protected either explicitly or by implication under traditional constitutional interpretive methods," and that his definition of the majoritarian regime established by the Constitution is in fact also the best regime, or at least "pretty good, and probably better than whatever a twentieth-century judge might come up with."40 He is simply restating an obvious but trivial point: his own vision of natural justice accords with the results reached by interpreting the Constitution through "traditional" methods. But what of a judge who finds the "traditional" result inconsistent with her care-


39McConnell, supra note 1, at 107.

40Id.
fully considered view of natural right? According to Professor McConnell, she is nevertheless precluded from entertaining moral considerations. That McConnell thinks his method of interpretation yields just results—in other words, that we have consented to what is, for him, a substantively just document—is not necessarily a reconciliation of reason and will for anyone else.

Professor McConnell's primary mode of reconciling reason and will is more subtle. He contends, in essence, that legislative moral choices are likely to be both substantively better and more productive of public moral discourse—and thus of public moral development—than judicial moral choices. I happen to disagree, for reasons that I will return to at the end of this Essay.

But the more significant response is to point to McConnell's concession that judges may override legislative choices when their (legitimate) interpretation of the Constitution requires them to do so. Our only quarrel is thus over what they may look at to determine whether a counter-majoritarian remedy is appropriate in a given case. He wants them to look to the Constitution. I want them to look to the Constitution and to justice.

Professor McConnell thus wishes to limit judicial review by means of interpretive devices that force judges to ignore reason and to focus exclusively on majority will as reflected in the written document. He fears that unconstrained judicial review will merely "substitute[e] the judge's understanding of natural rights for the Constitution's." Moreover, his strained reading of the ninth amendment suggests that he believes that any portion of the Constitution that itself directs judges to deliberate about justice is to be ignored.

This search for interpretive devices that eliminate judicial discretion is, at bottom, profoundly positivist and profoundly relativist. It treats the written Constitution as an absolute sovereign by excluding any examination of the moral dimensions of its language. Such a view is positivist in the sense that "it makes no difference ... if the sovereign command is nothing but arbitrary will: order still requires capitulating to it." It is relativist in that it denies the availability of any higher truth than what a particular society has already chosen to embody in its written fundamental law.

An appeal to the finality and exclusivity of the historical Constitution is also, like most positivist and relativist arguments, morally and politically dispiriting. It tells us that we as a society are not good enough to make our own moral decisions; we must instead adhere slavishly to the product of the better minds that went before. What Robin West has called the "authoritarian impulse" is a symptom of despair:

We turn to [the authoritative text] to tell us how to live, because we have abandoned the project of our own moral self-governance. ... We crave obedience when we have despaired of our own moral competence, and hence self-governing moral authority.

A passively textualist approach to the Constitution is itself productive of despair: when we cede the community's moral authority to an external source, we give up a part of our humanity.

The desire to appeal to the absolute authority of the historical Constitution is also self-replicating. To the extent that we as a society relieve ourselves of the obligation to make difficult moral decisions, we further undermine our capacity to do so. Moral sensibilities, whether of an individual or of a community, are best developed by making moral choices.

Let me anticipate Professor McConnell's probable response to this line of argument. He would contend, I suspect, that giving moral authority to unelected judges is an even more authoritarian solution. He would be wrong, for several reasons.

First, neither he nor any other New Right theorist denies that unelected judges should have some obligation to oversee the community's moral choices. The mere existence of judicial review is not itself controversial. Once we have ceded some moral responsibility to an unelected body, the only question is how they should exercise that responsibility. To tell judges that they must engage in "value-free" judging—to confine them to the unsupplemented text—diminishes the very 

42McConnell, supra note 1, at 101.

definition of moral choice by curtailing the sources of moral authority. Moreover, once we recognize that the legislature should not always prevail, we must delegate final moral authority somewhere: should we entrust it to judges who can reason about both morality and consent, or to an ancient document simply because it reflects our erstwhile will? Federal judges, however unrepresentative, are a part of the community in a way in which dead founders and parchment under glass cannot be.

Most important, judges are both of the community and outside it. Their values are shaped by the community, but they are less susceptible to the distorting influence of politics. Moral reasoning is deliberative. To the extent that judges are better able than legislatures to engage in reasoned deliberation, they will both produce better results and provide an example and a catalyst for popular moral deliberation. And when their reasoning—or their decision—is inferior to the legislature’s, it will not prevail for long. Judges are replaced, constitutional amendments are ratified, and judges rethink their positions—at least partly in response to moral dialogue.

Finally, to return to where we began, judges engage in moral reasoning whether or not they purport to be merely interpreting the written Constitution. Admonishing the judiciary to confine itself to interpretation of the majority’s past will is a sham. Chief Justice Taney, whom Professor McConnell so castigates for imposing his own values on an unwilling community, explicitly based his decision in _Dred Scott v. Sanford_ on a careful (and probably accurate) interpretation of the history and text of the United States Constitution.

Arguing about the validity of interpretive strategies merely diverts attention from the more important substantive question: did the Court read the Constitution in a morally justifiable way? A reinvigoration of the ninth amendment would force judges and their critics to argue about that meaning in a way in which dead founders and parchment under glass cannot be. Their reasoning—or their decision—is inferior to the legislature’s, it will not prevail for long. Judges are replaced, constitutional amendments are ratified, and judges rethink their positions—at least partly in response to moral dialogue.

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Arguing about the validity of interpretive strategies merely diverts attention from the more important substantive question: did the Court read the Constitution in a morally justifiable way? A reinvigoration of the ninth amendment would force judges and their critics to argue about that meaning, and “an angry quarrel over right and wrong is superior to the silence of relativism.”

Since the search for absolute constraints on judges—and the consequent rejection of open-ended judicial review—is historically inaccurate, politically misguided and intellectually unintelligible, why do some thoughtful scholars continue to insist on it? I would suggest that their insistence might stem from either of two sources. A few of those opposed to reinvigorating the ninth amendment are simply political strategists who wish “to curb civil liberties and restrict remedies for governmental wrongs by any available means.” More serious scholars, however, including Professor McConnell, are obviously truly troubled by what they perceive as an unaccountable and irresponsible judiciary: “Power without responsibility is not a happy combination.” This fear of a tyrannical judiciary stems, I believe, from a mistaken understanding of the judicial process, and especially of the art of interpretation.

Professor McConnell appears to believe that there is an inherent meaning in the Constitution: as he says of the ninth amendment, it “means precisely what it says.” He speaks of “the substantive principles of natural justice reflected in the Constitution” and “the political theory of the Constitution.” It is by now commonplace—but nonetheless accurate—to observe that meaning does not inhere in documents, but is created by an interaction between a document and its readers. This is not to say that a document has unlimited meanings; the language as well as the context make some meanings unimaginable and others implausible. The reader’s own sensibilities necessarily influence which meanings she finds unimaginable and which she finds most plausible. McConnell fails to recognize either the inevitability of ambiguities of meaning or the inescapable role of the reader in supplying part of the context. He thus misunderstands the very nature of interpretation.

Professor McConnell also has a limited vision of the nature of judging. In that he is not alone: for at least several decades, scholars envisioned judging in constitutional cases as a rule-bound task, and have searched for rules that will successfully constrain judges without leaving legislatures free to ignore the Constitution. In light of the failure of these “grand theories” to produce a useful and noncontroversial theory of constitutional constraints, many constitutional scholars have recently turned instead to anti-formalist, anti-theoretical approaches. In articles too numerous to mention individually, these scholars have begun to suggest that deciding constitutional cases requires what might be called judg-

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4660 U.S. (19 How.) 393 (1856).
48Hirshman, supra note 44, at 200.
49See Wells, Means, Ends and Original Intent: A Response to Charles Cooper, 4 J.L. & Pol. 81, 88 (1987) (attributing this motive to Cooper).
50McConnell, supra note 1, at 106.
51Id. at 94.
52Id. at 107 (emphasis added).
ment of practical reason, and to describe the exercise of that faculty. Because the literature is so extensive and impressive, I will describe it only very briefly, ignoring the differences between different writers and focusing instead on basic shared understandings.55

Judging—especially in difficult constitutional cases—is not a mechanical exercise, but a learned and lived craft. The tools of the trade are a thoughtful life lived in American social and legal culture. A pragmatist finds no formula by which to decide the difficult questions, but instead internalizes legal precedents, cultural traditions, moral values and social consequences, creatively synthesizing them into the new patterns that best suit the question at hand. No single source will adequately address the hardest questions; answers to societal dilemmas must be crafted from the web rather than constructed from the tower.

Above all, judging is an act of controlled creativity. Like writing at its best, it both draws on and evokes memories of what has gone before, but by innovation rather than by mimicry. It simultaneously acknowledges our debt to the past and denies that the past should control the present. The task of the pragmatist decisionmaker is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither. We can argue about whether a particular judge does so well or badly, but we should recognize that neither her job nor ours can ever be mechanical.

The framers, in a century in which judges were expected merely to focus their differences and forgotten the amendment, Sanford Levinson observes, “attempt to capture the

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14. The Ninth Amendment: The Beckoning Mirage*

Raoul Berger

I. Introduction

Almost ten years have passed since I made my devoir to the ninth amendment.1 In the interim a swelling tide of commentators have explored the subject, enlisting well-known academicians in a recent Symposium.2 One refers to the “mystery” of the amendment;3 another considers its meaning “very problematic.”4 The “mystery” is deepened by the dense philosophic fog that envelops the discussion,5 much of which is result-oriented. Francis Bacon cautioned that “what a man had rather were true he more readily believes.”6 “[T]he latter-day rediscoverers” of the amendment, Sanford Levinson observes, “attempt to capture the

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1 Reprinted, by permission, from 42 Rutgers L. Rev. 951 (1990).
3 Symposium on Interpreting the Ninth Amendment, 64 Chi.-Kent L. Rev. 37 (1988) [hereinafter Symposium].
4 Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi.-Kent L. Rev. 131, 143 (1988) (reprinted as chapter 4 of this volume).
5 Rapacynski, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64 Chi.-Kent L. Rev. 177, 185 n. 20 (1988) (reprinted as chapter 7 of this volume). Judge Morris Arnold, with whom I concur, considers that the amendment “means what it says and that it was included in the Constitution simply to prevent the Bill of Rights from triggering the maxim inclusio unius.” Arnold, Doing More Than Remembering the Ninth Amendment, 64 Chi.-Kent L. Rev. 265, 266 (1988) (reprinted as chapter 10 of this volume). Justice Story was of the same opinion. See infra text accompanying note 46.
6 Locke wrote, “Where it is not often happen, that a Man of ordinary Capacity, very well understands a Text, or a Law, that he reads, till he consults an Expositor... who by the time he hath he pleases.” J. Locke, An Essay Concerning Human Understanding 496 (P. Nidditch ed. 1984).
ninth amendment for libertarianism. . . Charles Black, for example, has led the way in reading the ninth amendment as a possible charter for the positive entitlements of the welfare state.7 The fact that the Supreme Court recently shut the door in the "sodomy" case8 to judicial fabrication of new "rights" under the aegis of the fourteenth amendment lends urgency to the search for a fresh source of judicial creationism.

Two of the contributors to the Symposium candidly avow that they are judicial activists. Thomas Grey is a "supporter of liberal judicial activism, post 1937 variety"; he joins Randy Barnett in exhorting "judges to continue the good judicial work of the last two generations."9 But Grey sees a cloud on the horizon: a "few more right-wing [election] victories" and "we will have a judiciary ready for the vigorous pursuit" of a contra-Warren Court "vision." "[L]iberal oxen can be gored by right-wing activist judges."10 Why not? The name of the game is "Two Can Play."

Andrzej Rapaczynski notes that "for every interpretation that sees the [ninth amendment] as support for judicial activism, there is another, respectable one that is not."11 The Symposium prompted me to restudy the matter. I shall eschew the "higher level of generality" favored by commentators that "lawyers and judges [do not] cite and consult," in favor of a "more down-to-earth commentary."12 Stripped of its philosophy-jurisprudential veneration, the central issue is whether there is judicial power to enforce the unidentified rights "retained by the people."

II. The Orthodox View

The ninth amendment provides:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.13

Thus, "enumeration" is differentiated from "retained" by the people. What is "enumerated" in the Constitution is embodied therein; what is "retained" is not.14 An analogy is furnished by the states' surrender of so much of their powers as was essential for national purposes while retaining the residue. Just as that residue is beyond the province of the federal government,15 so are the retained rights to be free of federal intrusion. Reservations are not grants of power to deal with what is retained. One who may not deny is not thereby empowered to enforce.

What are "rights" enumerated in the original Constitution? Hamilton lists the limitation of impeachment to removal from and disqualification to hold office (this will not affect the commonality). So too, the prohibition of grants of titles of nobility is a limitation of power, not the articulation of a right. But the prohibition against suspension of habeas corpus, bills of attainder, ex post facto laws, and the circumscription of treason while couched as limitations of power,16 also creates rights.

Justly, therefore, did Zechariah Chafee write that the "original Constitution did very little to protect human rights against the states."17 The reason, as Gordon Wood observed, is that to the Revolutionary generation "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."18 It was the collective, rather than the individual, that was paramount. Alpheus Thomas Mason correctly noted that "[i]n the Convention and later, states rights—not individual rights—was the real worry."19

14This was in response to anti-Federalist insistence such as was voiced by Patrick Henry in the Virginia Ratification Convention: "A general positive provision should be inserted in the new system, securing to the States and the people every right which is not conceded to the general government." McDowell, The Politics of Original Intention, in The Constitution and the Courts and the Quest for Justice 1. 13 (R. Goldwin & W. Schambra eds. 1989).
16The Federalist No. 84, at 556-57 (A. Hamilton) (Mod. Lib. ed. 1937).
18G. Wood, The Creation of the American Republic 1776-1877, at 63 (1969). In the Virginia Ratification Convention, Patrick Henry said that "the necessity of securing our personal rights, seems not to have pervaded the minds of men." J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (2d ed. 1836). It is therefore not surprising that critics of the Constitution—the Anti-Federalists—should hold that a Bill of Rights should "be declaratory, not of the personal rights of individuals, but of the rights reserved to the States." The Federalist No. 38, at 237 (J. Madison) (Mod. Lib. ed. 1937).
The deep attachment of the states to control their own internal affairs sheds light on the purpose of the ninth amendment. “State attachment and State importance,” said Gouverneur Morris, “have been the bane of this country.” Midway in the Convention, Washington wrote, “[I]ndependent sovereignty is so ardently contended for . . . the local views of each State . . . will not yield to a more enlarged scale of politics. . . .” Consequently, Madison was constrained in Federalist Number 40 to assure the ratifiers that “the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.” He emphasized in Federalist Number 39 that the central government’s “jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.” So too, Hamilton stressed in Federalist Number 84 that the object of the Constitution was “to regulated the general political interests of the nation,” not “every species of personal and private concerns.” The powers of the federal government, Madison observed in Federalist Number 45, “will be exercised principally on external objects as war, peace, negotiation and foreign commerce.” Similar views had been expressed in the Convention by Roger Sherman and James Wilson, and by Hamilton in the New York Ratification Convention. In Martin v. Hunter’s Lessee, Justice Story declared, “[I]t is perfectly clear, that the sovereign powers vested in the

state governments . . . remained unaltered and unimpaired, except so far as they were granted to the government of the United States.”

The importance of these facts is highlighted by Judge Richard Posner’s emphasis, in the context of the fourteenth amendment, that to “apply the Bill of Rights to the States” is to “weaken the states tremendously by handing over control of large areas of public policy to federal judges.” Nothing was further from the mind of the states who led the drive for a Bill of Rights. In holding that the Bill of Rights had no application to the states, Chief Justice Marshall stated in Barron v. Baltimore: “Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared their purpose in plain and intelligible language.”

Mark that the Bill of Rights was not meant to furnish “protection” to the people against “their own governments,” i.e., the states. Individual rights were peculiarly the concern of the states as Edmund Pendleton underscored in the Virginia Convention: “[O]ur dearest rights—life, liberty and property, as Virginians, are still in the hands of our state legislature.” To read the ninth amendment as enlarging federal power to “protect” rights there undescribed is, as Justice Potter Stewart remarked,

28Id. at 325–26. In Woodward v. Dartmouth College, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall stated: “That the framers of the Constitution did not intend to restrain the states in their regulation of their civil institutions, adopted for internal government . . . may be admitted.” Id. at 629. In the wake of the fourteenth amendment, Justice Field declared that no “amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribed regulations to promote health . . . education . . . good order of the people.” Harbord v. Connolly, 113 U.S. 27, 31 (1885).


30 “[S]o far from the states which insisted upon these amendments, contemplating any restraint or limitation by them on their own powers, the very cause which gave rise to them, was a strong jealousy on their part of the power which they had granted in the Constitution.” Holmes v. Jennison, 29 U.S. (10 Pet.) 540, 587 (1840) (Harbord, J.).


32Id. at 250. “An alleged surrender . . . of a power of government . . . must be shown by clear and unequivocal language; it cannot be inferred from . . . any doubtful or uncertain expression.” Belmont Bridge v. Wheeling Bridge, 138 U.S. 287, 292–93 (1891).

333 J. Elliot, supra note 18, at 289, 354. Oliver Ellsworth said in the federal Convention that “he turned his eyes to State governments ‘for the preservation of his rights.” 1 M. Farrand, supra note 20, at 492. Hamilton wrote that “the State legislatures” would be the “vigilant but suspicious and jealous guardians of the rights of the citizen against encroachments from the federal government.” The Federalist No. 26, at 163 (A. Hamilton) (Mod. Lib. ed. 1937).
"to turn somersaults with history," to convert what was designed to limit federal powers into their enlargement. In short, the ninth amendment is to be read in light of Justice Story’s statement that the Constitution is founded on a wholesome and strenuous jealousy which, foreseeing the possibilities of mischief, guards with solicitude against any exercise of power which may endanger the states, as far as it is practicable.35

Consider next the immediate origin of the Bill of Rights. Many feared, as Madison noted, that an enumeration of some rights might deliver those not enumerated into the hands of the federal government.36 James Wilson told the Pennsylvania Convention that a complete enumeration of rights was impossible, and that “if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposefully omitted.”37 Others stressed that what was not granted, or enumerated, was reserved.38 But advocates of the Constitution could “not overcome widespread suspicion”:39 there was pervasive distrust of power.40 So, Patrick Henry asked in the Virginia Convention, “What do they tell us? That our rights are reserved. Why not say so?”41 George Mason asked: “If they are not given up, where are they secured?”42 The ninth and tenth amendments were designed to set such fears at rest, to put the obvious beyond peradventure. As Charles Jarvis earlier assured

the Massachusetts Convention: “[B]y positively securing what is not expressly delegated, it leaves nothing to the uncertainty of conjecture, … but is an explicit reservation of every right and privilege which is nearest and most agreeable to the people.”43 That reservation, the Court stated in Kansas v. Colorado.44 was “made absolutely certain by the Tenth Amendment.”45 As much may be said of the ninth. Justice Story wrote that it “was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others.”46 that is, the enumeration of rights in the first eight amendments was not to be construed to deny “others retained by the people.”

It is time to examine the legislative history of the ninth amendment. “Madison’s conception of constitutional rights,” it is agreed, “is the most pertinent to an understanding of the Ninth Amendment’s intended function.”47 It was Madison who introduced and explained the Bill of Rights, stating at the outset that “the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act or to act only in particular mode.”48 In other words, the Bill was (1) to limit the earlier delegated powers, by (2) carving therefrom “exceptions” in the form of “rights”; (3) in which area the federal government “ought not to act,” i.e., in the area of “retained” rights. How this is converted into authority to fish in the pool of undescribed “rights” for federal enforcement passes understanding.

To meet the objection that enumeration in the Bill of Rights of some rights would result in the “implication that those rights which were not singled out, were intended to be assigned into the hands of the General Government,” Madison said that this danger could “be guarded against … [by] the last clause of the fourth resolution.”49 That last clause, the progenitor of the ninth amendment, provided:

43 J. Story, supra note 35, § 1007.
44 Barnett, supra note 9, at 3.
46 Id. at 439 (emphasis added).
The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.50

In short, the purpose was to "guard against" the implication that the unenumerated rights were to be "assigned" to the federal government, to preclude an enlargement of the delegated powers; and the "exceptions" were to serve as "actual limitations of such powers." What was not "assigned" to the federal government could scarcely be exercised by it. Madison's disclaimer of intention "to enlarge the powers delegated by the Constitution" by non-enumeration of "other rights," and his emphasis upon the enumerated "exceptions" as "actual limitations" on such powers bars a construction that would endow the federal government with the very powers that were denied. It is incongruous, moreover, to read the ninth amendment as expanding federal powers at the very moment that the tenth was reserving to the states or the people all powers "not delegated." John Ely observed that "[o]ne thing we know to a certainty from the historical contact is that the Ninth Amendment was not designed to grant Congress authority to create additional rights, to amend Article I, Section 8 by adding a general power to protect rights."51 And he pointed out that the phrase, "'others retained by the people' [is not] an apt way of saying 'others Congress may create.'"52 That power of creation equally was withheld from the courts; the Founders did not regard the courts as "creators" or as lawmakers.53 Then too, because the federal government may not deny unenumerated rights, it does not follow that is may enforce them.

In fact, enforcement was to be confined to expressly "stipulated rights." '[T]he great mass of the people who opposed" the Constitution, said Madison, "disliked it because it did not contain effectual provisions against encroachments on particular rights."54 Hence, Madison explained, if the Bill of Rights were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; ... they will be naturally led to resist encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."55 Thus, enforceability turned on the presence of "particular," "expressly stipulated" rights, not the undescribed rights "retained by the people." The Framers' purpose was narrow—courts would serve as "guardians of those [stipulated] rights"; they could not claim an expanded jurisdiction of the "other" retained rights. And in fact they have refused to do so.

Those who look to the ninth amendment as a reservoir of new rights presumably expect the Court, as they have in the recent past, to fashion them. Judicial enforceability, however, poses yet other problems. The Founding Fathers did not share the current infatuation with judicial creativity. Jefferson Powell, the activist legal "historian," observed that the Puritan fear of "twisted construction" had traveled to America, and that "a cultural suspicion of judicial interpretation" was widespread in late eighteenth century America.56 This was allied to what James Wilson described as "aversion and distrust" of judicial power,57 plus a "profound fear" of judicial discretion,58 so that Hamilton felt constrained to assure the ratifiers that of the three branches the judiciary is "next to nothing."59 Far from expecting the judiciary to protect the rights they had studiously retained, they viewed the judiciary with suspicion. In consequence, Hamilton emphasized that judicial "encroachments on the legislative authority"—what but law making is the judicial framing of new rights—would be checked by impeachment.60

50 Id. at 435 (emphasis added).
52 Id. Barnett agrees that "Madison made clear that the retained rights were not 'assigned' to the federal government," and concludes that "the courts have not been empowered to enforce the retained rights," stressing that "Madison speaks here of 'particular powers ... given up to be exercised by the Legislature.'" Barnett, supra note 11, at 15 n. 54. I find no reference to the "Legislature" in this "assigned" passage. If I have overlooked it, it takes more than mere mention of the legislature to cut down the "not assigned to the General Government." The burden is on Barnett to prove that what was withheld from the "General Government" was "assigned" to Congress.
53 Beginning with Francis Bacon, it has been reiterated that it is not for courts to make law. For citations see Berger, The Activist Legacy of the New Deal Court, 59 Wash. L. Rev. 751, 785 (1984).
54 Annals of Congress, supra note 48, at 433 (emphasis added). Speaking of free speech and trial by jury, Madison said, "[E]very Government should be disarmed of powers which trench upon those particular rights." Id. at 441.
55 Id. at 439 (emphasis added).
58 G. Wood, supra note 18, at 298.
59 The Federalist No. 78, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).
60 The Federalist no. 81, at 526 (A. Hamilton) (Mod. Lib. ed. 1937)
Let us postpone consideration of the nature of the retained rights and turn to the elaborate argument made by Randy Barnett, “one of [the] warmest supporters” of an activist construction of the ninth amendment. I focus on him because he is in the forefront of those who would read their libertarian agenda into the amendment, having organized the Symposium, written a lengthy Foreword, published a forty-two page article elaborating his views, and is the editor of a recent book devoted to the subject.

III. Randy Barnett’s Heterodoxy

A. The “Rights-Powers” Conception

Although Barnett purports to rely on Madison, he does not deal with Madison on his own terms. Rather, he first frames the discussion in what he considers the erroneous “rights-powers” conception of the amendment, whereunder “delegated powers and constitutional rights are logically complementary.” On this view, the ninth amendment means “nothing more that what is stated in the Tenth,” notwithstanding that the “Tenth Amendment does not speak of rights . . . but of reserved powers” whereas “the Ninth Amendment speaks only of rights, not of powers.” “Logically complementary” analysis, he continues, leaves “absolutely no need for another amendment confusingly written in terms of ‘rights’ that are ‘retained by the people,’ to express exactly the same idea,” namely, that “powers not delegated are reserved.” Rights and powers, however, are quite different concepts; they do not “express exactly the same idea.” “Power” is the ability to act. For instance, the driver of an automobile has the “power” to drive through a red light; a pedestrian crossing the red signal has a “right” to pass unharmed. The driver has the power to run down the pedestrian, although he is under a duty not to harm him. It is rights and duties that are correlated, not rights and powers. To say that these different concepts mean one and the same thing is to do violence to language. Barnett’s assertion that “rights begin at precisely the point where powers end,” overlooks that the driver retains power to drive away after striking the pedestrian. Madison’s description of a right as an “exception” to a power leaves the balance of the power in place. Hence the power does not “end” at “precisely the point” where “rights begin.”

On this analysis, rights are not “the logical converse” of the delegated powers. But assuming the contrary, Barnett argues that the “very enumeration of a particular power in the Constitution automatically ceded to the general government any potentially conflicting rights that might have existed prior to the adoption of the Constitution,” so it follows that “even an enumerated right should never constrain an enumerated power.” It by no means follows. Madison spoke to the contrary: an “enumerated right” constitutes an “exception” to, and therefore “constrains,” an enumerated power. Nor does Barnett’s “potentially conflicting rights” sustain his conclusion. “Potential” is defined as

64 Barnett, supra note 9, at 6.
65 Justice Story quoted Bacon: An “exception strengthens the force of a law in cases not excepted.” J. Story, supra note 35, § 448, at 342.
66 Barnett, supra note 9, at 7.
67 Id. (emphasis added). Certainly I should not be cited for Barnett’s pronouncement that “[i]f thus viewed, the Bill of Rights added nothing, but was merely declaratory.” Id. at 7. My statement was Madison admitted that the amendments “may be deemed unnecessary, but there can be no harm in making such a declaration.” Thus viewed, the Bill of Rights added nothing, but was merely declaratory.
68 Berger, supra note 1, at 6. Madison was epitomizing the view expressed by such as Hamilton: “[W]hy declare that things shall not be done which there is no power to do.” The Federalist No. 84, supra note 16, at 559. That is far cry from Barnett’s citation for “even an enumerated right should never constrain an enumerated power.” Barnett, supra note 9, at 7.
69 Barnett argues that “Madison would have no reason to devise a means of protecting unenumerated rights placed in jeopardy by an enumeration that, at that time [before submission of the Bill of Rights], he still opposed.” Id. at 8. Speculation about Madison’s motivation “at that time” cannot curtail the later express reservation by the ninth amendment of those unenumerated rights to the people. They, and they alone, are to protect them.
"[p]ossible as opposed to actual";72 "possible" as "capable of being realized,"73 and therefore as yet nonexisting. Rights that may or may not come into being can hardly be equated with enumerated, actual rights. Barnett recognizes the present day "jurisprudential climate where the only rights deemed to be 'real' are those that a court has recognized."74 Nor does "denying the effect of unenumerated rights [deny] effect to enumerated rights as well."75 To deny effect to a "potential," as yet nonexisting right, is not the same as denying effect to an enumerated, existing right. So too, I would not deny effect to the unenumerated rights of the ninth amendment, but only insist that it is for the people, not the judiciary, to clothe them with actuality.

Barnett asserts that "the rights-powers conception specifies that the rights retained by the people automatically diminish as the powers of government expand—a construction that contradicts the stated purpose for declaring the existence of individual rights."76 Barnett's "automatically diminish" construction is at war with Hamilton, who explained that under the Constitution "the people surrender nothing; and as they retain every thing they have no need of particular reservations."77 Moreover, under the Constitution, "powers" do not expand by themselves; they are grants from the people, so that to the extent that they infringe on the "retained" rights, that represents a choice by the people, the ultimate sovereign. In fact, however, "stated purpose for declaring the existence of individual rights" found expression in those enumerated in the first eight amendments. Forming "exceptions" to the delegated powers, they diminished those powers, not the "other rights" that were "retained."

"Logically complementary" analysis leads Barnett into another cul de sac: "When rights are viewed as the logical obverse of powers, content can be given to unenumerated rights by exclusively focusing on the expressed provisions delegating powers."78 How do "expressed provisions" give "content" to unenumerated rights? What content does trial by jury give to a "potential" right to fly to the moon? Barnett finds it "impossible" to associate a specific right with an enumerated power.79 On this reasoning, how does one conceive of "constitutional [enumerated] rights" as the "logical obverse" of enumerated powers?80 "Logically complementary" is of no help. "Complementary" means "each of two parts which mutually complete each other."81 That cannot be said of rights "retained by the people," which he recognizes to be innumerable, whereas the enumerated powers are few. Logically, innumerable unidentified rights cannot "complete" a few specific enumerated powers.

Nor is the ninth amendment "superfluous."82 Barnett urges that it "has absolutely no role to play in the [orthodox] analysis," that it is "functionless."83 One may as well argue that a reservoir has no role to play unless judges turn on a spigot. One function was pointed out by Dean Roscoe Pound: "If the Ninth Amendment is read with the Tenth" the retained rights are "left to be secured by . . . the people of the whole land by constitutional change, as was done, for example, by the Fourteenth Amendment."84 Not only is the ninth amendment a reservoir of rights on which the people can draw, but it can be the predicate of a charge that federal authorities have violated it, just as the tenth amendment has been used in times past. The ninth, in Barnett's words, "operate[s] as a genuine and enforceable constraint on government,"85 thus deflating his assertion that it is rendered "effectively inapplicable to any conceivable case or controversy."86 Judicial enforcement, in my judgment, is limited to its traditional "negative" role of policing constitutional boundaries,87 i.e., halting legislative or executive invasion of the "retained" rights area.

74Barnett, Foreword to Symposium, supra note 2, at 60 (reprinted as chapter 18 of this volume).
75Barnett, supra 9, at 7-8.
76Id. at 16.
77The Federalist No. 84, supra note 16, at 558.
78Barnett, supra note 9, at 5.
That policing function, however, does not license the courts to invade the state-people domain by fashioning new rights in the name of the ninth amendment. Why, it needs to be asked, did the Founders depart from their purpose to limit the delegated powers by “exceptions” expressed in the first eight amendments, only to confer unlimited judicial power by the ninth? If the ninth amendment was designed to authorize the courts to “enforce”, i.e. to create, whatever rights they deemed necessary, the first eight amendments were superfluous. In truth, Madison, as we have seen, plainly limited judicial enforcement to the “stipulated,” i.e., enumerated, rights.\(^9\)

Barnett would recast the “original debate,” urging that “[t]he idea that constitutional rights are simply what is left over after the people have delegated powers to the government flies in the face of the amendments themselves.”\(^9\) That is his “idea,” not that of the Founders. “Constitutional rights” must refer to those enumerated in the Constitution; they are not “leftovers” but “exceptions” to the delegated powers. Consider Barnett’s statement that “it is impossible to find a ‘right to a speedy and public trial by an impartial jury’” and other rights expressed in the fourth and fifth amendments by “examining the limits of the enumerated powers.”\(^9\) Trial by jury is an unfortunate choice, because article III, section 2 expressly provides for it in criminal cases, and it is expressly provided by the sixth amendment. Assume arguendo its absence, why should we look for trial by jury in the powers, for example, to borrow money, regulate commerce, establish post offices, raise armies, etc.? The delegation of powers postulated that what was not granted was retained, as the tenth amendment confirmed. No power to curtail or abolish trial by jury was conferred by article II, section 8; consequently, it was retained by the people who soon embodied it in the sixth amendment. In any case, the “impossibility” of assigning the enumerated rights to particular powers is of no moment given that they were framed as “exceptions” from the delegated powers in toto, exhibiting, in Madison’s words, an excess of “caution.”\(^9\) Barnett’s charge that his opponents would “neutral” the ninth amendment gains nothing from his allegation that “they fail to discern the distinct functions played by the Ninth and Tenth Amendments.”\(^9\)

They understand full well, to borrow his own words, that “[t]he danger of interpreting federal powers too expansively was handled by the Tenth Amendment, while the danger of jeopardizing unenumerated rights was addressed by the Ninth Amendment.”\(^9\) The jeopardy the Founders feared was federal intrusion into the “retained” domain, not least by the “expansive” federal courts.

Anticipating that his theory is vulnerable, Barnett states that “[o]ne might try to salvage the rights-power theory by claiming that there can be no clash between powers and rights because Congress has no power to violate a constitutional right.”\(^9\) This, however, he argues, “suggests an entirely different methodology for determining the content of constitutional rights than that described by Justice Reed in United Public Workers v. Mitchell.”\(^9\) He misreads Mitchell: The Court stated that “[i]f granted power is found, necessarily the objection of invasion of those rights reserved by the Ninth and Tenth Amendments, must fail.”\(^9\) Self-evidently, a specific grant of power overrides an unenumerated right. How can an undescribed right present an obstacle to the exercise of a granted power? Nor is it a tenable objection that “[t]his formulation of the rights-powers distinction would require an inquiry into the substance of constitutional rights to determine the extent of Congressional power.”\(^9\)

The annotations to the first amendment are studied with such inquiries. “Moreover,” Barnett maintains, “this distinction does not provide an

\(^{9}\) See supra text accompanying note 55.
\(^{9}\) Barnett, supra note 9, at 9.
\(^{9}\) Id.
\(^{9}\) See supra text accompanying note 50.
objection to including unenumerated rights in such an inquiry. 99 Until the people give them expression, unenumerated rights, by his own testimony, "are as varied as our imaginations"; 100 inquiry into imaginary rights will not commend itself to lawyers and judges.

B. The "Power Constraint" Conception

Having— to his satisfaction— laid "the rights-power conception to rest," 101 Barnett shifts to the "better" "power constraint" conception, stating that "enumerated rights can potentially limit in some manner the exercise of powers delegated by other provision of the Constitution." 102 This obfuscates Madison's simple explanation that "rights" are "exceptions" to delegated powers. Employment of a different vocabulary, chopping that simple proposition into bits and pieces, obscures the nature of the problem. For example, Barnett remarks that the "power-constraint conception contemplates a potential conflict between constitutional rights and enumerated powers." 103 He instances a hypothetical congressional exercise of its tax power to infringe the "enumerated rights of free speech"; but that, he considers, does not violate the tenth amendment, for it is acting within its delegated power. 104 The free speech right, however, constitutes an "exception" to the delegated powers, including the power to tax. 105 Congress's "delegated [tax] power" therefore did not extend to free speech, rendering unnecessary resort to the tenth amendment's protection of reserved powers. It is flawed analysis to refer to a "conflict between constitutional rights and enumerated powers." As "exceptions," the rights cut down the delegated powers; no "conflict" is presented by the expression of a purpose to curtail a delegation.

Barnett would explain his tax example as not involving "whether Congress has such a power, but whether the means which it has employed conflict with" the free speech amendment. 106 A means does not exist in vacuo. As the necessary and proper clause makes clear, it exists only to carry a granted power into execution. 107 Inasmuch as the free speech amendment curtails the tax power, the means is likewise abridged. It was because the necessary and proper clause "heightens the prospect that Congress" may enact laws that "are neither necessary nor proper," 108 that Madison underlined the need for a Bill of Rights. 109 Barnett himself concludes that the Bill places "restrictions on the means by which government may pursue its delegated ends." 110

"If one concedes," Barnett argues, "that the rights enumerated in the Constitution were intended as 'actual limitations of such [delegated] powers,' [then] a fundamentally different conception of constitutional rights applies to the 'retained' rights of the Ninth Amendment than applies to the enumerated rights." 111 But, Barnett opines, "This implication appears to conflict with Madison's claim that the enumerated rights also included 'retained' rights." 112 Madison described three categories of "enumerated" rights, the second of which "specified those rights which are retained when particular powers are given up [i.e., delegated] to be exercised by the Legislature." 113 Read simply, the specified rights are retained when powers are delegated; in Madison's words, they constitute "exceptions" to the delegations, intended to make doubly sure federalist assurances that the delegated powers, for example, did not authorize federal

99Id.
100Id. at 35.
101Id. at 3.
102Id. at 11–12.
103Id. at 12.
104Id.
105As Barnett notes, "[b]oth Hamilton and Wilson argued that an expressed protection of freedom of the press was unnecessary since the regulation of the press was beyond the power of Congress." Id. at 5 n. 13.
106A means does not exist in vacuo. As the necessary and proper clause makes clear, it exists only to carry a granted power into execution. Inasmuch as the free speech amendment curtails the tax power, the means is likewise abridged. It was because the necessary and proper clause "heightens the prospect that Congress" may enact laws that "are neither necessary nor proper," that Madison underlined the need for a Bill of Rights. Barnett himself concludes that the Bill places "restrictions on the means by which government may pursue its delegated ends." "If one concedes," Barnett argues, "that the rights enumerated in the Constitution were intended as 'actual limitations of such [delegated] powers,' [then] a fundamentally different conception of constitutional rights applies to the 'retained' rights of the Ninth Amendment than applies to the enumerated rights." But, Barnett opines, "This implication appears to conflict with Madison's claim that the enumerated rights also included 'retained' rights." Madison described three categories of "enumerated" rights, the second of which "specified those rights which are retained when particular powers are given up [i.e., delegated] to be exercised by the Legislature." Read simply, the specified rights are retained when powers are delegated; in Madison's words, they constitute "exceptions" to the delegations, intended to make doubly sure federalist assurances that the delegated powers, for example, did not authorize federal
control of free speech. The very act of enumeration is at war with inclusion of all the "other" enumerated rights. Why enumerate if everything is included? Barnett's reading would obliterate the distinction drawn on the face of the ninth amendment between "enumerated" and "retained" rights; one branch of a distinction cannot swallow up the other without rendering the distinction meaningless. That is an unreasonable inference; it also collides with Madison's aim to limit, not enlarge, federal power.

Barnett's conclusion that his elaboration of Madison's view "reveals a fundamental flaw in any interpretation that acknowledges the power-constraining function of enumerated powers while denying this same function to unenumerated rights" reveals rather that he is caught in the toils of his rhetoric. He paraphrases Madison: "An expressed declaration of 'rights retained... that... shall not be abridged' has the same object in view as an expression that 'powers granted... shall not be extended.' The object of both strategies is that 'the rights retained... be secure.' Given this object, if one provision has teeth, so must the other." Barnett cannot fasten on infringement of unidentified rights. Barnett recognizes that the ninth and tenth amendments have "distinct functions," They do not become identical because they have the same "object." One may as well argue that because the object of planes and wagons is transportation that they are therefore the same. Of the same order is his claim that to 'deny the effect of unenumerated right' is to deny "effect to enumerated rights as well." How does one effectuate an imaginary right? Even stranger is Barnett's conclusion that "the Federalists' fear that enumerating rights would diminish other, unenumerated rights suggests only that they wanted unenumerated rights protected every bit as much as the enumerated rights." But the protection the Framers sought was against the "General Government," including the judiciary. By Barnett's own testimony, "the courts have not been empowered to enforce the retained rights," whereas Madison declared that they were to be an "impenetrable bulwark" against "every encroachment upon rights expressly stipulated for... by the declaration of rights." The unenumerated, non-"stipulated" rights, it will be recalled, were not to be "assigned" to the "General Government."

Barnett devotes several pages to discussion of Madison's fear of the legislature, deducing that "it is unlikely that Madison would have envisioned the protection of the rights retained by the people being consigned exclusively to the legislature." Of course, retention by the people is at war with "consigned exclusively to the legislature." As Roscoe Pound noted, the "people" can act by amendment. Barnett's gratuitous discussion is but a prelude to his recognition that the courts, in Madison's words, would "resist every encroachment upon rights expressly stipulated for." "Seizing upon this phrase," he states, "Raoul Berger argued that judicial review was originally intended to be confined to the enumerated rights." Barnett attempts to escape from the force of Madison's express, unequivocal words:

Although this passage is consistent with such an interpretation, it hardly compels it. The proposal under consideration at the time included an enumeration of expressly stipulated rights, so it is natural that Madison would dwell on the advantages of such a strategy. This in
no way requires, however, that expressly stipulated rights were to be the only rights receiving judicial protection. Reference to "stipulated" rights, on time honored rules, excludes the non-stipulated. And he himself declared that "the courts have not been empowered to enforce the retained rights." Madison's use of "stipulated" was not fortuitous; he also referred to the "exceptions . . . in favor of particular rights." "Particular" is defined as "relating to a single definite thing or person, a set of things or persons as distinct from others." So, too, to "stipulate" is to specify, and to "specify" is to invest with a specific character. The "particular" specifies something that is identifiable; that cannot be said of an undescribed right. Lawyers do not "stipulate," "particularize" or "specify" with the object of leaving the door open to unnamed things. They act on the expressio unius maxim—what they name excludes the unmentioned. This is reinforced by Madison's aim to "guard against" assigning "those rights which are not singled out" to the general government.

No matter! Barnett explains this "assigned" passage: "Without judicial review of government interference with the unenumerated rights retained by the people, the legislature would be the judge in its own

Id. at 15 n. 54. Let him reconcile this statement with: "An analysis that supports judicial review of legislative interference with enumerated rights while denying equal judicial protection to unenumerated rights is inherently suspect. The words of the Ninth amendment argue strongly against such a construction." Id. at 21.

See supra text accompanying notes 54-55. He explained: "The great mass of the people who opposed [the Constitution] disliked it because it did not contain effective provisions against encroachment on particular rights." 1 Annals of Congress, supra note 48, at 433. For "particular rights," see also supra text accompanying note 50.


Id. at 715.

Id. at 160.

Barnett, supra note 9, at 20. To this analysis Barnett opposes bald assertion: "[T]he fact that Madison refers to the perceived threat to 'particular rights' does not mean that the other rights retained by people were to be left unprotected from encroachment. The Ninth Amendment was intended to negate this inference." Id. at 23 n. 83. This flies in the face of the age-old expressio unius rule, and Madison's repeated emphasis on "particular," "stipulated" rights. In the upshot, it was the "particular rights" that were enumerated, the "other rights" were not "assigned" to the General Government but "retained" by the people. Again and again Barnett seeks to escape from the clear ordinary meaning of words (with no legislative history to the contrary) in favor of some labored obscurity. So, he deplores the failure "to acknowledge and expanded scope to the implied rights referred to in the Ninth Amendment." Id. at 25-26. His recognition that the retained "other rights" were innumerable, id. at 35, is incompatible with "expanded scope." How does one expand the innumerable? How, too, are "other rights" that are specifically retained "implied?"

Against Barnett's asserting that it is "highly unlikely" that Madison confined judicial review to the enumerated rights is Madison's assurance, referring to the Bill of Rights, that the courts would be "the guardians of those rights," the "bulwark" against encroachments "upon rights expressly stipulated for." One who would expand crystal clear words must produce not speculation, but legislative history of a purpose that went beyond the words. Then, too, how would courts "enforce" rights that are undescribed?

"An analysis," argues Barnett, "that supports judicial review of legislative interference with enumerated rights while denying equal judicial protection to unenumerated rights is inherently suspect." He is not invoking the fourteenth amendment's "equal protection" of persons, but is arguing for "equal protection of all rights protected by the Constitutions of the states" as an equal class. Barnett's text accompanying note 110. "[T]o quarrel with the records without abundant cause is to engage in a desperate cause." Id. at 21. A question, at least, is raised by the different phraseology of the ninth and tenth amendments. The ninth refers to rights "retained by the people," whereas the tenth reserves powers "to the States respectively, or to the people." The reservation to the states embraces their legislatures, suggesting that only the "people" can act under the ninth.

139 Id. at 21.

139 See supra text accompanying note 110. "[T]o quarrel with the records without abundant cause is to engage in a desperate cause." Id. at 21.

140 Barnett observes: "[I]f government exceeded its proper boundaries . . . then a declaration of constitutional rights might provide an invaluable second line of defense." Barnett, supra note 9, at 23. "Constitutional rights," he noted, "were not to be added by amendment," Id. at 22, that is, by drawing on the "other rights" the people retained in the ninth amendment. This does not extend judicial protection to the "other rights" not so added.

He misquotes me as suggesting that the Framers "would have rejected out of hand" judicial protection of individual rights." Id. at 23. I merely suggested that they would have rejected judicial dipping into a bottomless well for "the formation of undreamed of rights in their limitless discretion," a quite different proposition. Berger, supra note 1, at 2.

141 Barnett, supra note 9, at 21.
tion." 140 It took the fourteenth amendment to secure equal protection for persons; where is the constitutional source for equal protection of rights? 141 Madison made plain that only the "particular," "stipulated" rights had judicial protection. Barnett's argument is exploded by Madison's plainly limited sphere of judicial protection. But, he contends, that "[i]f we concede that enumerated rights are not, is to 'diminish' their 'just importance' and surely to 'disparage' them, if not to 'deny' them altogether. Denying judicial protection to the unenumerated rights effectively surrenders them up to the general government." 142 Yet, he states, "[T]he courts have not been empowered to enforce the retained rights." 143 To deny that the unenumerated rights are judicially enforceable is not "to 'deny' them altogether." The "people," who "retain" those rights, can adopt an amendment to give some or all of them effect. It was to avoid such surrender, to rebut the implication that the unenumerated rights were "assigned" to the "General Government," that the "retained" language appears in the ninth amendment. What the ninth amendment sought was to protect the rights of the people to frame new rights; that was what could not be denied or disparaged. Rights that remain in the hands of the people are not "diminished," "disparaged" or "denied" because the judiciary is not authorized to dredge undescribed rights from the ninth.

C. "Three Methods of Interpreting Unenumerated Rights" 144

Thus far I have covered only about half of Barnett's forty-two pages. To proceed in the same painstaking detail would weary the reader and be hardly worth the effort. For example, Barnett sets forth three methods of interpreting unenumerated rights, which rest on an assumption that "the

140 Id. at n. 77 (emphasis added).
141 In Missouri v. Lewis, 101 U.S. 22 (1879), Justice Bradley stated that the fourteenth amendment "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line." Id. at 31.
142 Barnett, supra note 9, at 21. The argument was earlier made by Charles Black, but wrapped up, supra note 4, at 183, doubts that a right is being denied or disparaged if another is promoted, pointing to the privileged position given to free speech as compared with other enumerated rights. Throughout, Barnett, cites Black, who is a flaming apostle of the school that holds if the result if "good" and "just," ergo it is constitutional. In the Convention, however, James Wilson said: "Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet not be 'unconstitutional.'" 2 M. Farrand, supra note 20, at 73.
143 Barnett, supra note 9, at 15 n. 54.
144 Id. at 30–38.

Framers intended that unenumerated rights be protected by the judiciary. 145 That assumption, I have demonstrated, is utterly untenable and renders an attempt to furnish guidelines for "determining the content of such rights" 146 unnecessary. If the reader remains unconvinced that the Framers did not contemplate judicial interference with the retained "other rights" before the "people" framed them, nothing I can add will persuade. Nevertheless, I may be indulged for noticing a few more of Barnett's singular flights.

Although he holds that the retained rights "are as varied as our imagination," 147 he cites James Wilson for a "comprehensive and specific" list of rights. Wilson referred to man's "natural right[s] to his property, to his character, to liberty and to safety . . . to be free from injury, and to receive the fulfillment [sic] of the engagements, which are made to him." 148 Presumably the references to "engagements" are to the private law of contracts, not "rights" against the state. "On these two pillars principally and respectively," Wilson continues, "rest the criminal and civil codes of the municipal law." 149 Wilson largely paraphrased the "life, liberty and property" of the fifth amendment's due process clause. That Wilson's is not a "comprehensive" list is attested to by the recitals of the other seven amendments. In point of fact, Wilson himself considered that in no book "can you find a complete enumeration of rights appertaining to the people," and that no delegate to the Convention "would have attempted such a thing." 150 A view I share with Barnett.

It was a widely accepted maxim that all power resides in the people, 151 and they exercised it in framing the Constitution. Among the "other rights" they retained was, as the Declaration of Independence proclaimed, the "Right of the People to alter or abolish" the government, as is confirmed by article V which reserves the right to amend the Constitution to the people. Thereby, in my judgment, the people are left free to declare whatever they choose a "right," even if the right was theretofore undreamed of, thus rendering unnecessary a "people's" search for a nat-
urtal law, customary or common law right as the antecedent for one they choose to frame. But this right the people reserved unto themselves; it has never been delegated by them to judges.

Turn to "The Constructive Method," whereunder Barnett cites "examples of unenumerated rights that have been acknowledged by the courts over the past 200 years." He appends a list of thirteen. A few examples will suffice to show that they are rooted in the Constitution itself or in the common law. But first an example of judicial prestidigitation, the right of "equal protection not only from the states but also from the federal government." "Equal protection" from the states first appears in the fourteenth amendment. Extension to the federal government in Bolling v. Sharpe in which the Court held that a person has a right to the equal protection of the laws against the federal as well as the state governments, notwithstanding the fact that the Equal Protection Clause of the Fourteenth Amendment applies only to the states. John Ely, a perfervid admirer of Chief Justice Warren, stamped his Bolling decision as "gibberish both syntactically and historically." Let it suffice that it exemplifies naked judicial revision of the Constitution.

152Barnett, supra note 9, at 32 n. 106. See also text accompanying note 9. Barnett acknowledges that

Many would question the competence of judges to engage in the interpretive enterprise that a constructive method would seem to require. Moreover, sharp theoretical disagreement seems inevitable. Although such disagreement does not undermine the actual legitimacy of unenumerated rights, it does serve to weaken the apparent legitimacy of their protection by judges.

Barnett, supra note 9, at 34.

153Id. at 32 n. 106, number 2.

154Id. at 40-41 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

155Ely, Democracy and Distrust 32 (1980) (excerpted in volume 1). Three of Barnett's fellow contributors to the Symposium do not share his enthusiasm for Bolling. Levinson considers that "[t]here is no satisfactory theory... that explains the imposition of the federal government in Bolling v. Sharpe, of the equal protection norms." Levinson, supra note 3, at 147. Bolling is cited by Grey as an example of "when the Court treats the words of the Constitution as essentially irrelevant to its decision." Grey, supra note 9, at 230. And Sager is greatly troubled by the "baldly prochronistic doctrine that the due process clause of the fifth amendment incorporates the principles which underlie the equal protection clause (ratified roughly 100 years later)." Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 262 (1988) (reprinted as chapter 9 of this volume).

Consider Barnett's citation of the "right to vote." That was always a creature of the states; it took the fifteenth, nineteenth and twenty-sixth amendments to extend this right to citizens of the United States. So, too, the "right to travel" is derived from article IV: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Those can only be enjoyed within a sister state, thus contemplating travel from one state to another, as the predecessor article IV of the Articles of Confederation expressly provided by the rights of "ingress and regress." Some of the other examples cited by Barnett are common law rights, such as the "presumption of innocence," an attribute of a due process trial. For the Founders the provision for jury trial carried with it all its incidents. The right to use the federal courts was self-evident: for what purpose were courts created if not for the citizens' use, an inference confirmed by the diversity jurisdiction for controversies "between citizens of different States." Nor was the "right to marry" a creation of American courts; it antedated even the common law. Barnett sums up: "[T]he right to travel... and the right to equal protection of the laws from the federal government—are now well accepted and provide paradigm examples or 'easy cases' from which theories of unenumerated rights can be developed." Such are the wondrous judicial feats that Barnett exhorts the courts to follow.

156Senator Jacob Howard, to whom it fell to explain the fourteenth amendment to the 1866 Senate, said:

We know very well that the States retain the power which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; and the theory of the whole Amendment is, to leave the power of regulating suffrage with the people or legislatures of the States, and not to assume to regulate it by any clause of the Constitution.


157H.S. Commager, supra note 94, at 111. Chief Justice White said of the provisions of article IV of the Articles of Confederation and article IV, § 2 of the Constitution: "the purpose of both the provisions is the same." United States v. Wheeler, 254 U.S. 281, 296 (1920) (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75-76 (1872)).

Zecheriah Chafee wrote that "there is a queer uncertainty about what clause in the Constitution establishes this right" to travel. Z. Chafee, supra note 17, at 188. The Court found "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision," content that it "has been firmly established" by the Court. Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)). The more remarkable aspect of Thompson is its conclusion that the right to travel carried with it the rights to immediate support at the terminus.

158For citations, see R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 403 (1977).

159Barnett, supra note 9, at 33 (citig Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985)).
Under his third category, "The Presumptive Method," Barnett suggests that instead of authorizing a search for particular rights, the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty (whereunder) individuals are constitutionally privileged to engage in rightful behavior—acts that are within their sphere of moral jurisdiction—and such behavior is presumptively immune from governmental interference.

These are pretty woolly generalizations. Instead of engaging in "a search for particular rights," the people have retained the plenary power to declare whatsoever they please a "right." For the Framers, "liberty" was poles removed from current civil libertarian notions. It had been defined by Blackstone as freedom to go anywhere without restraint, a definition that was read again to the draftsmen of the fourteenth amendment by the chairman of the House Judiciary Committee, James Wilson. Moreover, for the Revolutionary generation the collective will looked higher than "individual rights." The people looked to the states, not the federal newcomer, for protection of their "individual liberty."

Reliance upon "rightful behavior" and "moral jurisdiction" raises yet other problems. Moral philosophers differ widely and "rightful behavior" must be within the several persons' "respective jurisdictional spheres." Barnett would embark the courts on a calculus of morals; before arriving at "rights" against the government, the courts would first have to settle the "respective jurisdictional spheres" between individuals. Apparently, however, Barnett does not favor upon "an inquiry into the substance of constitutional rights to determine the extent of Congressional power." What do we gain from another Barnett suggestion, "[O]nce's common law rights may be viewed as a central background presumption of the Constitution—a presumption that is reflected in the Ninth Amendment"? The common law rights were summarized by Blackstone as security of life, liberty and property, already protected by the due process of the fifth amendment, rendering the ninth supererogatory.

From this murky background Barnett distills: "According to the presumptive method, the unenumerated rights of the Ninth Amendment that protect individual liberty operate identically to enumerated rights." He cites as an example the judicial exception from free speech of "defamation." But he notices that this was an "ancient common law principle" and therefore it was not an unidentified right. He himself observes of a claimed "right of children against their parents" that it "does not require the Ninth Amendment for its foundation; it can readily be assimilated into common law of guardianship." It is a non-sequitur, therefore, to deduce from the "defamation" example that "in the same manner, the Ninth Amendment established a constitutional presumption in favor of other rightful activities." They do not "operate identically." It is one thing to fashion a "presumption in favor of speech" that is not "defamation," and something else again to leap to a presumption in favor of "other rightful activities" that are neither identified nor rest on a common law base. The "defamation" exception to free speech is etched in the common law; "other rights" are amorphous. It is no easier to understand how unidentified rights can protect "individual liberty" than to grasp "emanations from penumbras." Both are empty rhetoric.

But enough; the time has come to cry halt and to leave still other tidbit to other commentators. Despite his disclaimer, his suggested, admittedly "controversial" constraints on judicial interpretation of the ninth amendment, in essence Barnett leaves judges pretty much at large to dip into a bottomless well. The contrary view is regnant because,
according to Barnett, "the Supreme Court and most constitutional analysts have seriously misconceived" the ninth amendment.174 He applauds judicial revision of the Constitution—e.g., *Bolling v. Sharpe*—and deplores the Court's failure to expand its arrogrations. I would urge Barnett to come out of his rhetorical maze and follow Robert Cover's candid avowal:

[A] reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning, nor upon the intentions of the 1787 or 1866 framers. . . . It is for us, not the framers, to decide whether that end of liberty is best served by entrusting to judges a major role in defining our governing political ideas.175

Where did "we" "entrust" this awesome power to judges? Already, as we have seen Thomas Grey has dismal forebodings that the Republican appointees will upset the liberal apple cart. Judicial revision of the Constitution is fine so long as it fulfills libertarian aspirations, but it is anathema when it goes the other way.

IV. Leonard Levy's Pronouncements

Speaking of Madison's restricted "expressly stipulated" rights, Levy states: "Without doubt he was not referring to the desirability of giving courts what Raoul Berger calls a "roving commission to enforce a catalog of unenumerated rights against all of the states."176 He also recognizes that "[b]y excepting many rights [by the Bill of Rights] from the grant of powers, no implication was intended, an no inference should be drawn, that the rights not excepted from the grant of powers fell within those

powers."177 Nevertheless, he argues that "[t]he Problem is not whether the rights it guarantees are as worthy of enforcement as the enumerated rights; the problem, rather, is whether courts should read out of the amendment rights worthy of our respect which the Framers conceivably have meant to safeguard, at least in principle."178 That is by no means the problem. By his own testimony, "the Framers did not intend most, if any, of the rights that litigants read into the Ninth."179 What litigants "read into the Ninth" counts for nothing until accepted by the Court, acceptance that has notably not been forthcoming. Moreover, if "rights not excepted from the grant of powers" do not fall "within those powers," how can courts "read out of the amendment rights...which the Framers conceivably have meant to safeguard"?

Levy concedes that Justice Goldberg's 1965 approach was not that of the Framers, but enters a strange plea in avoidance:

The fact that the Framers did not intend most, if any of the rights that litigants read into the Ninth and would have found bizarre the notion that the Constitution protects any of those rights is really of no significance. We must remember, after all, that the Framers would have found bizarre most of the features of our constitutional law.180

Baldly stated, prior judicial departures from the will of the Framers justify every fresh infringement.

Finally, Levy differs with my statement that the ninth amendment "added no unspecified rights to the Bill of Rights," commenting: "But an explicit declaration of the existence of unenumerated rights is an addition of unspecified rights to the Bill of Rights."181 This is a word juggling, and odd logic to boot. The textual emphasis on "other rights retained by the people" is transformed by Levy into the *addition* of unspecified rights to the Constitution. What is retained is not added. Substantively, the ninth's "explicit declaration" merely formalized the assurances by Wilson, Hamilton, Madison and Marshall—all is retained that has not 174Id. at 42. Of the same order is his bland reference to the due process clauses as "abstract constitutional provisions." Hamilton, on the contrary, said: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice." 4 The Papers of Alexander Hamilton 35 (H. Syrett & J. Cooke eds. 1962). Charles Curtis, an admirer of the Court's "adaptation" of the Constitution, said that the meaning of the words due process "was as fixed and definite as the common law could make a phrase." They "meant a procedural due process." Curtis, *Review and Majority Rule*, in Supreme Court and Supreme Court Law 170, 1777 (E. Cahn ed. 1954). Justice Story wrote that the clause "affirms the right of trial according to the process and proceedings of the common law." 2 J. Story, supra note 35, § 1789.


177Id. at 272.

178Id. at 283.

179Id. at 268 (emphasis added).

180Id.

181Id. at 280. Levy converts my mistaken reading of "States" into the ninth amendment into evidence that I am a "hostile critic of the amendment ... eager to keep it a feeble provision." Id. I am hostile only to those who would "read their claims" into the amendment, and "eager" only to give it its historic significance. Levy's exuberant rhetoric betrays his bias.
been surrendered. It “added” nothing to the list of rights; the “unspecified rights” remained exactly where they were—retained by the people.

V. Conclusion

The Supreme Court’s steadfast rejection of the activist gloss on the ninth amendment is solidly based. In sum, the people looked to the States, not the federal newcomer, to protect their rights. Each right enumerated in the Bill of Rights, Madison explained, carved out an “exception” to the delegated powers, crowned by the ninth amendment’s reservation of the “other rights” retained by the people.” What was retained was not delegated to the general government for enforcement or otherwise. To “guard against” the “assignment” of those “other rights” to the government, Madison underscored that the ninth amendment was to limit, not to enlarge, federal power. Refusal to accept these incontrovertible facts underlines that bringing a libertarian agenda to the task of constitutional construction warps analysis and results in wishful thinking.

15. The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*

Thomas B. McAffee

I. Introduction

The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” There is no question that this Amendment was designed as a savings clause, to ensure that the specification of particular rights would not raise an inference that the Bill of Rights exhausted the rights which the people held as against the newly-created national government. But there is an ongoing debate as to nature of these additional rights retained by the people and as to the sort of claim they might support against the exercise of government power.

On the one hand, some commentators contend that the other “retained” rights are those guaranteed by a fundamental law that exists outside the written Constitution; they are the natural rights that individuals “retain” when they enter into civil society by agreeing to live by the social contract that forms the system of government. On this view, the Ninth Amendment is the textual evidence that the framers of the Constitution were social contract political theorists who envisioned the social


1 U.S. Const. amend. IX.

contract as consisting of both the terms of the written Constitution as well as limitations on government that are inherent and inalienable.

The Ninth Amendment thus acknowledges the constitutional status of the rights retained because they cannot in principle be alienated, and the consequence is that we have both a written and unwritten Constitution. The reason for the Ninth Amendment was to clarify that the specification of rights in the written Constitution was not intended to imply that the natural rights not included in the writing were forfeited; they were still "retained" and held constitutional status. Since these additional rights are not to be disparaged, an implication is that they are judicially enforceable to the same extent as the rights enumerated in the text. This I shall call the Natural Law reading of the Amendment.

On the other hand, a number of commentators (of whom I am one) assert that the historical evidence shows that the other rights "retained" by the people are those which the framers of the proposed Constitution sought to secure by the granting of specified and limited powers to the national government. Those who defended the Constitution in the original struggle over ratification (the Federalists) were those who stood against the proposal for a bill of rights during that struggle. They defended the omission of a bill of rights by arguing that the limited powers given the national government provided adequate security for the people's rights because (as Madison said) "it follows that all [powers] that are not granted by the Constitution are retained: that the Constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be necessary as if the residuum was thrown into the hands of the government."4

Moreover, this apparent suggestion implicit in a bill of rights, that "the residuum was thrown into the hands of the government," meant that a bill of rights actually posed a threat to the rights of the people. To the extent that any of the great residuum of rights" referred to by Madison were omitted from a bill of particular rights, it might be inferred that such rights "were intended to be assigned into the hands of the general government."5 The purpose of the Ninth Amendment, on this reading, was to clarify that the strategy of enumerating "certain rights" was not intended to jeopardize those rights already secured as a residuum from the limited powers scheme of the proposed Constitution.

On this alternative reading, while the other rights retained are not "enumerated" in the Constitution, they are just as surely provided for by the language and design of the written Constitution; the point of the Ninth Amendment is to affirm that the bill of rights has not changed this design. The implication is that the rights secured by the Ninth Amendment are those rights which cannot be invaded because the national government simply was not empowered to act to affect these rights; but these are not rights found outside of the written Constitution which restrict government regardless of the grants of power contained in the Constitution.6 This I shall call the Positivist reading of the amendment because on this understanding the focus of the amendment is to secure the rights which the people had already retained for themselves by virtue of the limited powers scheme of the written Constitution; the purpose was not to avoid an inference against the idea of enforceable unwritten natural rights.

3Id. at 439. I have here brought language from Madison's description of the argument that we need no bill of rights and linked it directly to language from his description of the danger that had been perceived in a bill of rights. But this is not selective quoting out of context. I am suggesting that when these statements are read in light of the ratification-debate history, it becomes evident that there is a direct connection between Madison's initial suggestion that a bill of rights could be read to imply that "the residuum was thrown into the hands of the government" (emphasis added) with his subsequently expressed concern that rights not enumerated in a bill of rights might be thought "to be assigned into the hands of the General Government." For further analysis of Madison's speech before Congress explaining the proposed Ninth Amendment as it relates to the overall ratification debates, see McAffee, supra note 2, at 1285-87.

4In a previous article, I have referred to this construction as the "residual rights" reading of the Ninth Amendment. See McAffee, supra note 2, at 1221. The point is that the rights held harmless by the Ninth Amendment are the rights which are secured by the limited grants of federal power; the rights are not "affirmative rights," or rights that would serve as exceptions to the powers granted by the Constitution. See McAffee, supra note 2, at 1222. The residual rights reading corresponds with what I label for our purposes the Positivist reading; the affirmative rights reading corresponds with what I here label the Natural Law reading. While this treatment focuses on an explanation of the Ninth Amendment in terms of natural law jurisprudence, some advocates of the affirmative rights reading have explicated the idea of unenumerated affirmative rights without placing exclusive (or, in some cases, even primary) reliance on the founders' commitment to natural law.
Despite reliance on the Ninth Amendment to help justify an expansive human rights jurisprudence at least since 1936,7 for many the Amendment has remained a seemingly unsolvable mystery.8 Even so, it has become popular to rely upon the Ninth Amendment as itself a key piece of evidence that the founders embraced a natural law jurisprudence that included the idea that republican constitutions presuppose (and thus implicitly contain) limitations on government resting on the inherent rights of people.9 In my own lengthy article on the Ninth Amendment, I attempted to call into question the claim that the Ninth Amendment lent support to the project of defending an unwritten Constitution.10 But it seems worthwhile to also look at these questions through the other end of telescope: I propose here to address the question as to whether evidence we have as to the founders’ views about the relationship between natural law and constitutional law might strengthen or weaken the modern claims for the Natural Law reading of the Ninth Amendment.

While we can hardly exhaust this debate within the compass of this occasion, it is possible to undertake two somewhat more modest tasks. First, by briefly reviewing the social contract/natural law political theory of the founding period, particularly as revealed by the debates over ratification of the Constitution, we can summarize what appears to be the most salient (and in my view fatal) objections to the idea that unwritten constitutionalism is what illuminates the Ninth Amendment. Second, we can use this review to assess arguments defending the Natural Law reading which have been fully formulated (or reaffirmed) subsequent to my own.

8Robert H. Jackson, The Supreme Court and the American System of Government 74–75 (former Justice Jackson observing that the Ninth Amendment rights “which are not to be disturbed by the Federal Government are still a mystery to me”); testimony of Robert Bork, as quoted in Barnett, supra note 2, at 1 (comparing Ninth Amendment to an inkblot that cannot be used by courts because it lacks meaning; a constitutional provision cannot be applied unless you “know something of what it means”).
9The works cited in note 2 supra reflect this tendency. In addition, in 1975 Thomas Grey pointed to the text of the Ninth Amendment as such a piece of evidence in a celebrated article heralding the modern recognition that we have an unwritten Constitution that has an historical claim of legitimacy. Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 716 (1975) ("The Ninth Amendment is the textual expression of the idea [of higher law] in the federal Constitution.").
10McAffee, supra note 2, at 1318–19. The issue of natural and inalienable rights as they related to the debate leading to the Ninth Amendment is therefore treated specifically in the article. Id. at 1265-77. As we shall discover, however, the ratification debate sheds light on the debate over the unwritten Constitution in various ways.

II. Natural Rights, Social Contract Theory, and Constitutional Law

Proponents of the Natural Law reading of the Ninth Amendment frequently write as though modern positivists have simply forgotten that the framers of the Constitution and Bill of Rights were committed to the idea of natural rights in the context of social contract political theory. But if any have forgotten this historical fact, their position is a straw man that need not detain us. The ratification debates over the Constitution are filled with the rhetoric of natural and inalienable rights, and both sides in the debate stood as pretenders to the role of guardian of such rights. The modern debate is not over whether it was a central end of the Constitution to secure natural rights, but the relationship of such natural rights to the law of the Constitution.

Proponents of the Natural Rights reading begin with the premise that the founding generation believed that these natural and inalienable rights had binding force as legal limitations on government even within a duly-constituted legal order in which a written Constitution made no explicit provision for their protection—i.e., by virtue of their status in natural law standing alone (or at least by virtue of the well-understood and universally accepted social contract theory as briefly summarized above). This premise is a necessary one since the Ninth Amendment operates as a rule of construction as to what does or does not follow from the enumeration of rights in the Constitution and therefore does not purport to be the source of the constitutional status of the unenumerated rights.

If this premise is correct, and the founders believed that even in the absence of a bill of rights these natural and inalienable rights necessarily would still be part of the fundamental law of the land, it seems plausible that they might wish to clarify whether the provision for a bill of rights was intended to affect any such rights that were omitted. If the founders did not agree that at least some natural rights operated as self-executing constitutional limits on the powers granted by the Constitution, even without a bill of rights, the Ninth Amendment rule of construction would make little sense as a way of securing natural rights against any perceived threat.
presented by a bill of rights. Indeed, considering that the provision appears to presume a general understanding of the unenumerated constitutional rights retained by the people that might conceivably be threatened by a bill of rights, we would expect the historical evidence to show that most, if not all, the founders assumed the inherent constitutional status of certain natural rights. This paper will attempt to show that there was no such general understanding.

A. The Written Constitution and the Doctrine of Popular Sovereignty

We can begin by appreciating that the idea of unwritten constitutional rights must be based on more than the near-universal commitment to natural rights and social contract political theory. After all, two of the natural rights theorists who most influenced the founding generation, John Locke and William Blackstone, nevertheless assumed a constitutional system dominated by a doctrine of legislative supremacy (wherein the power of legislature could not be challenged within the legal order). The natural rights, after all, were not secure except within a well-governed legal order; and popular legislatures were most likely to

\[\text{\textsuperscript{11}}\text{In the abstract it might make sense that the founders simply wanted to affirm that there are constitutional (political) claims to rights, rooted in natural law, that the Bill of Rights should not be taken as eliminating. On this view, the Ninth Amendment would have the effect of acknowledging the continuing significance of this sort of political discourse without acknowledging or creating any legal status for such claims of right. Such a view is suggested, though not defended at great length, in Andrew Rapaczynski, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64 Chi.-Kent L. Rev. 177, 185-88 (1988) (reprinted as Chapter 7 of this volume) (observing that a ground for appeal of “political” rights reading is precisely that, while the founders “subscribed to some such strong affirmation of the independent validity of basic rights (natural or otherwise)” Id. at 187, it would be “extremely surprising” to find a basis for the view “that they believed that the basic rights so understood were legally self-executing, to the point of not needing any further support as authority in the courts of law.” Id.).}

But in my judgment, Lawrence Sager is correct that the historical materials show that the Ninth Amendment did not grow from a concern as to the potential legal construction that might be given to the existence of enumerated rights. Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do With the Ninth Amendment?, 64 Chi.-Kent L. Rev. 239, 242-43 (1988) (reprinted as Chapter 9 of this volume). It is therefore not surprising that no commentator has provided a sustained defense of this essentially political reading of the Amendment.

\[\text{\textsuperscript{12}}\text{For commentary on Locke’s decisive commitment to republican government and legislative supremacy that went hand in hand with his commitment to limited government and natural rights enforceable by the people’s inherent right of revolution, see Walter Berns, Taking the Constitution Seriously 27-28, 187-88 (1987); Edward S. Corwin, Liberty Against Government 45-51, 57 (1948); Garson, The Intellectual Reference of the American Constitution, Reflections on the Constitution 1, 7-9, 19 (1989).}

13In general, it was assumed that the people's representatives would best secure their rights, and Locke and others held out the possibility that serious abuse of the pre-existing rights could ultimately be remedied by the people's right of revolution.

The views of Locke and Blackstone point up the assumption that natural law-based principles provide a foundation for limiting government power is compatible with more than one conception of legal and institutional arrangements for giving the limiting principles effect. There is no question of the existence of such principles for the founders, but they faced serious issues relating to how best to secure them in the real world of political practice and by what allocation of legal and constitutional power. For example, although the founding generation eventually rejected the doctrine of legislative supremacy which Locke and Blackstone embraced, this was only one aspect of the attention they devoted to the problem of the potential gap between normative political theory—which addresses the elements of a just political order—and the reality of descriptive jurisprudence, which confronts the actual elements of existing legal systems. Because they had learned by sad experience that
human liberty might seem to be protected by well-established political (or even constitutional) principle without receiving meaningful protection in the actual legal and political order, the founders never took for granted any connection between principles of natural right and the notion of constitutional government.

Thus in the years following the American Revolution, which had begun as a fight over constitutional principle, thoughtful Americans had eventually concluded that the British lacked a meaningful Constitution both because it lacked the specificity of written law and because the doctrine of Parliamentary sovereignty permitted Parliament to ignore established principle. One consequence was the emphasis on the importance of written constitutions. As one modern scholar has put it, whereas the British relied on "an unstipulated, imprecise constitution," the Americans "insisted in contrast that the principles and rules essential for organizing power and preserving liberty be separated from government and objectively fixed in positive form."

The debate leading to the Revolution also fixed the founding generation's attention on the critical question of who ultimately exercises political authority to determine the law's content. This is the issue of sovereignty. Despite the struggle with Great Britain over the notion of Parliamentary sovereignty, particularly as applied to the American colonies, there is little question that most thoughtful Americans came to embrace Blackstone's formulation that every political order must have one party that holds illimitable power to establish the law. This concept of sovereignty is associated for obvious reasons with the rise of modern legal positivism.

For Americans at the time of independence, the way to reconcile the positivist idea of sovereignty with the concept of government limited by precepts of natural law was to place that sovereignty in safe hands: the hands of the people. Thus in 1776, the Massachusetts General Court (a popular body) proclaimed: "It is a maxim that, in every Government, there must exist a Supreme, Sovereign, absolute, and uncontrollable Power; But this Power resides, always in the body of the people, and it never was, or can be delegated, to one Man or a few." For a time, this sovereignty was thought by many to effectively exist in the people's representative assemblies (as in the thinking of Locke and Blackstone), but in the years following independence Americans gradually came to their own unique view that even popularly elected legislatures represented the people as agents but derived their authority from the people acting through constitutional conventions.

The American theory of popular sovereignty became a key ingredient in the defense of the newly-proposed Constitution, and its chief defenders relied repeatedly on the people's sovereign right and power to alter their government as the justification for the decision in Philadelphia to exceed the Convention’s original charge to propose amendments to the existing Articles of Confederation, as well as for the proposal to shift the balance of power from the states to the central government. James Wilson insisted:

The truth is, that, in our governments, the supreme, absolute and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess, over our constitutions, control in fact, as well as in right.

1As to the American revolutionary experience with the violation of established principles of right (some of which were conceived to be rooted ultimately in natural law), see John Philip Reid, Constitutional History of the American Revolution: The Authority of Rights (1986).

2For standard formulations, see T. Paine, Rights of Man, in The Selected Works of Thomas Paine 218 (H. Fast ed., 1945) ("If from the want of a Constitution in England to restrain and regulate the wild impulse of power, many of the laws are irrational and tyrannical, and the administration of them vague and problematical."); The Federalist No. 53, at 360-61 (James Madison) (Jacob Cooke ed., 1961) (noting the distinction "between a constitution established by the people, and unalterable by the government" and "a law established by the government," and observing that the distinction is not well understood in England where Parliament is viewed as "uncontrollable" even by the constitution). For commentary on this development in early American thinking, see Berns, supra note 12, at 77; Herman Belz, Constitutionalism and the American Founding, in The Framing and Ratification of the Constitution 333, 337 (Leonard W. Levy & Dennis T. Mahoney eds., 1987); Gordon S. Wood, The Political Ideology of the Founders, in Toward a More Perfect Union 7, 23 (N. York ed., 1988).

3Belz, supra note 15, at 336.

4See, e.g., Wood, supra note 12, at 528-32.
The consequence is, that the people may change the constitutions whenever and however they please. This is a right, of which no positive institution can ever deprive them.20

The debate leading to the Bill of Rights and the Ninth Amendment can be understood fully only against the backdrop of the insistence on the device of a written Constitution and the doctrine of popular sovereignty. My thesis is that, as of 1787, thoughtful Americans believed that the people were the ultimate judges of the division between the powers to be granted and the rights retained by the people. They also believed that there were rights which the people ought always to retain when entering civil society—those which even the people may not legitimately yield up to government because they are inalienable. Even so, these rights were to be secured by the written Constitution. And even such natural and inalienable rights did not hold an inherent status within the legal and constitutional system absent provision for their security within the written Constitution.21

B. The Antifederalists

If anything is clear from the ratification debates, it is that those most responsible for the Bill of Rights, the Antifederalist opponents of the proposed Constitution, did not believe that their fundamental rights were inherent features of legal and constitutional orders, whether or not found in the written Constitution. In their view, the purpose of the written Constitution was to secure these rights; if it failed to do so, the rights were forfeit as far as the legal system was concerned. These points governed their thinking, both as to inherent rights of nature properly retained as well as to the fundamental law rights Americans had uniformly enjoyed under the English constitution. After summarizing a number of essential rights that a bill of rights must contain, including various due process guarantees and the right to trial by jury, the author of Letters from a Federal Farmer, the leading Antifederalist tract, stated: "These rights are not necessarily reserved, they are established or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws."22 The people had effectively secured these rights "by long custom, by magna charta, bills of rights &c."23

The implication was clear enough. The traditional means for preserving these rights—the sources and mechanisms for protection rooted in the English constitution—would have no application in America after adoption of the proposed Constitution. These essential protections could be effectively secured only by "compacts" or "immemorial usage."24

Reasoning that "it is doubtful, at least, whether [the rights under discussion] can be claimed under immemorial usage in this country,"25 the Farmer goes on to argue that Congress' power to institute and regulate courts would include the right to "exercise those powers, and constitu-

20Version of Wilson's Speech by Thomas Lloyd (Nov. 24, 1878), reprinted in 2 The Documentary History of the Ratification of the Constitution 361-62 (Merrill Jensen ed., 1976) [hereinafter Documentary History]; see also id. at 348 (while some Americans think that the power "from which there is no appeal" resides "in their constitutions," in fact "it remains and flourishes with the people").

For confirming evidence that the founders were committed to the people's absolute right to alter and reform their constitutions, see Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1049-52, 1058-59 & n.49, 1102 n.209 (1988). Amar concludes, correctly I think, that the theory of popular sovereignty "served as the foundational principle of the Constitution." Id. at 1064 n.77; see also id. at 1071 (contending that "our true constitutional rule of recognition is . . . the principle of popular sovereignty that undergirds every Article of the original Constitution and every Amendment in the Bill of Rights.").

21For foundational treatments of the natural rights/social contract theory underlying our constitutional order along these lines, see Philip A. Hamburger, Natural Rights in the Bill of Rights (forthcoming); Walter Berns, The Constitution as Bill of Rights, in How Does the Constitution Secure Rights? 50, 54-59 (Robert A. Goldwin & William A. Schambra eds., 1985).
tionally too, as to destroy those [procedural] rights." In another letter, the Farmer even more emphatically relies upon the well-understood principle that, since the proposed Constitution would be people's "last and supreme act," it would follow that "wherever this constitution, or any part of it, shall be incompatible with the ancient customs, rights, the laws or the constitutions heretofore established in the United States, it will entirely abolish them and do them away."

The same analysis applied to the rights that were considered natural and inalienable. Among the natural rights as to which the Antifederalists were most anxious was the freedom of the press. Even so, the author of the Federal Farmer letters argued that the powers granted the national government would appropriately be construed to include authority to limit the press and concluded:

context the author seems confident that the proposed Constitution would properly be read as abolishing these traditional rights, it may be that he is hedging his bet and leaving open the possibility that one or more of these rights might be inferred from constitutional structure (perhaps from the concept of separation of powers and from the creation of an independent judiciary).

Letters from a Federal Farmer (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 22, at 246; id. at 328-29 (acknowledging that power to alter or destroy constitutions includes authority to annihilate rights previously held); Essays of Brutus (Nov. 1, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 22, at 376 (proposed Constitution will be "an original compact; and being the last, will, in the nature of things, vacate every former agreement inconsistent with it" and "must receive a construction by itself without any reference to any other").

George Mason, Objections to the Constitution (Oct. 6, 1787), in 13 Documentary History, supra note 20, at 346, 350. Offered a couple of weeks after the end of the Philadelphia convention, to Roger Sherman's draft of a bill of rights during the first Congress that considered amendments to the Constitution, Roger Sherman's Proposed Committee Report (July 21-28, 1789), reprinted in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 266, 267 [Helen E. Veit et al., eds., 1991] (hereinafter The Debate over Ratification of the Constitution and bill of rights is filled with references to freedom of the press as among the most fundamental rights of the people which the Constitution might threaten.

While most of these ratification-period writings and statements pertaining to this particular right do not even focus on the underlying basis for its claim, Sherman probably accurately reflects common sentiment in describing it as among the "natural rights which are retained by [the people] when they enter into society." Id. at 267.

The people's or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annul or alter those constitutions, can annul or limit this right. This may be done by giving general powers, as well as by using particular words.

The Antifederalists went further in denying that a written Constitution includes even a presumption of any sort in favor of fundamental rights. They repeatedly insisted that it is "universally acknowledged" that the natural rights "can neither be retained to themselves, nor transmitted to their posterity, unless they are expressly reserved." This doctrine extended not merely to the natural rights that people necessarily give up to obtain the advantages of civil government, but also to the rights described as inalienable. Patrick Henry declared: "If you intend to reserve your inalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights."

We might be tempted to think that Patrick Henry is speaking out of both sides of his mouth. How can rights be "inalienable" and yet presumed to be transferred unless expressly reserved? But it is we, not Henry, who are confused; he is speaking at different levels of discourse. His normative moral and political views sound in natural law: we have rights by nature and the purpose of civil society is to secure these rights; since they are moral rights, they can never justifiably be taken or relin...
quished. But Henry’s constitutional jurisprudence is positivist: in practice (and hence in descriptive theory) it is understood that the people are charged with securing their rights in the actual social compact (the written constitution), or those constitutions are construed in favor of government power.

The ratification materials are replete with similar statements confirming that “inalienable” rights are those which are not properly granted away, but which may nevertheless be granted away in law by the people’s design or neglect. “[A] free and enlightened people will not resign all their [unalienable and fundamental] rights to those who govern.” Even though there are natural rights “of which the people cannot deprive individuals,” the only inevitable implication is that “the national laws ought to yield to unalienable and fundamental rights”; even so, this “will not be the case with the laws of Congress.” Although the “great object [of the people] in forming society is an intention to secure their natural rights,” where the people fail to expressly reserve their rights “every right whatsoever will be under the power and control of the civil jurisdiction.”

Consider George Mason’s contribution to this discourse. Mason drafted Virginia’s 1776 Declaration of Rights, the document that became a model for later declarations of independence and a document of practical results and “for discussion was this

32Letters from Federal Farmer (Oct. 9, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 22, at 231.

33Id. at 247 (Oct. 12, 1787). There is arguably some ambiguity in the statement as to precisely what “will not be the case” with congressional enactments inasmuch as the author had referred earlier in the paragraph both to limiting principles that ought to be observed as well as the idea that national laws ought to extend to only a few objects. Id. In the same paragraph, however, the author also states that while it might be hoped that Congress would abide by well-known “principles” that are essential to free government, it “will not be bound by the constitution to pay respect to those principles.” Id.

34Essays by the Impartial Examiner (Feb. 20, 1788), reprinted in 5 The Complete Anti-Federalist, supra note 30, at 176, 177. In fact, an outspoken Antifederalist delegate to the North Carolina ratifying convention, David Caldwell, proposed that the convention address whether the Constitution was fitting by considering whether it embodied “those maxims which I conceive to be the fundamental principles of every safe and free government.” 4 Elliot’s Debates, supra note 30, at 9 (July 24, 1788). One of the maxims he set forth for discussion was this one: “Unalienable rights ought not to be given up, if not necessary.” Id.


36Id. at 234.

37E.g., Sherry, supra note 2, at 1132–33; Grey, supra note 2, at 156; Patterson, The Forgotten Ninth Amendment, in The Rights Retained by the People 107, 108–09 (Randy E. Barnett ed., 1989).

383 Elliot’s Debates, supra note 30, at 444 (George Mason, June 14, 1788).

39Documents of History, supra note 20, at 348 (Oct. 7, 1787). For useful analysis of Mason’s compelling fears as to the proposed Constitution, see Wilmarth, supra note 3, at 1275, 1281.

40While the Antifederalists are clear that the existence of inalienable rights generates an obligation in the people to secure such rights, they are equally clear that the people possess the political and legal authority to fail or refuse that task. The people are the ultimate judges, and popular sovereignty (understood as the people’s limitless power to fix the law of the Constitution) is the first principle of American constitutionalism. See supra note 20. This is what accounts for the urgent need to persuade the sovereign people that they are at great risk of ceding their basic rights away to government.
ments offered by the Federalists against inclusion of a bill of rights. 41 But this move is a mistake for several reasons. First, it would seem anomalous to assume that any difference between the parties on the issue of the inherent legal status of the inalienable rights should be resolved in favor of the Federalist position; the Federalists, after all, lost the

Modern commentators, by contrast, have created enormous confusion by failing to thoughtfully reconcile the founding generation's dual commitment to natural rights and popular sovereignty. E.g., Sherry, supra note 2, at 1133-34, 1146, 1160, 1165-65 (suggesting that natural rights were viewed as unalterable limitations on government so that constitutional provisions recognizing such rights were viewed as declaratory and as immune from constitutional amendment even by the people; fundamental law might evolve, but never in derogation of natural rights); id. at 1156 n.132 (confronting doctrine of popular sovereignty in a single footnote with the assertion that the founding generation did not perceive a tension between popular sovereignty and fundamental rights during the 1780's). But the oft-expressed Antifederalist fear that the people were being duped into casting away their precious rights shows a sharp awareness of the tension between popular sovereignty and fundamental rights and, indeed, points out the direction in which any conflict would be resolved.

A striking example of the resulting confusion is the recent law journal note arguing that the recently proposed flag burning amendments of recent years would be unconstitutional infringements on the natural right of free speech. Compare Rosen, supra note 2, at 1085-86 (right to alter and abolish government does not extend to inalienable rights because individuals lack power "to surrender or alienate their retained natural rights"); and id. at 1091 n.53 (arguing that recently proposed flag burning amendment would be an unconstitutional invasion of inalienable right to free speech because the term "unalienable" should be understood "literally" rather than "rhetorically;" also contending that even repeal of the Ninth Amendment would not permit an amendment abridging an inalienable right because the Ninth amendment only makes explicit what is already implicit), with id. at 1081 & n.53 (acknowledging that "the people are 'indispensably' bound by the law of nature, but as the supreme judicial power, the people themselves are the judges of the natural law boundaries that constrain them"); id. at 1082 (appearing to recognize the people's authority to recognize "a new natural right" or to deny "an old one"); id. at 1092 (arguing that a particular hypothetical flag burning amendment might be constitutional, but only if the amendment articulated the people's conclusion that free speech should not be considered a natural right).

In the first place, the author fails to explain why the recently proposed amendments, drafting as exceptions to the first amendment, are not properly construed as a judicial judgment that the natural right of free speech does not extend to flag burning. If the people are "the judges of the natural law boundaries that constrain them," they surely would be empowered to determine the scope of protection such a natural right would offer as much as whether free speech is a natural right at all. And if (as the author claims) the Constitution necessarily embodies the inalienable rights on the grounds that individuals may not cede such rights when entering civil society, and judges are empowered to invoke these rights as inherently part of the fundamental law with or without a Ninth Amendment, how can it even be proper for the people to be in any sense the ultimate judge of the natural law boundaries? The author, in short, engages in a futile attempt to avoid the necessity for choosing whether to give priority to popular sovereignty or to the supposed inherent constitutional status of inalienable natural rights. But that is a choice that cannot be avoided.

41As to the Federalist argument which most commentators have thought leads to the Ninth Amendment, see infra notes 50-51 and accompanying text. The inference that commentators tend to discount the importance of the Antifederalist constitutional jurisprudence is largely derived from the fact that most pass over the intense positivism of the debate over the necessity of a written bill of rights as reflected in their own recognition of the need to appease the many people who accepted the Antifederalist arguments. 42

Moreover, as observed above, the text of the amendment reads not as a provision securing rights, but as a rule of construction that avoids an inference against rights generally understood as already secured without the enumeration of rights in a bill of rights. Clearly both sides of the dispute generally understood that at least some rights were secured by the enumerated powers scheme (especially, in the case of the Antifederalists, when article I of the Constitution was supplemented by the contemplated tenth amendment).43 On the other hand, it is clear that at least the Antifederalists did not believe that the natural rights were reserved by the Constitution, except to the extent that it might be supplemented to

Antifederalists while focusing on what they take as a Federalist argument that the preexisting rights of nature would be secured as implied limitations on the powers granted to the national government by the proposed Constitution. E.g., Grey, supra note 2, at 162-64 (summarizing Antifederalist demand for bill of rights without making clear its grounding in positivist insistence on strict legal necessity for such provisions; eventually acknowledging that "some of the Antifederalists" responded to asserted Federalist reliance on implied limitations with arguments favoring presumptive legislative power, with the conclusion that to "omit stating [right] was to risk surrendering them") (emphasis supplied); Sherry, supra note 2, at 1161-65 (explicating debate leading to the Ninth Amendment in terms of supposed Federalist concern that implied limitations might be lost by construction if a bill of rights were inserted; no attention to positivist character of Antifederalist position); Van Loan, Natural Rights and the Ninth Amendment, in The Rights Retained by the People, supra note 2, at 149, 154-58 (summarizing the positions of the parties about necessity and propriety of a bill of rights without alluding to the positivism of the Antifederalists).

42Thus even if we assumed that the Federalists did not concur that inalienable rights could be granted away, "[i]t is odd indeed," as Randy Barnett observes, "to insist that the best interpretation of the Bill of Rights is based on the theory used by its most vociferous opponents." Barnett, supra note 2, at 10. As I have observed elsewhere, however, both the history and original drafts of the Ninth Amendment were in fact drafted to appease both sides of the debate over the necessity for a bill of rights. McCaffee, supra note 2, at 1226, 1263-64. As we shall see, of course, the Federalists in fact argued that even so-called inalienable rights might be granted away.

43It might be thought that the Antifederalists believed that no rights would be secured absent the enumeration of specific rights in a bill of rights, but as explained elsewhere, however, the Antifederalists did believe that the Constitution would reserve rights to the states and the people so long as language clearly stating that all powers not granted were reserved was added to the Constitution. McCaffee, supra note 2, at 1244-45, 1274-75. The parties disagreed, of course, as to whether the concept of limited powers and reserved rights was a completely sufficient safeguard of cherished rights.
clarify the reservation of such rights by reference to the powers expressly granted.44

Finally, the explicit Antifederalist rejection of the notion of an inherent legal status for natural rights ought to weigh heavily in evaluating the significance of the fact that they offered arguments about the risks of enumerating some rights that paralleled the arguments of the Federalists against a bill of rights.45 The Antifederalists simply emphasized that the problem posed by the decision to enumerate some rights was already present—i.e., that broad national powers could in fact be implied from the provision for some fundamental rights in the body of the proposed Constitution. They reasoned: if the constitutional scheme could not be construed broadly enough to threaten fundamental rights, why did the framers include such rights as jury trials in criminal cases while omitting a provision for juries in civil cases?

Since, according to the Antifederalists, the limitations found in the body of the Constitution “are no more nor less, than a partial bill of rights,” it followed that “[t]he establishing of one right implies the necessity of establishing another and similar one.”46 For the Antifederalists, at least, this argument cannot be that natural and fundamental rights which otherwise would hold inherent legal status might be forfeited by construction (they, after all, had effectively rejected any notion of natural rights with inherent legal status); it is, instead, an argument that the existing partial enumeration of rights implicitly acknowledged the contemplated breadth of the powers granted by the Constitution. Indeed, when the Federalists expressed concern that a bill of rights might be construed as the sole source of limitation on national power, Antifederalists such as Patrick Henry (who rejected that inalienable rights held inherent legal status) pointed to the enumeration of rights in the proposed Constitution

44One of the few commentators to attempt to call this argument into doubt is David Richards. See David Richards, Foundations of American Constitutionalism 220 (1989) (viewing author of Letters from a Federal Farmer, reprinted in 2 The Complete Anti-Federalist, supra note 22, as proponent of implied unenumerated rights who advocated “a provision like the Ninth Amendment” to rebut “any negative inference drawn from enumeration of certain rights”). For a refutation of this reading of the Federal Farmer, which includes a summary of the Farmer’s proposal for a comprehensive scheme of listing rights combined with a general reservation of rights from granted powers; see McAffee, supra note 2, at 1272–75. See also supra notes 22–23, 25–27, 32–33 and accompanying texts (pointing up positivist views of Federal Farmer and other Antifederalists).

45For a brief summary of the Federalist argument, see supra notes 4–6 and accompanying text.

46Letters from a Federal Farmer (Oct. 12, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 22, at 248, 249.

and observed that the argument against specific limitations “reverses the position of the friends of the Constitution, that every thing is retained which is not given up; for, instead of this, every thing is given up which is not expressly reserved.”47

Such arguments by the Antifederalists almost assuredly influenced the decision to add a provision clarifying that the enumerated rights would not exhaust the rights retained by the people. That influence is probably reflected in the drafting of the Ninth Amendment in terms of the inference to be drawn from the enumeration of rights in “the Constitution”—rather than in terms merely of the Federalist concerns about the insertion of a bill of rights as advocated by those who opposed ratification. Considering this Antifederalist contribution to the dialogue leading to the Ninth Amendment, it would seem reasonable to assume that their constitutional jurisprudence would be as likely to bear on the meaning of the amendment as would the jurisprudence of the Federalists. Fortunately, however, the jurisprudence of the contending parties shared more premises than we are sometimes led to believe, as the following section will show.

C. The Federalists

The Federalist defenders of the proposed Constitution disagreed completely with the Antifederalist interpretation of the Constitution. What is frequently missed is that they shared with the Antifederalists the same basic assumptions about the relationship between the written Constitution, natural rights, and social contract theory. If modern commentators were on the mark, the Federalists logically should have reminded the Antifederalists that the most crucial rights about which they were concerned were “inalienable” and thus held inherent constitutional status. Instead, they agreed that the key to everything was in the written constitution.

An example is James Wilson’s landmark defense of the omission of a bill of rights, offered just three weeks after the Philadelphia convention adjourned. In his speech in Philadelphia, Wilson clearly conceded that natural rights obtained constitutional status only when they are secured by the written constitution. He acknowledged, for example, that under

47 Elliott’s Debates, supra note 30, at 461 (Patrick Henry, Va. Ratifying Convention, June 15, 1788). Henry’s statement reflects not only that he saw the problem of a partial enumeration of rights as bearing on the debate over the reach of constitutional powers, but also that he construed the Federalist argument in the same terms. See McAffee, supra note 2, at 1254–55.
their state constitutions the people had "invested their representatives with every right and authority which they did not in explicit terms reserve."48 According to Wilson, all rights—traditional or natural, as well as those referred to as either alienable or inalienable—were subject under the state constitutions to this presumption that they were granted if not reserved. None of these rights would have constitutional status merely because they were deemed implicit in the social contract.49

Wilson's defense rested instead on the contention that the proposed Constitution was unique because, like the Articles of Confederation which it replaced, the government thereby contemplated was designed to accomplish a limited number of specific national objects. Because of the enumerated powers scheme, then, "the reverse of the proposition [found in the state constitutions] prevails, and everything which is not given, is reserved."50 Before the North Carolina ratifying convention, James Iredell made the point even more emphatically:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [proposed] Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.51

The fundamentally positivist nature of this debate as to the necessity of a bill of rights under the proposed Constitution is underscored by the Federalist argument referred to by Iredell—that a bill of rights would be dangerous, as well as unnecessary. Just as Wilson had observed that the state constitutions had granted all not specifically status as an inalienable right. Rather, Wilson's overall argument provides an example of response by confession and avoidance—yes, even such an inalienable right would be ceded if not expressly retained as to a government formed like the state constitutions, but this argument has no application to the federal Constitution because it forms a government of specific powers.

Contrast the interpretation of David Richards, who claims that the "standard answer" to objections to the omission of bill of rights was that, "in contrast to the British constitution," the Constitution "was republican; any powers not expressly granted to the federal government . . . were reserved for the people, including the wide range of inalienable human rights that could not, in principle, be surrendered to the state principle, be reserved because the state constitutions included an exception for inalienable rights, he surely would have said so. Richards is wrong on three counts: (1) the argument that the any powers not granted were reserved did not center on the claim that the Constitution created a "republican" form of government, by contrast to the British constitution, but rather in terms of it being a government of delegated powers for limited purposes; (2) although some Federalists also argued against the necessity for a bill of rights based on the protections to liberty inherent in republican government, those arguments would have also applied to state governments (indeed, no one suggested that the state governments were not republican governments); (3) the Federalist arguments were not to the effect that the concept of republican government under a constitution included inalienable rights as implied constitutional rights; indeed, Wilson's statement in text referring to the republican state constitutions is directly to the contrary.

48 James Wilson's Speech in the State House Yard (Oct. 6, 1787), reprinted in 2 Documentary History, supra note 20, at 167. For useful explication of the Federalist focus on the uniqueness of the proposed federal Constitution, and the contrast between it and the state constitutions from which the Antifederalists had drawn their constitutional theory, see Wilmarth, supra note 3, at 1285.

49 One commentator has suggested that my own "failure to distinguish between alienable and inalienable rights" led me to the misguided conclusion that "Federalists believed that even inalienable rights may be granted away." Rosen, supra note 2, at 1077 (citing McAffee, supra note 2, at 1267). The author, however, does not cite a single Federalist statement that purports to make this distinction critical to the Federalist argument stressing that rights not specifically retained under the state constitutions were deemed granted. From my own careful review of the ratification debates, it seems clear that the Antifederalist arguments and the Federalist counter-arguments were not driven by, nor explicated, in terms of a distinction between alienable and inalienable natural rights; any emphasis on inalienable rights came because Antifederalists most feared the loss of their inalienable rights, and the Federalist arguments were primarily directed at reassuring the people that the inalienable rights were secured by the federal system so as to obviate the need for a bill of rights.

It is thus quite clear in context that Wilson's argument was referring to all species of rights—natural and positive, alienable and inalienable. The remarks are offered in response to pervasive Antifederalists claims that all the rights previously secured in the bills of rights of the state constitutions (which included the most-valued inalienable rights as well as rights that might conceivably have been properly granted to government) would be lost because not expressly reserved. Moreover, in the same remarks Wilson refers to the specific provisions of freedom of the press as one that could be forfeited under a state constitution not specifically provided for—a right which would most have conceived of as an inalienable right.

50 James Wilson's Speech in the State House Yard (Oct. 6, 1787), reprinted in 2 Documentary History, supra note 20, at 167–68. Thus Wilson's argument that the freedom of the press had been retained under the Constitution did not refer to that freedom's unique
retained, which would create the need for a bill of rights, he argued that “annex[ing]” a bill of rights to the federal plan would be improper “for this plain reason, that it would imply that whatever is not expressly reserved, which is not the principle of the proposed Constitution.”

Samuel Parsons reasoned that inserting a new bill of rights in the place of the limited powers scheme would bring about the implication “that nothing more was left with the people than the rights defined and secured in such bill of rights.”

In other words, resort to a bill of rights might raise the inference that the Antifederalists were right, the new Constitution created a government of general powers like the extant state constitutions—and many of the rights reserved by the limited grants of power would be forfeited because they would not all be specified in the bill of rights. It was this Federalist argument of “danger,” as one Antifederalist called it, that led to the Ninth Amendment; and it is an argument that rests on the distinction between governments of general and specific powers and the assumption that even the inalienable rights must be provided for within the Constitution, either by reservation from limited powers or as specific limitations on the general powers of legislation. The purpose of the Ninth Amendment, then, was to preserve the rights retained by virtue of the enumerated powers scheme that was central to the design of the federal Constitution.

Moreover, if the proposed distinction between alienable and inalienable rights were truly the key to understanding Federalist discourse on a bill of rights, it would be precisely the alienable rights that Iredell and Wilson acknowledge are granted to a government of general powers if not expressly reserved. Even so, the advocate of this distinction as the key to explaining the Federalist statements acknowledging that it was possible for the sovereign government to give up their rights nevertheless relies on additional elements of social contract political theory to suggest that courts should invalidate even a popular-based constitutional amendment granting to government an alienable right if it concludes that no adequate equivalent had been obtained in exchange for giving up the right. Rosen, supra note 2, at 1091--92 (pointing to social contract theory principle that government should limit even alienable rights only to the extent essential and in exchange for enhancing the security of other rights).

But if courts can inquire into the legitimacy of an attempt to delegate even an alienable natural right, it is no longer true that what is not expressly reserved is deemed to be granted, and Federalist spokesmen have fallen into incoherence. The lesson is a simple one: sooner or later, it is critical to discover that every limiting principle of social contract political theory is not ipso facto an implied enforceable limitation in the Constitution. By the same token, if the limiting principles concerning alienable rights are not inherent legal limitations, why should we assume differently of the theory of inalienable rights?

Statement of James Wilson at Pennsylvania Convention (Nov. 28, 1787), reprinted in 2 Documentary History, supra note 20, at 391.

Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 Documentary History supra note 20, at 569.

In the multitude of speeches and writings that make up the debate over ratification, there are some statements that can be read as assuming the fundamental law status of principles of natural rights and social contract theory. See, e.g., 4 Elliot's Debates, supra note 30, at 161 (Richard Maclaine, July 29, 1788) (asserting there are rights “which never can, nor ought to, be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up”). The argument implicit in this statement is less clear than it might appear at first glance. Maclaine could have been contending that inalienable rights cannot properly be said to have been “given away” even if they are not secured within the legal order by the written Constitution. If so, the argument sounds in the discourse of political legitimacy rather than constitutional or fundamental law: the mere omission of rights from the Constitution does not necessarily embody a judgment that it is fitting that government infringe them at will.

A similar tactic was employed by Federalists in defending the omission of a guarantee of trial by jury in civil cases: even while acknowledging that such an omission gave discretion to Congress in regulating the right, a number objected to the claim that civil juries had been abolished, arguing that Congress would of course make provision for jury trials. Compare A Citizen of New Haven (Jan. 7, 1788), reprinted in 3 Documentary History, supra note 20, at 524, 527 (the “citizen” was Roger Sherman) (“[N]or is there anything in the Constitution to deprive [juries to law suits] of trial by jury in cases where that mode of trial has been here tofore used.”) and 3 Elliot's Debates, supra note 30, at 546 (Edmund Pendleton, Va. Ratifying Convention, June 20, 1788) (observing that “there was no exclusion of [jury trials] in civil cases, and that it was expressly provided for in criminal cases,” not even “any tendency towards it”) (id. at 544 (Patrick Henry, June 20, 1788) (summarizing argument that Congress would honor right to trial by jury because of strong feelings as to its basic nature: “[T]he enormity of the offence is urged as security against its commission.”)).

Even if Maclaine's argument is that inalienable rights hold a status as fundamental law apart from the written Constitution, his statement does not clarify whether he views unwritten fundamental law as holding a status within the legal order established by the Constitution. The general course of debate over ratification of the Constitution confirms that most of its participants agreed that principles of government gained this status by their inclusion in the written Constitution. Maclaine, of course, could be merely scoring a debater's point in suggesting the paradox presented by the notion of alienable “inalienable” rights, or, less ironically, suggesting that government is bound (morally and otherwise) to honor such inalienable rights whether or not they are converted to legal rights. Moreover, even if Maclaine's assumption is that the inalienable rights are part of the fundamental law—perhaps based in part on the widespread recognition of such rights in extant state declarations of rights—Maclaine's statement does not clarify whether he views unwritten fundamental law principles as having force within the ordinary legal order. A more complete treatment, analyzing the various statements from the Philadelphia convention and ratification debates which have been relied upon will be a part of the larger project of which this is a part.

Apart from the meaning and significance of such statements, the evidence is overwhelming that any competing views of the nature of fundamental law would have run against the grain of the entire course of the dialogue as to the relationship between fundamental rights and written constitutions and are not related to the arguments that lead to the Ninth Amendment. Given that the Ninth Amendment text, and the debate that leads to it, assumes a universal understanding of the other rights already retained, such statements cannot properly be given significant weight.
D. Beyond the Legalistic Debate Over the Necessity for a Bill of Rights

Beyond the formidable body of evidence demonstrating the lineage from the highly positivist ratification-period arguments to the final language of the Ninth Amendment—a great deal of which we shall pass over—there is a great deal of indirect evidence that the participants in the debate would have placed no stock in a theory of inherent constitutional rights. For example, underlying the formal theory of the Antifederalists was genuine fear of the new national government, reflecting both experience harking back to the American revolution and a general eighteenth century distrust of human nature and government officials. The Antifederalists began with the premise that "[a]ll checks founded on anything but self-love, will not avail,"55 and that "it is the nature of mankind to be tyrannical."56 As Cecelia Kenyon observed, this skepticism led the Antifederalists to a quest for clarity, explicitness, and specificity in stating the nature and limits of government power.57 It was an attitude conducive to an authentically positivist orientation toward the nature of law and constitutionalism.

The Federalists' own form of skepticism went to the efficacy of theoretical legal restraints to effectively limit the exercise of arbitrary political power. Many Federalists echoed the theme of one advocate that "[p]aper chains are too feeble to bind the hands of tyranny or ambition."58 Federalists, too, relied upon the national experience, this time the experience with the ineffectiveness of the "parchment barriers" in the state bills of rights to stem the tide of unjust laws enacted by "over

55See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 1 Schwartz, supra note 30, at 614, 616.
56See, e.g., Aristides, Maryland Journal, at 4 (arguing against necessity of bill of rights partly based upon "[i]n the manner, in which Congress is appointed; the terms upon which it’s members are elected; the mutual checks between the branches; the check arising from the president’s privilege; the sure pledge we enjoy in the proper interests of the members...") (Jacob Cooke ed., 1961) (focusing on checks and balances, an independent judiciary, republican government, and the “ENLARGEMENT of the ORBIT within which such systems are to revolve”...i.e., the extended republic). The Federalist No. 49, at 333, 338 (James Madison) (Jacob Cooke ed., 1961) (framers avoided tendency of legislature to absorb all power by connecting and blending powers to achieve the actual separation of power “essential to a free government”). For useful commentary, see Levy, supra note 12, at 150; Wood, supra note 12, at 547–62; Berns, supra note 12, at 130–31; Michael W. McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.-Kent L. Rev. 89, 106 (1988).
57Indeed, John Philip Reid has shown us that the very conception of liberty in the eighteenth century contrasted the civil liberty that just laws secured from abuses of liberty and licentiousness that government should not protect. Reid, supra note 13, at 32–37, 115–19; see also Philip A. Hamburger, Natural Rights in the Bill of Rights, (forthcoming). While liberty was a constant refrain of the revolutionary and founding era, the founders were in general not “libertarians” in the modern sense of the term.
prominent members of the Philadelphia convention, Roger Sherman and Oliver Ellsworth, wrote that the Convention sought “to provide for the energy of government on the one hand and suitable checks on the other hand to secure the rights of the particular states, and the liberties and properties of the citizens.”62

Indeed, a government of ample powers was deemed by many as an essential prerequisite to true liberty.63 One supporter of the Constitution offered the thought of many Federalists: “there is no way more likely to lose ones liberty in the end than being too niggardly of it in the beginning.”64 Moreover, since “all governments are founded on the relinquishment of rights to a certain degree,” there was a “clear impropriety” about attempting to be “very particular about them”; the creation of exceptions to delegated power might prevent government “from doing what the private, as well as the public and general, good of the citizens and states require.”65 Implicit in this line of reasoning was the assumption that a decision to exclude a proposed right (or set of rights) from a written constitution was to acknowledge government’s discretion to act within the powers delegated out of a preference for erring on the side of government effective enough to secure the rights and interests of the people.

The founders also saw that the Constitution was to govern an expanding nation over time and was not lightly to be amended. At the Convention, the Committee of Detail wrote that it had been its purpose

62Letters from Roger Sherman and Oliver Ellsworth to Governor Huntington (Sept. 26, 1787), reprinted in 3 Documentary History, supra note 20, at 351 (Sherman and Ellsworth to Governor Huntington, Sept. 26, 1787). For a general perspective on the tension between governmental authority and liberty that to a great extent underlies the debate over the omission of a bill of rights from the proposed Constitution, see John K. Kaminski, Liberty Versus Authority: The Eternal Conflict in Government, 16 S. Ill. U.L.J. 213 (1991).

63As Storing observes, one factor underlying Federalist opposition to a bill of rights was the fear that adding a list of rights “might weaken government, which is the first protection of rights and which was in 1787 in particular need of strengthening.” Herbert J. Storing, What the Anti-Federalists Were For, in 1 The Complete Anti-Federalist, supra note 22, at 69.

64Virginia Independent Chronicle, Jan. 16, 1788 (State Soldier), quoted in Storing, supra note 63, at 29.

65Elliot’s Debates, supra note 30, at 87 (James Bowdoin, Mass, Ratifying Convention, Jan. 23, 1788). In referring to the “private good,” Bowdoin is clearly referring to private rights; he goes on to argue that “the private good could suffer no injury from a deficient enumeration, because Congress could not injure the rights of private citizens without injuring their own, as they must in their public as well as private character, participate equally with others in the consequences of their own acts.” Id. at 87-88.

“[T]o insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events.”66 Finally, there were, in addition to the problem of balancing the ends of empowering as well as limiting government power in general, the various difficulties associated with securing individual and group liberty while not undermining what were perceived as the liberty-enhancing advantages of retaining considerable power within the states.67

In defending the omission of a provision for a right to a jury in a civil case, Hamilton employed these very sorts of concerns. Hamilton began by describing the difficulties in establishing a uniform rule, given the varieties of jury trial practices in the several states.68 This argued in favor of leaving provision of such rules for the discretion of Congress. More fundamentally, Hamilton expressed doubts about the appropriateness of jury trials in all cases and then questioned whether a jury provision could be drafted “in such a form, as not to express too little to answer the purpose, or too much to be advisable.”69 Implicit in Hamilton’s argument is the assumption that a constitutional provision is designed to limit government (whether it does so meaningfully or not), and that omission of such a limitation leaves discretion in government (at least to the extent that such discretion is effectively granted by the powers delegated by the people to a particular government).70

662 Farrand, supra note 29, at 137. See generally Hamburger, supra note 3, at 271-200; Storing, supra note 63, at 29-30.

67For a powerful treatment of these themes, see Wilmorth, supra note 2 (confronting the search for “a workable balance between federal and state power”). See also Akhil R. Amar, The Bill of Rights as Constitution, 100 Yale L.J. 1131 (1991) (treating federalism-related themes in the original bill of rights).


69Id

70The civil jury debate provides a striking illustration of the real terms of the bill of rights debate. By contrast to the Federalist responses to fears expressed about freedom of the press and freedom of conscience, which relied on the lack of all delegated power to regulate those fundamental rights, Hamilton is fully aware that the discretion to decide the question of jury trials would logically fall within Congress’ power to establish lower federal courts. If the Federalist argument that the most fundamental rights had been retained were really an argument about implied limitations on federal power, rather than an assertion about the scope of powers delegated, the argument logically should have been extended to the basic right of trial by jury—a right that Americans considered fundamental and which had generally been secured in the state declarations of rights. Compare Sherry, supra note 2, at 1163 (eliciting Federalist argument about rights “which are not intended to be given up” as reference to inherent limits on government power) with supra notes 22 and 26 (documenting Sherry’s view that “time-tested customs,” such as right to trial by jury, were among rights that did not depend on the positive law of the Constitution).
Now it is true that proponents of a bill of rights feared that the spon-
sors of the Constitution held too much regard for governmental
efficiency and too little for liberty.71 Particularly as to the federal
government, they favored defining and limiting power as carefully and precisely
as possible. Even so, the Constitution's opponents also acknowledged
this need for balancing collective need and individual liberty. For exam-
ple, George Mason and Patrick Henry both objected to the proposed
Constitution's *ex post facto* clause, which they construed as prohibiting
retroactive legislation, both civil and criminal. Mason contended that
"there never was, or can be a Legislature but must and will make such
laws, when necessity and the public safety require them."72

Once again, an underlying assumption of such arguments over the
merits of specific provisions on the balancing scales of liberty and effi-
ciency is that a victory in favor of those opposing inclusion of a provision
would imply a decision to leave discretion to
known, for example, that when criticisms
would be
judged. Governor
canon a bill of attainder against an unpopular Tory at the instigation of
statists
Henry.73 And subsequently the Virginia legislature actually enacted a bill of attainder against an unpopular Tory to the instigation of
Governor Patrick Henry.74

Henry's argument in 1776 tracks the equivalent arguments of
statesmen during the debates of 1787-1788. Federalists and Antifederalists
agreed over the appropriate content of a bill of rights, and as to which
provisions were essential to secure liberty and which would unduly
hamper government, then or in the conceivable future. In both settings,
the parties well understood on the one hand that the failure to include a
proposed prohibition, such as the one on bills of attainder, did not neces-
sarily embody an endorsement of such measures as an ordinary method
of policy or as a just way of dealing with individuals. On the other hand,
 omission of a such a provision was understood to embody a decision to
leave the evaluation of such questions entirely to the legislatures in their
representative capacities (to the extent that granted powers encompassed
such a grant of discretion).75

E. Summary

These are in general, then, the reasons I find the Natural Law read-
ing of the Ninth Amendment to be implausible historically. The whole
approach misconceives the relationship between natural law and natural
rights and the written constitution; the purpose of the positive legal order
is to secure the natural rights, and they remain insecure until they are
protected by the established constitutional order. It also ignores the
essentially positivist jurisprudential assumptions that underlie the
debate leading to the enactment of both the Bill of Rights and the Ninth
Amendment. These positivist assumptions pervade both the formal
debate over the necessity and propriety of a bill of rights under the federal
consitution, but also the larger debate over trust for government,
the efficacy of reliance on parchment barriers, and the pervasive
disagreements over how to strike the balance between the needs of
government and the liberty of the people.

III. New Variations on the Natural Rights Reading

Against this body of evidence, and much more that could be cited,
proponents of the Natural Law reading of the amendment have recently
offered some new supporting arguments that call for attention; the argu-
ments focus on the arguable significance of Madison's reference to the
rights "retained" by the people. Thus one commentator suggested that

The evidence reviewed above sharply undermines the efforts of modern libertari-
ans, such as Randy Barnett, to read a constitutional presumption in favor of liberty and
against government power into the Ninth Amendment as an embodiment of the founda-
tional thinking of the framers. See Randy E. Barnett, Foreword: Unenumerated Consti-
does the inclination during the early national period to rely on the Ninth and Tenth
Amendments in strictly construing federal power in favor of the prerogatives of states and
individuals reflect such a general libertarian constitutional philosophy. See id. at 635-40
(pointing to Madison's arguments against the first national bank relying in part on the
Ninth Amendment). I will develop a more complete analysis of the significance of the
argument over the first national bank to understanding the constitutional philosophy of
the founders, and the original meaning of the Ninth Amendment, in a subsequent treat-
ment.

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71See, e.g., Letters from a Federal Farmer (Jan. 20, 1788), reprinted in 2 The Com-
plete Anti-Federalist, supra note 22, at 329 ("many of us are quite disposed to barter [our
freedom] away for what we call energy, coercion, and some other terms we use as vaguely
as that of liberty"); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787),
reprinted in 2 Schwartz, supra note 30, at 605, 608 (Jefferson owning that I am not a
friend to a very energetic government because they are "always oppressive").

72Speech of Patrick Henry at the Virginia Ratifying Convention (June 15, 1788),
in 2 Schwartz, supra note 30, at 803 (objecting to inclusion of *ex post facto* clause).

73Edmund Randolph, Essay on the Revolutionary History of Virginia, reprinted in
1 Schwartz, supra note 30, at 249.

74Levy, supra note 12, at 154-55. When the incident was paraded during the debate
over ratification, Henry defended the bill as justified by the circumstances. 3 Elliot's
Debates, supra note 30, at 140 (June 16, 1788).
my own previous efforts at reviewing the historical materials bearing on the meaning of the Ninth Amendment had failed to take into account that the phrase referring to the rights “retained by the people” draws on a term of art from social contract theory. According to social contract theory, the people “retained” certain natural and inalienable rights when they entered into civil society. Madison would have known that a reference to the “retained” rights would be understood as drawing upon this foundation of the natural and inalienable rights that are retained.

For one who is intimate with the debate over ratification of the Constitution, however, it is impossible to credit the claim that the allusion to rights “retained” by the people uniquely refers to natural rights retained under social contract theory. The ratification debates are filled with references to the rights and powers which the people “reserve” or “retain” throughout the debates these terms are used interchangeably and they generally are used to refer to the people’s grants and reservations of their own sovereign power. James Wilson referred to a bill of rights as “an enumeration of the powers reserved,” a fact which gave rise to the feared inference that everything “not enumerated is presumed to be given.” President Washington explained that we did not need a bill of rights because the people “retained” every thing which they did not in express terms give up. Archibald Maclaine observed: “We retain all those rights which we have not given away to the general government.”

These were not arguments about limitations on the powers granted to the government based on natural or inalienable rights that were implicit in the decision to enter the social contract; they were arguments referring to the scheme of limited powers by which the people retained all rights and powers not granted. In the summer of 1789, during the process of considering Madison’s proposed amendments, Richard Parker
wrote to Richard Henry Lee that he did not object to Madison's proposed Bill of Rights because "we declare that we do not abridge our Rights by the reservation but that we retain all we have not specifically given."\(^{83}\) The proposals for the Ninth Amendment drafted at the state ratifying conventions were framed as prohibitions on an inference of new or enlarged powers from the provision for "exceptions" to those powers.\(^{84}\) During the drafting process, it was recast as a prohibition on an inference against other rights "retained by the people" from the reservation of particular rights in the Constitution.\(^{85}\) This shift in focus was objected to in Virginia, where the first of these proposed amendments had been drafted.\(^{86}\) In a letter to President Washington, Madison (the amendment's draftsman) objected that any proposed distinction between the two forms of the amendment was "altogether fanciful."\(^{87}\) The key to the provision in either of its forms would be the success of the Constitution's limited powers scheme: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the [rights] be secured . . . by declaring that they shall [not be  

30, at 1091. Hartley accurately summarizes the arguments of Wilson and others, and this statement accenuates that the rights of the people are "retained" in the precise manner that the rights of the States are retained. There is also no doubt that the inclusive residiary sovereignty to which he alludes included various positive law and customary rights (as well as state's rights) not thought to be within the reach of the enumerated powers; this is not centrally about natural or inalienable rights.

As Philip Hamburger observes, Wilson's own exclusive statements about the rights "retained" can be taken as referring (at least in part) to the entire body of natural rights, which includes basically every species of natural liberty, including those aspects that are properly given up upon entering civil society. Philip A. Hamburger, Natural Rights and Positive Law: A Comment on Professor McAffee's Paper, 716 S. II. U. L. J. 307 (1992). But Hamburger's observation simply points up the popular sovereignty/federalism roots of the conception of "retained" rights at stake. This understanding is reflected in the amendment proposed by New York which states that every "right" not "clearly delegated" to the federal government "remains to the People of the several States, or to their State Governments to whom they may have granted the same . . . ." New York Proposed Amendments, 1788, reprinted in 2 Schwartz, supra note 30, at 911–12.

\(^{83}\) Id. Letter from Richard Parker to Richard Henry Lee (July 6, 1789), reprinted in Creating the Bill of Rights, supra note 28, at 260. Parker's formulation is particularly telling because it so explicitly links the Ninth Amendment proposal with preserving the substance of the Federalist claim that a bill of rights was not really necessary because the people retained all that they had not specifically granted.

\(^{84}\) See McAffee, supra note 2, at 1236, 1278–79.

\(^{85}\) Id. at 1236–37, 1282–87.

\(^{86}\) Letter from James Madison to George Washington (Dec. 5, 1789), reprinted in 2 Schwartz, supra note 26, at 1190. For further discussion of the incident, see McAffee, supra note 2, at 1287–93; Wilmeth, supra note 3, at 1302–03.

\(^{87}\) Letter from James Madison to George Washington (Dec. 5, 1789), reprinted in 2 Schwartz, supra note 26, at 1190.

abridged], or that the [powers] shall not be extended."\(^{88}\) On the other hand, if the enumerated powers are so ill-defined that "no [such] line can be drawn, a declaration in either form would amount to nothing."\(^{89}\) Madison's defense of the rights-based version of the amendment draws upon the pervasive themes of the ratification debates and makes it very clear that the other "retained" rights were those reserved by the limited powers scheme; his acknowledgment of the hypothetical possibility that the scheme could fail in adequately securing rights if governmental powers had not been adequately defined (an acknowledgment anticipating our historical development) reflects that he referred to the positive law of the Constitution (as created by the sovereign people) rather than to pre-existing inherent rights.

A closely-related argument is Randy Barnett's reliance on a July 1789 draft of the Bill of Rights which Roger Sherman presented to the House Select Committee on which Madison and Sherman served. Sherman's draft includes a provision referring to the "natural rights" which are "retained by [the people] when they enter into society."\(^{90}\) Barnett concludes that this provision "reflects the sentiment that came to be expressed in the Ninth Amendment."\(^{91}\) Though he offers us virtually no help on this, Barnett apparently presumes this connection because Sherman's draft refers to rights that are "retained" by the people, the very language employed by the Ninth Amendment. Before we take this inference too seriously, of course, we might expect its proponents to explain the statements developed above in which the rights referred to by the Ninth Amendment are described as those retained by virtue of the limited grants of federal power.\(^{92}\)

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) See Barnett, supra note 2, at 7 n.16, 351 (App. A).

\(^{91}\) Id. at 7 n.16. See also Barnett, supra note 75, at 629–30 & n.48, 639 n.91; Rosen, supra note 2, at 1073 n.5.

\(^{92}\) Indeed, careful attention ought to be paid to the entirety of Sherman's draft bill of rights. It includes, for example, a provision anticipating the Ninth and Tenth Amendments that (1) reserves all powers not delegated, and (2) forbids an inference against powers "retained" from limitations inserted by way of caution. Barnett, supra note 2, at 352. See infra note 94. (Sherman's draft is also found in Roger Sherman's Proposed Committee Report (July 21–28, 1789), reprinted in Creating the Bill of Rights, supra note 28, at 266). Sherman's use of the term "retained" in his prototype of the Ninth and Tenth Amendments casts against the view that the concept of retained rights necessarily consists of those identified in social contract theory as natural rights retained as people enter into civil society. Moreover, despite Barnett's claim (as quoted in the text accompanying note 87) that the concept of retained natural rights was "the sentiment that came to be ex-
We ought also to be confident that there is a real connection between Sherman's proposed amendment and the Ninth Amendment. But the historical context calls this assumption into serious question. To begin with, Madison's proposed draft of the Ninth Amendment, referring to the other rights retained by the people, had been presented to Congress during the previous month; so it is not likely that Madison's draft or the committee's work owed anything to Sherman's particular choice of language. Moreover, it is by no means clear that Sherman's effort here was intended as an important contribution to the substance of the proposals. Sherman was the main proponent of placing the Bill of Rights at the end of the document, rather than inserting the amendments into the body of the text as proposed by Madison. The editors of the documentary record of the first Congress' consideration of the Bill of Rights suggest that Sherman's proposed amendments were largely directed to "showing how Madison's amendments could be revised and placed at the end of the Constitution."93

When this historical context is taken into account, it appears that the provision in question was based on Madison's draft of a proposal for language to be inserted into the preamble of the Constitution that would affirm the basic principles of popular sovereignty and government's purpose to act "for the benefit of the people" by securing their time-honored natural rights.94 Several state ratifying conventions had proposed similar proposed amendments, which were based on similar statements found originally in the Virginia Declaration of Rights.95

There is no evidence, of course, that Madison or Sherman, let alone the ratifying conventions that initially proposed such provisions, perceived them as related to the Federalist objections to adding a bill of rights. Not surprisingly, both the Virginia and New York conventions proposed such a statement of first principles along with the provisions that would become the Ninth Amendment.96 There is no evidence that either convention thought these proposals were redundant. Madison's proposals, as we have noted, tracked the decisions of the state conventions, including both the provision setting forth the language of first principles as well as the "hold harmless" provision we call the Ninth Amendment.97 Madison's proposed Ninth Amendment, moreover, included the retained rights language, which suggests that he did not see it as embodying the substance of the "first principles" provision. In fact, as I have elsewhere observed, Madison recognized the importance of the statement of first principles along with adding a "hold harmless" provision that would preclude any general constitutional incorporation of the doctrine of natural rights. See Herbert J. Storing, The Constitution and the Bill of Rights, in How Does the Constitution Secure Rights 15, 33 n.50 (Robert A. Goldwin & William A. Schambra eds., 1985) (observing that Madison's proposal shifted from the Virginia Declaration of Rights "in the direction of supporting government"; whereas the Virginia Declaration secured natural rights and referred to the "inherent rights of which man cannot be divested," Madison's proposal begins with society as a starting point and converts the inherent rights to the idea that government should be for the "benefit of the people").98

93See 1985 ed., note 2, at 1303 n.333 (citing related provisions and proposals).

94See 1985 ed., note 3, at 840 (Virginia's first amendment within its "declaration or bill of rights" setting forth certain natural rights); id. at 842 (Virginia's first amendment to the Constitution stating the general principle of reserved rights and powers); id. at 844 (Virginia's seventeenth proposed amendment stating that the clauses limiting Congress' powers should not be construed to enlarge its powers, but should be interpreted as "making exceptions to the specified powers" or as "inserted merely for the greater caution"); id. at 911 (New York's provision as to "essential rights"); id. at 911-12 (New York's proposal anticipating the Ninth and Tenth Amendments).

95Madison Resolution (June 8, 1789), reprinted in 1985 ed., note 28, at 11. Madison's proposal read as follows:

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety. Id. It is striking, and perhaps not insignificant, that Madison summarized the gist of what had been referred to as natural and inalienable rights without referring to these interests in those terms. Cf. New York Proposed Amendments, 1788, reprinted in 2 Schwartz, supra note 30, at 911 (New York proposed amendment omitting allusion to natural rights while referring to same specified rights as the "essential rights which every Government ought to respect and preserve"). In following New York's lead, Madison may have been avoiding the disagreement that had sometimes existed as to whether property should be conceived as among the inalienable natural rights and, in addition, may have thought it wiser to refer to the particular ends to which most agreed government was instituted without intimating any general constitutional incorporation of the doctrine of natural rights. See Herbert J. Storing, The Constitution and the Bill of Rights, in How Does the Constitution Secure Rights 15, 33 n.50 (Robert A. Goldwin & William A. Schambra eds., 1985) (observing that Madison's proposal shifted from the Virginia Declaration of Rights "in the direction of supporting government"; whereas the Virginia Declaration secured natural rights and referred to the "inherent rights of which man cannot be divested," Madison's proposal begins with society as a starting point and converts the inherent rights to the idea that government should be for the "benefit of the people").99

99Madison Resolution (June 8, 1789), reprinted in 1985 ed., note 28, at 11, 13, 14. Although Madison's draft of the Ninth Amendment contributed new language, not included in the state proposals, that prohibited an inference against unenumerated rights "retained by the people," the new language was closely associated with the language prohibiting an inference enlarging delegated powers; and both the prohibited inferences were contrasted with language indicating that the Constitution's rights provisions were, instead, to be construed "either as actual limitations of such powers, or as inserted merely for the greater caution." Id. at 13.
where observed, Sherman's own proposed amendments included both provisions as well.98 It is true, of course, that the natural rights language proposed by Madison and Sherman was never adopted as part of the Bill of Rights. The committee that Madison and Sherman served on did not recommend such a provision for the consideration of the whole House.99 While it might be thought that this language was omitted because it was conceived of as redundant with the proposed Ninth Amendment, the evidence reviewed above points away from this reading of the Ninth Amendment. Moreover, there are more satisfying explanations for the omission of the language of first principles that bears on our overall discussion.

98McAffee, supra note 2, at 1303 n. 333. With words added to fill gaps in Sherman's handwritten draft, Sherman's proposal of what would become the Ninth and Tenth Amendments reads as follows:

And the powers not delegated to the government of the United States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively, nor shall any of the above-mentioned powers be assumed by the government of the United States [in the particular instances here in enumerated by way of caution be construed to imply the contrary.

Roger Sherman's Proposed Committee Report (July 21-28, 1789), reprinted in Creating the Bill of Rights, supra note 28, at 267. The two sentences of the New York pattern of confronting the closely related concerns of the Ninth and Tenth Amendments in a single provision. The second sentence, which embodies the substance of the Ninth Amendment, prohibits the feared invasion of the principle that all powers not delegated are retained as an inference from the enumeration of limitations on national powers (a way of describing rights provisions). This relationship between the Ninth and Tenth Amendments is dramatically underscored when Sherman's Ninth Amendment prototype states that the limitations on powers set forth in individual rights provisions shall not "imply the contrary" of the principle of retained powers already set forth in the language stating the substance of the Ninth Amendment. This is significant not only because the language strongly suggests that his natural rights provision is not directly related to the Ninth Amendment, but also because its timing suggests that an important member of the committee apparently saw no difference of substance between Madison's proposed Ninth Amendment, with its reference to retained rights, and the language of the state proposals that had framed the idea in terms of avoiding a construction of enlarged powers. Compare McAffee, supra note 2, at 1282-93 (presenting the case for continuity between the Virginia proposal and Madison's Ninth Amendment) with Rosen, supra note 2, at 1075 n. 11 (suggesting McAffee misconceives "retained by the people") in claiming that "Madison's reference to rights retained by the people 'added nothing to the precursores of the Ninth Amendment proposed by Virginia'."

99See House of Representatives Journal (Aug., 1789), reprinted in 2 Schwartz, supra note 30, at 1122-23 (amendments reported by Select Committee to entire House); Storing, supra note 94, at 33.

100See, e.g., Donald S. Lutz, Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions 61 (1980) (early state declarations of rights "invariably contained general admonitions with no specific legal content" and their provisions thus "lacked positive, binding force"); id. at 62 (such declarations "did not so much prohibit use of legislative power as impede legislative will").

101Id. at 65-66 (use of language of obligation rather than command "ought", "should," etc. — reflects "the prescriptive nature of the [state bills of rights] as opposed to the legally binding nature of the [frames of government]"). See also Donald S. Lutz, The U.S. Bill of Rights in Historical Perspective, in Contexts of the Bill of Rights 9 (S. Schechter & R. Bernstein eds., 1990) (use of advisory language shows that these provisions "are not 'capable of being legally enforced'; such provisions are "statements of shared values and fundamental principles rather than a simple listing of prohibitions on governmental action"); Robert C. Palmer, Liberties as Constitutional Provisions 1776-91, in Constitution and Rights in the Early American Republic 55 (1987) (the state bills of rights "were not 'constitutional guarantees' but 'governmental principles'"); id. at 65 (use of words such as "ought" were purposeful and reflected "that the rights were principles; 'ought' denotes obligation, not a command"); Pa. Const. Decl., Rights, art. V (["G]ovfrncnt is, or ought to be, instituted for the common benefit, protection and security of the people." (emphasis supplied)); Va. Const. Bill of Rights § 12 (the press "can never be restrained but by desperate governments"). As Palmer observes, such statements articulated "governmental principles by which the Virginia government, assured to be a freedom-enhancing and united with the people, should have, ought to have, held itself bound.").

102E.g., Lutz, supra note 101, at 14; Palmer, supra note 101, at 116; Bernard Schwartz, Madison Introduces His Amendments, May-June, 1789, in 2 Schwartz, supra note 30, at 1008-09.

103See Bernard Schwartz, Madison Introduces His Amendments, May-June, 1789, in 2 Schwartz, supra note 30, at 1009 (referring to Madison's recognition that courts might enforce the provisions of a bill of rights). Schwartz and others have attributed Madison's attention to this aspect of a bill of rights to correspondence he engaged in with Jefferson during and after the debate over ratification of the Constitution. See Letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in Creating the Bill of Rights, supra note 28, at 218 (stressing to Madison the significance of "the legal check which it [a bill of rights] puts into the hands of the judiciary"); 1 Schwartz, supra note 30, at 592 (attributing Madison's emphasis on the judicial check a bill of rights to his correspondence with Jefferson).
included this language of principle in a proposed prefix to the Constitution, given his probable awareness that preambles are not considered part of the binding law of the Constitution. These were the background principles of America's constitutionalism, not enforceable constitutional commands.

Some objected that these statements of principle would simply clutter the preamble, which was a model of brevity and clarity. And it was even suggested that they would better fit within the proposed Bill of Rights. Ultimately, however, while the first of these judgments was accepted, the second was not adopted. Certainly no one was rejecting the importance of these statements as first principles. No doubt many simply believed that these were the first principles that went without being specifically articulated in the written Constitution; they were in that sense superfluous. But the related point is that a majority of the adopters of the Bill of Rights did not see such provisions as essential to securing the people's fundamental rights; the people's rights would be secured by the specific limitations of the Bill of Rights and the Constitution itself and

the reservation of all the rights and powers not delegated to the national government. Neither Sherman's draft, nor the Virginia Declaration of Rights from which it is drawn, provides the key to understanding the Ninth Amendment.
16. The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee

David N. Mayer

It is a tribute to the significance of Professor McAfee’s subject, and to the subtlety and sophistication of his argument, that I find it difficult to respond fully to his defense of the so-called “Positivist” reading of the Ninth Amendment within the allotted time and space. Nevertheless, as an adherent to what he calls the “Natural Law” reading of the amendment, I feel compelled to respond as best I can; and therefore, like Professor McAfee, will try to focus on what I regard as the most crucial issues.

There are three basic reasons why I am troubled by his “Positivist” reading of the Ninth Amendment and find it unpersuasive. First, this interpretation seems to ignore the flaws in the enumerated powers scheme of the Constitution—flaws that were immediately recognized by skeptics of the Constitution during the debate over ratification. Accordingly, the interpretation assumes that retained rights were the exact opposite of federal powers, which was not the case. Second, Professor McAfee’s interpretation relies heavily on seemingly “positivist” arguments that were made in the ratification debates. These arguments are misleading and do not negate the considerable body of evidence that Americans of the Founders’ generation still believed in higher law principles, among them the theory of natural rights. Third, Professor McAfee’s interpretation begs the critical question—the status of judicial review in the late 1780s—a question that is distinct from that of the meaning of the Ninth Amendment.


I.

The Positivist reading of the Ninth Amendment seems to rely on the assumption that the Constitution was indeed, as its advocates argued, a system of enumerated federal powers. The error in that assumption is that, as the debates over ratification make clear, the Framers in fact failed to create such a system. Residual rights were not secured by the limited powers scheme of the Constitution because that scheme was so imperfect.

One problem which the Antifederalists were quick to point out in response to the “danger” argument advanced by Federalists such as James Wilson and Alexander Hamilton2 was that the text of the Constitution already enumerated certain rights. The protection of some rights in the Constitution “opened the Federalists to devastating rebuttal,” as Leonard Levy has noted. Their argument that a partial enumeration of rights would be dangerous, because it would imply the power to abridge other rights, “boomeranged.” Article VI of the Constitution prohibited religious tests as qualifications for office; did this prohibition imply that Congress might otherwise abridge religious freedom? The right to trial by jury in criminal cases was expressly guaranteed in Article III, but did the enumeration of this particular guarantee imply that Congress could abridge other rights traditionally enjoyed by accused persons? These and other rhetorical questions raised by the advocates of a bill of rights were not readily answered; indeed, they underscored the point made by “Centinel,” an Antifederalist writer who answered James Wilson in a Philadelphia newspaper, that the explanation for the omission of a bill of rights was “an insult on the understanding of the people.”3

Another problem with the supposed limited powers scheme of the Constitution was also readily apparent to its Antifederalist critics and other skeptics like Thomas Jefferson, who joined the Antifederalists in calling for the addition of a bill of rights.4 This problem was that many of the power-granting clauses of the Constitution were themselves so ambiguous. The “necessary and proper” and “general welfare” clauses particularly provoked concern.5 Opponents of the Constitution saw those clauses as the potential sources of undefined and unlimited powers which would accrue to the national government in the absence of a bill of rights.6

Recognizing these problems with the text of the Constitution, Jefferson was not at all persuaded by Federalist arguments that the addition of a bill of rights would be both unnecessary and dangerous. As he noted in a letter to Madison, James Wilson’s argument was “opposed by strong inferences from the body of the instrument,” as well as from the absence in the Constitution of a clause, similar to one found in the Articles of Confederation, that had declared an enumerated federal powers scheme in express terms.7 Jefferson agreed that a constitution could “be so formed as to need no declaration of rights,” and he noted that he had endeavored to draft his 1783 proposed constitution for Virginia “to reach all the great objects of public liberty, and did not mean to add a declaration of rights.” But, he emphasized, in a constitution like the new federal Constitution, “which leaves some precious articles unnoticed, and raises some implications against others,” a declaration of rights “becomes necessary, by way of supplement.”8 As he argued to Madison in

2Federalists such as James Wilson and Alexander Hamilton had argued that adding a bill of rights to the Constitution would need to be “dangerous” because the enumeration of particular rights could imply that some powers, in addition to the enumerated powers, were granted. James Wilson, Address to a Meeting of the Citizens of Philadelphia (Oct. 6, 1787), reprinted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 528, 529 (1971); The Federalist No. 84, at 579 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Other Federalists noted a second related, but distinct, “danger.” See text at note 16, supra.


4Jefferson claimed that he was “neither federalist nor antifederalist” because he supported the general idea of a stronger national government but had serious reservations about particular features of a new Constitution, particularly the lack of a bill of rights. See Letter from Thomas Jefferson to Francis Hopkinson (Mar. 13, 1797), in 14 The Papers of Thomas Jefferson 649, 651 (Julian P. Boyd ed., 1958).


6Id. at 367 (Oct. 18, 1787) (“Brutus,” arguing that the powers given Congress by the necessary and proper clause were “very general and comprehensive” and might “justify the passing almost any law”) and 391 (Dec. 13, 1787) (that the Necessary and Proper Clause, coupled with the General Welfare Clause, would allow Congress to “totally destroy all the powers of the individual states”).


an oft-quoted passage from his letter of December 20, 1787, "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference."

These problems with the enumerated powers scheme of the Constitution were readily apparent to Madison by the time he gave his speech on the floor of the House of Representatives, introducing proposed amendments, in June 1789. The basic problem, as Madison recognized, was the relation of means and ends; in other words, the problem of implied powers:

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within these limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the State Governments under their constitutions may to an indefinite extent.10

Hence the Federalist argument that a federal Bill of Rights was unnecessary—an argument premised on the supposed distinction between federal enumerated powers and state general powers—was, in Madison’s words, “not conclusive to the extent which has been supposed.”11 Because the Constitution in Article I, Section 8, enumerated only the ends to which Congress may exercise its powers, Congress—especially given its general power under the necessary and proper clause—might choose to exercise those powers by means which would destroy individual rights. For example, Madison noted, Congress might authorize the issuance of general warrants as a “necessary” means to collect federal revenues. “If there was reason for restraining the State Governments

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9 Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), supra note 7, at 337 (emphasis added). Antifederalist writers who decried the absence of a bill of rights made similar statements. See, e.g., The Address and Reasons of Dissent of the Convention of Pennsylvania To Their Constituents (Dec. 17, 1787), reprinted in 3 The Complete Anti-Federalist, supra note 3, at 145, 157 (complaining of the omission of a bill of rights “ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the control”).

10 James Madison, Speech in the House of Representatives (June 8, 1789), reprinted in 2 Schwartz, supra note 2, at 1030 (emphasis added).

11 Id.)

12 Id. at 1030-31.

13 Id. at 1027. Madison's proposal for what would later become the Tenth Amendment read, “The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively.” Id. at 1028. The addition of the words, “or to the people,” to the end of the Tenth Amendment as it was finally adopted, Largue, made that amendment not only a guarantor of federalism but also of the retained rights of the people. As another scholar previously has noted, “[The] last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both that as to the federal government there were rights, not enumerated in the Constitution, which were reserved . . . to the people.” and that because the people possessed such rights there were powers which neither the federal government nor the states possessed.” Norman Bedich, Are There “Certain Rights Retained by the People”?, in The Rights Retained by the People; The History and Meaning of the Ninth Amendment 117, 141 (Randy E. Katz ed., 1989).

14 James Madison, Speech in the House of Representatives (June 8, 1789), reprinted in 2 Schwartz, supra note 2, at 1027.

15 McAffee, supra note 1, at 1226, 1283 n.255. If McAffee is right, Ninth Amendment “rights . . . retained by the people” are the same as Tenth Amendment “powers . . . reserved . . . to the people.” Hence the Ninth Amendment, as he interprets it, is functionally the same as the Tenth Amendment, with the addition of the last four words, “or to the people.” Id.

16 James Iredell, for example, during the North Carolina ratifying convention debates, mentioned two distinct reasons why a federal bill of rights would be “dangerous.” James Iredell, in 4 Debates in the Several State Conventions on the Adoption of the from this power, there is like reason for restraining the Federal Government.”12

As to the Federalist argument that the addition of a Bill of Rights would be “dangerous,” Madison proposed a solution—his draft provision of what would eventually become the Ninth Amendment as well as part of the Tenth:13

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.14

The plain language of Madison’s proposal indicates that it was meant to deal with two distinct dangers—two related, though distinct, implications that might arise from the enumeration of rights in the Constitution: first, that it might result in the loss of rights not included in the enumeration; and second, that it might result in the addition of powers. Professor McAffee’s interpretation assumes that these are the same because, as he has argued, rights and powers were “two sides of the same coin.”15 Madison’s recognition by June 1789 of the means/ends problem, however, shows that he had followed some Federalists in recognizing both dangers.16 His attempt to deal with the two dangers in one provision.
was reworked by Congress into two separate amendments—the Ninth, to deal with the first danger of lost rights; the Tenth, to deal with the second danger of implied powers.

As Randy Barnett has shown, Madison’s own use of the Ninth and Tenth Amendments during the debate over the national bank bill in 1791 suggests that Madison considered the two amendments to be complementary. Madison denied that Congress had the power to create the bank under the necessary and proper clause, arguing, among other things, that it was too remotely connected to a legitimate Article I, section 8 end, the borrowing of money. To permit Congress to utilize this particular means to that end—a means which also involved the creation of a monopoly and hence violated “the equal rights of every citizen”—would be a “latitude of interpretation” that would be “condemned by the rule furnished by the Constitution itself.” As authority for that “rule,” Madison relied on both the Ninth and Tenth Amendments: “the former, as guarding against a latitude of interpretation; the latter, as excluding every source of power not within the Constitution itself.”

The significance of this, as Professor Barnett has argued, is that Madison’s use of the Ninth Amendment was “entirely outside the only Federal Constitution 148–49 (photo reprint 1974) (Jonathan Elliot ed., 2d ed., Washington, D.C., 1836) [hereinafter Elliot’s Debates]. The first reason, emphasized by Professor McAffee, was that it would lead to the loss of the system of enumerated powers and reserved rights. McAffee, The Original Meaning of the Ninth Amendment, supra note 1, at 1254 (citing 4 Elliot’s Debates, supra at 149). Professor McAffee, however, ignores Iredell’s clear—and astonishingly prophetic—warning why a bill of rights “might operate as a shame rather than a protection.” In discussing the likely consequences of a partial enumeration, Iredell made explicit a second danger, the loss of unenumerated rights. “Suppose, therefore, an enumeration of a great many, but an omission of some, and that, long after all traces of our present disputes were at an end, any of the omitted rights should be invaded, and the invasion be complained of; what would be the plausible answer of the government to such a complaint? Would they not naturally say, ‘We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights, passed at that time, showed that the people did not think every power retained which was not given. The bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them.” Iredell, in 4 Elliot’s Debates, supra at 149.

As Barnett has shown, Madison’s use of the Ninth Amendment was meant to be relevant.” Madison used the amendment, not in response to an argument for expanded federal powers based on incomplete enumeration of rights, but “precisely and explicitly as authority for more strictly construing enumerated powers—in particular, the Necessary and Proper Clause.” Moreover, it is significant also that Madison’s argument against the bank bill rested in part on the fact that the claimed power to grant a monopoly charter would violate the “equal rights of every citizen,” a right not enumerated in the Constitution, at least not prior to the addition of the Fourteenth Amendment.

More fundamentally, it is far from clear that Americans of the Founders’ generation moved so quickly or so completely from unwritten, “higher law” constitutionalism to positivism, as Professor McAffee’s argument implies. Indeed, the evidence suggests that the concept of a higher law was at least as firmly rooted in early American constitutionalism as the concept of positivism.

Professor McAffee’s reliance on polemical remarks made by Federalists and Antifederalists during the course of the debate over ratification of a Constitution, without a bill of rights, is highly misleading. The partisan statements of either Federalists or Antifederalists, raised during the debate, were taken by themselves as not reliable evidence of the intent of the Framers.

In the first place, for every Antifederalist warning that the failure to protect rights explicitly in the Constitution would result in their loss, one can find a Federalist comment to the effect that enumeration of fundamental rights was unnecessary because these rights were so well known and, in the case of natural rights, inalienable. For example, Richard MacLaine in the North Carolina ratification debates argued that “[i]f there be certain rights which never can, nor ought to, be given up, these context in which, according to McAffee, the Ninth Amendment was meant to be relevant.” Madison used the amendment, not in response to an argument for expanded federal powers based on incomplete enumeration of rights, but “precisely and explicitly as authority for more strictly construing enumerated powers—in particular, the Necessary and Proper Clause.” Moreover, it is significant also that Madison’s argument against the bank bill rested in part on the fact that the claimed power to grant a monopoly charter would violate the “equal rights of every citizen,” a right not enumerated in the Constitution, at least not prior to the addition of the Fourteenth Amendment.

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rights cannot be said to be given away, merely because we have omitted to say that we have not given them up."22 In the same vein, Benjamin Rush commended the framers for omitting a bill of rights: "As we enjoy all our natural rights from a pre-occupancy, antecedent to the social state," it would be "absurd to frame a formal declaration that our natural rights are acquired from ourselves."23

Similar Federalist comments can be found in reference not only to natural rights but also to certain well-established civil rights. For example, at the Constitutional Convention, when a prohibition of ex post facto laws was proposed, Oliver Ellsworth and James Wilson both argued against the proposal on the grounds that it was unnecessary. Ellsworth remarked that "there was no lawyer... who would not say that ex post facto laws were void in themselves," and Wilson argued that the inclusion of such a prohibition would "bring reflections on the Constitution—and proclaim that we are ignorant of laws was proposed, and therefore held inherent constitutional status, as Professor McAffee suggests,25 clearly such a response would not appease the Antifederalists' strong skepticism about the various ways in which rights could be endangered.

The Federalists might have regarded bills of rights as mere "parchment barriers," but the Antifederalists—"men of little faith," to use Cecilia Kenyon's descriptive phrase—saw them as necessary safeguards. Americans of the Revolutionary generation generally were imbued with radical Whig ideology and its profound distrust of political power;26 and what was true of Americans generally was especially true of the Antifederalists. If their arguments in the ratification debates seem "highly positivist," as Professor McAffee asserts,27 it may be because the

22Elliot's Debates, supra note 16, at 161 (July 29, 1788).
24Id. at 123–24 (quoting from Madison's notes of the Convention, as edited, respectively, by Herbert Storing and Max Farrand).
25See McAffee, supra note 1 at 286.
27McAffee, supra note 1 at 290.

Antifederalists, having been taught by Whig ideology that such was the inevitable tendency of things, feared that without express stipulations for rights, written constitutions would be used as a pretext for invading individual rights.

Perhaps the clearest expression of this idea in Antifederalist writings came from Richard Henry Lee of Virginia, who in a letter to Governor Edmund Randolph which was subsequently printed in the Virginia Gazette, argued that "universal experience" had shown "that the most express [sic] declarations and reservations are necessary to protect the just rights and liberty of mankind from the silent powerful and ever active conspiracy of those who govern." "That such precautions are necessary to restrain and regulate the exercise of the great powers given to rulers," even under republican forms of government, he added, was "the sense of the good people of America, by the various bills or declaraions of rights whereon the government of the greater number of states are founded."28 Thus, to Lee, the inclusion of declarations of rights in the state constitutions proved that Americans realized the necessity of guarding against the inevitable "conspiracy" of those who hold public office.29

The libertarian thrust of Antifederalist arguments on behalf of a bill of rights is unmistakable. In referring to the dangers of governmental power, Antifederalists continually spoke of the need to "distrust" the government,30 to be "jealous" of one's liberty. Like Jefferson, they
believed that governmental power inevitably tends to lessen individuals' freedom.32

Written constitutions, as they had evolved in America by the late 1780s, were viewed as "barriers against powers in all forms and departments of Government," as Madison had noted in his House speech.33 Americans had not departed from their Revolutionary-era understanding that written law was not the source of rights, but merely affirmed pre-existent rights, in order to provide added security.34 Such was the useful function to be served by constitutional declarations of rights, even the self-evident natural rights. The New Hampshire Bill of Rights of 1783, for example, followed the model set by declarations of rights in earlier state constitutions, such as Pennsylvania's and Virginia's, in providing that "[a]ll men have certain natural, essential, and inherent rights; among which are— the enjoying and defending life and liberty— acquiring, possessing, and protecting property—and in a word, of seeking and obtaining happiness." Further, after noting that the people "surrender up" some of their natural rights "in order to insure the protection of others"—as social contract theory taught—the New Hampshire Bill of Rights then explicitly recognized that among the natural "somes are in their very nature unalienable, because no equivalent can be given or received for them," such as "the rights of conscience."35

Would Americans in the 1780s have regarded such rights as lost if they were not protected explicitly in the state constitutions? Some Federalists argued that under the state constitutions the people had "invested their representatives with every right and authority which they did not in explicit terms reserve".36 It is doubtful, however, that in making these arguments, Federalists meant to contradict natural rights theory.37 It is far more likely that they were exaggerating the necessity for bills of rights in state constitutions in order to reinforce their argument that the federal Constitution did not need such declarations because it was a government of limited rather than general legislative powers.

III.

In summarizing the "Natural Law Reading," Professor McAffee notes that "[s]ince these additional [unwritten] rights are not to be disparaged, an implication is that they are judicially enforceable to the same extent as the rights enumerated in the text."38 The "implication" that he refers to misses the critical distinction between constitutional limitations, generally, and judicial enforcement of constitutional limitations through the power of judicial review. The critical issue—which has not been adequately answered by scholars—is whether the Founders meant for the judiciary to enforce unwritten rights; that issue is separate from the meaning of the Ninth Amendment and indeed may be the critical issue that divides scholars such as McAffee and Randy Barnett.

The origins of judicial review—the story of its gradual evolution from Sir Edward Coke's opinion in Dr. Bonham's Case to John Marshall's opinion in Marbury v. Madison—is becoming a familiar story, one that has been addressed by many scholars. In summarizing the scholarship to date, I think it is fair to say that the doctrine of judicial review, in the modern sense of the term (which includes the associated idea that the Supreme Court is the ultimate arbiter of constitutional meaning), was not yet firmly established at the time of the ratification debates.39

Contemporary evidence clearly shows that Americans of the Founding generation did not regard the judiciary, and certainly not the federal judiciary, as having a monopoly on constitutional interpretation. For example, when Jefferson suggested to Madison that an additional justification for a bill of rights was "the legal check which it puts into the

33Arguing on behalf of a federal bill of rights, Jefferson noted that "[t]he natural progress of things is for liberty to yield [sic] and government to gain ground." Letter from Jefferson to Edward Carrington (May 27, 1788), in 13 The Papers of Thomas Jefferson 208, 208–209 (Julian P. Boyd ed., 1956). See also Essays of Brutus (Oct. 1, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 3, at 367–69 ("It is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way").

33James Madison, Speech in the House of Representatives (June 8, 1789), reprinted in 2 Schwartz, supra note 2, at 1029.


3New Hampshire Bill of Rights (1783), reprinted in 1 Schwartz, supra note 2, at 375. As the editor notes, id. at 374, New Hampshire was unique among the states in explicitly acknowledging freedom of conscience to be an inalienable natural right.

34James Wilson, Address to a Meeting of the Citizens of Philadelphia (Oct. 6, 1787), reprinted in Schwartz, supra note 2, at 529; see also James Iredell, in the North Carolina ratification debates, supra note 16.
hands of the judiciary," he undoubtedly was referring to judicial review by state as well as federal judges. Madison relied on Jefferson's suggestion in his speech of June 8, 1789 when he argued that if rights provisions were incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." Madison, however, also suggested that the declaration of rights would be enforced by the state legislatures—a use that he and Jefferson would make of the Virginia and Kentucky legislatures in 1798 to protest the constitutionality of the Alien and Sedition Acts. Indeed, he argued, "because the State Legislatures will jealously and closely watch the operations of this [the federal] Government," they would be "sure guardians of the people's liberty," better able to resist the encroachment of federal power "than any other power on earth." The fact that Jefferson, Madison and their contemporaries did not regard the judiciary as having a monopoly on enforcing constitutional provisions, nevertheless, does not show whether the Founders intended to deny judges the power to enforce unwritten individual rights. There is some evidence in support of the proposition that the Framers' generation intended, and expected, judges to apply principles of higher law to hold governmental acts within legitimate bounds. Robert Riggs and Suzanna Sherry, for example, have cited several early cases in which

40 Letter from Jefferson to Madison (Mar. 15, 1789), in 12 The Papers of James Madison 13 (Charles F. Hobson & Robert A. Rutland eds., 1979). Jefferson described the judiciary as "a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning & integrity," and he mentioned specifically "the men of Wylie, Blair & Pendleton," all of them Virginia judges. Id. at 1031–32.

41 James Madison, Speech in the House of Representatives (June 8, 1789), reprinted in 2 Schwartz, supra note 2, at 1031.

42 Id. at 1031–32.

43 Robert Riggs, Substantive Due Process in 1791–1990, 90 Wis. L. Rev. 941, 977–978 (discussing several cases indicating that law-of-the-land and due process clauses in state constitutions had broad substantive connotations as well as procedural guarantees).

44 Suzanna Sherry, The Ninth Amendment: Righting an Unwritten Constitution, 64 Chi.-Kent L. Rev. 1001, 1003–1007 (1988) (discussing cases from four states—Virginia, Massachusetts, New York, and South Carolina—that illustrate use of unwritten law and that "[j]udges and lawyers throughout the new nation shared a common belief that both written and unwritten rights should be enforced by courts."). Sherry's conclusions have been criticized by another recent commentator, who sees judicial review as much less firmly established. Helen Michael, The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?, 69 N.C. L. Rev. 421, 424 (1991) (arguing that "the historical record indicates that the founders did not even uniformly expect judges to enforce in interpreting the review of legislation based on express constitutional terms, much less to void legislation based upon unwritten law.").

state court judges apparently did enforce unwritten "higher law." Similarly, some statements found in early federal court decisions—most notably, in Justice Samuel Chase's opinion in Calder v. Bull, and in Chief Justice John Marshall's opinion in Fletcher v. Peck—also illustrate judicial willingness to enforce at least some higher law principles.

CONCLUSION

Because of these three basic concerns, I remain unpersuaded by Professor McAfee's arguments on behalf of a "Positivist" reading of the Ninth Amendment, as originally intended by the Framers. In the two centuries that have passed since the Bill of Rights was adopted, courts have not confined their protection of individual rights to those enumerated in the text of the Constitution, as is illustrated by the long history of substantive due process protection, and the more recent history of Ninth Amendment protection, of unenumerated constitutional rights. Similarly, the even longer history of implied federal powers—the broadening of the Necessary and Proper, General Welfare, and Commerce Clauses—shows that the powers exercised by Congress in practice, as

45 U.S. (3 Dall.) 386 (1798). Chase held that there are "certain vital principles in our free republican governments" which will override abuse of legislative power, state or federal, whether or not these principles were stipulated in written constitutions. Among the examples he gives are laws that impair lawful private contracts; laws that take property from A. and give it to B.; laws that make a man a judge in his own cause; and laws that punish citizens for acts which, when done, were innocent. These are acts that no legislature could do without exceeding its rightful authority, under social compact theory. Indeed, Chase added, "[I]f to maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments." Id. at 387–88.

46 U.S. (6 Cranch) 87 (1810). In declaring invalid the Georgia statute that canceled the "Yazoo" land sales, Marshall cited not only the Article I, Section 10 clause prohibiting the states from impairing the obligation of contracts, but also "the nature of society and of government," which would also "prescribe some limits to the legislative power." Id. at 135–36. He concluded that "the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff ... could be constitutionally and legally impaired." Id. at 139.

47 For a discussion of uses of natural law in these and other early Supreme Court decisions, see J.A.C. Grant, The Natural Law Background of Due Process, 31 Colum. L.R. 56, 58–63 (1931).

48 Elsewhere I have described the constitutional jurisprudence of Christopher G. Tiedeman, a leading proponent of turn-of-the-century "laissez-faire constitutionalism," who fervently insisted upon judicial enforcement of what he called the "unwritten constitution of the United States," even in an age (the late-nineteenth century and beyond) which deemed the philosophy of natural law and natural rights to be old-fashioned. See David N. Mayer, The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism, 55 Mo. L. Rev. 93 (1990).
recognized by the courts, have not been limited to those permitted by positive law, either.

Still, the legal culture today is—as it has been in most of the twentieth century—dominated by positivism. (How else can one explain why it would be so controversial for a nominee to the Supreme Court to merely have written or talked about natural law?) I am not convinced that natural, or higher law, was vitiates by positivism in the decade of the 1780s; however, it seems clear that at some point since, positivism indeed did supplant natural law and, with it, the theory of natural rights. It remains to be shown by scholars when positivism really did first take hold in American legal culture. Was it in the nineteenth century, accompanying the rise of legal formalism; or was it not until the twentieth century, contemporaneous with the rise of legal realism? And what exactly did happen to the doctrine of higher law—arguably the great founding principle of American constitutionalism49—to have made it so alien to our own understanding, and to have made the Founders' generation seem so remote? These are the great unanswered questions that, in my mind, are raised by Professor McAffee's insightful and provocative article.

17. Natural Rights, Positivism and the Ninth Amendment: A Response to McAffee*

Steven J. Heyman

In modern constitutional law and theory, no issue is more fundamental—or controversial—than that of the existence of constitutional rights not expressly stated in the text of the Constitution. This issue is central, of course, to the ongoing debate over whether the Constitution guarantees a broad right of privacy.1 For the most part, the controversy over such rights has focused on the doctrine of substantive due process. During the last twenty-five years, however, there has been growing interest in the implications of the Ninth Amendment for the existence of unwritten constitutional rights.

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."2 In recent years, a number of scholars have argued that this amendment reflects concepts of natural rights that were prevalent during the post-Revolutionary period.3 On this reading, the "rights . . . retained by the people" refers to the natural rights that individuals retain when they enter into civil society and establish government. Understood in this manner, the Amendment points to a body of unenumerated rights that limit governmental power in the same way as the rights expressly stated in the Constitution.

In his contribution to this Symposium, Thomas B. McAffee challenges this view of the original understanding, and argues for what he

2U.S. Const. amend. IX.
calls a positivist interpretation of the Ninth Amendment.\(^4\) Elaborating the view that he advanced in an important recent article,\(^5\) McAffee argues that the “rights . . . retained by the people” refers to the rights that the people retained when they adopted the Federal Constitution.

McAffee’s argument may be summarized as follows. According to American constitutional theory during the late eighteenth century, all authority originally resides in the people. When the people adopt a constitution granting powers to government, the powers that are retained constitute the rights of the people.\(^6\) During the debate on ratification of the Federal Constitution, the Antifederalists demanded that the document be amended to expressly reserve the people’s fundamental rights, in the same way that those rights were declared in many of the state constitutions.

In response to these demands, James Wilson, followed by other Federalists, drew a basic distinction between the state and federal constitutions. Because the former established governments with general legislative authority, they were subject to the presumption that all powers not expressly reserved were granted to the government. The Federal Constitution, by contrast, delegated only particular, enumerated powers to Congress, and so the presumption was that all powers not expressly granted were reserved by the people. Accordingly, the Federalists contended, no bill of rights was necessary in the Federal Constitution, since the people’s rights were effectively reserved by the scheme of enumerated powers. Indeed, a bill of rights might be dangerous, because it might imply that the national government had been granted all powers not expressly reserved in the bill of rights, thereby undermining the scheme of enumerated powers as a mechanism for safeguarding liberty.


\(^6\) The framers’ conception of the reciprocal definition of constitutional rights and powers—according to which powers were understood as the rights delegated to government by the people, and rights as the powers that they retained—reflected a more general theoretical conception of the relationship between liberty and power. In eighteenth-century thought, liberty was understood as power—the power to direct one’s own actions. When individuals entered civil society, they ceded some of their liberty or power to the state in order to protect the rest. The liberty that they retained constituted their civil liberty or civil rights. On the eighteenth-century conception of liberty and power, see Gordon S. Wood, The Creation Of The American Republic, 1776–1787, at 21–25 (1969); Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L.J. 507, 526–30 (1991).

Of course, the demands for a bill of rights proved irresistible. Nonetheless, according to McAffee, the Ninth Amendment was added in order to guard against the danger feared by the Federalists—that the adoption of a bill of rights would effectively reverse the presumption that everything not granted was retained. Under McAffee’s view, then, the unenumerated rights referred to in the Amendment are not a body of rights with independent content, such as natural rights; instead, they are the residuum of rights retained by the people when they granted particular powers to Congress. It follows that these unenumerated rights do not impose any independent limitations on the powers of the federal government. Whether a government action violates unenumerated rights must be determined solely by reference to the powers granted to the federal government, not by reference to any extra textual source of rights. This view is positivist in the sense that it rejects any recourse to natural rights and looks solely to the Constitution’s written provisions defining the powers of government.

In this Comment, I shall not attempt to fully explore McAffee’s powerful and complex argument. Instead, I shall focus on what seems to me the crucial issue with respect to his positivist interpretation of the Ninth Amendment: whether, under the original understanding, unenumerated rights are to be identified solely by reference to the Constitution’s positive grants of power to Congress.\(^7\) I shall argue on the contrary that these rights were to be determined primarily by reference to an independent source of rights, natural rights theory. In particular, I shall suggest, first, that it is unlikely that the drafters meant to define unenumerated rights solely in residual terms; second, that the case for a natural rights interpretation is stronger than McAffee acknowledges.

\(^7\) Debate over the positivist reading of the Ninth Amendment has often focused on whether unenumerated rights impose affirmative limitations that “trump” delegated powers, or whether unenumerated rights and delegated powers are reciprocal, with rights defined as the powers not granted, and powers defined as the rights delegated to the government. When the issue is framed in this way, McAffee can make a powerful case that the original understanding supports the reciprocal view. See, e.g., Letter from James Madison to George Washington (Dec. 5, 1789), in 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1190 (1971) (quoted infra at text accompanying note 16); see also supra note 6 (discussing eighteenth-century conception of liberty and power). To my mind, however, this is not the decisive issue. As I argue below, even if McAffee is correct that rights and powers were understood to be reciprocal, the positivist position is untenable if unenumerated rights had content that was capable of being determined independently (e.g., by reference to natural rights doctrine), and not merely by negative implication from the power-granting provisions of the Constitution. I shall refer to this as the “independent rights” view of the Ninth Amendment, in contrast to McAffee’s “residual rights” view.
and, finally, that even if the residual rights view is correct, reference to natural rights principles might nonetheless play an important role in determining the scope of congressional powers.

The Residual Rights Interpretation

Within the framework of Federalist logic, McAfee’s interpretation of the Ninth Amendment seems compelling. But the Federalist argument was directed toward the rejection of a bill of rights altogether. Those who supported a bill of rights were not persuaded that the constitutional scheme of enumerated powers provided adequate security for rights. The basic point, as Madison expressed it, was that “all power is subject to abuse.”\(^8\) A bill of rights was therefore necessary to guard against abuse of the powers submitted to the federal government.\(^9\) Moreover, supporters questioned whether federal powers were defined with sufficient precision to impose effective limits.\(^10\) Finally, as Madison explained, under the Necessary and Proper Clause Congress had discretion as to the means required to accomplish the ends committed to it, and might abuse this discretion by adopting measures that infringed fundamental rights. For example, in order to collect the federal revenue, Congress might authorize the use of general warrants, in violation of the right to be free from unreasonable searches and seizures.\(^12\)

\(^8\)The supporters of a bill of rights do not appear to have taken the Federalist arguments as to necessity or the dangerousness of a bill of rights very seriously. For example, in a letter to Madison, Jefferson remarked that Wilson’s argument that rights were effectively reserved by the scheme of enumerated powers “might do for the Audience to whom it was addressed [a popular meeting], but is surely gratis dictum, opposed by strong inferences from the body of the instrument. . . .” Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 1 Schwartz, supra note 7, at 606–07. Similarly, in his speech explaining the Bill of Rights to the House of Representatives, Madison observed that many Federalists had contended that a bill of rights was “not only unnecessary, but even improper, nay, I believe some have gone so far as to think it even dangerous,” and concluded, “Some policy has been made use of perhaps by gentlemen on both sides of the question. . . .” Speech of James Madison (June 8, 1789), in Creating the Bill of Rights, The Documentary Record From the First Congress 80 (Helen E. Veit et al. eds., 1991). This makes it doubtful that the Ninth Amendment was designed to meet these Federalist concerns.

\(^9\)Speech of James Madison (June 8, 1789), in Creating The Bill of Rights, supra note 8, at 79.

\(^10\)See, e.g., id.; Letter from Thomas Jefferson to James Madison (March 15, 1789), in 1 Schwartz, supra note 7, at 621.

\(^11\)See McAfee, Original Meaning, supra note 5, at 1243–44.

\(^12\)Speech of James Madison (June 8, 1789), in Creating The Bill of Rights, supra note 8, at 82–83.

The adoption of the Bill of Rights thus implied a rejection of the Federalist position that rights were adequately secured by the structure of enumerated powers. Instead of defining rights residually by reference to powers, the basic approach of the Bill of Rights was to limit powers by reference to rights.\(^13\) When the Ninth Amendment is viewed within the context of the Bill of Rights as a whole, rather than within the framework of Federalist logic, it seems probable that that Amendment was intended to follow the same approach—that is, to limit the powers of government by reference to the “other[] [rights] retained by the people.”

This interpretation receives some support from a letter written by Madison to President Washington during the debate over ratification of the Bill of Rights. Some early proposals for what became the Ninth Amendment had provided that the enumeration of certain rights should not be construed to expand the powers of the federal government.\(^14\) In his draft of the Amendment, Madison had added that the enumeration of rights also should not be construed “to diminish the just importance of other rights retained by the people.”\(^15\) In the final version of the Amendment, the reference to the expansion of powers was deleted, and only the reference to rights was retained. In late 1789, after learning that some objections had been raised in Virginia to phrasing the Amendment in terms of rights rather than powers, Madison wrote to Washington:

[T]he distinction . . . appears to me . . . altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would

\(^13\)As Madison explained, “[t]he great object in view [in adopting a bill of rights] is to limit and qualify the powers of Government, by excluding out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.” Id. at 81.

\(^14\)For example, the seventeenth amendment proposed by the Virginia Ratifying Convention would have provided:

That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 661 (Jonathan Elliot ed., 2d ed. 1863) [hereinafter Elliot’s Debates].

\(^15\)Madison’s draft of the provision that became the Ninth Amendment declared:

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

Madison Resolution (June 8, 1789), reprinted in Creating the Bill of Rights, supra note 8, at 13.
seem to be the same thing, whether the latter be secured, by declaring that they shall [not be violated], or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing. 16

This passage strongly supports the view that rights and powers were understood to be reciprocal. 17 Madison maintains that there is no difference in principle between defining rights with reference to powers, and limiting powers by reference to rights. Contrary to the residual rights view, however, he clearly assumes that the Ninth Amendment in its final form takes the latter approach.

The Natural Rights Interpretation

Of course, the Ninth Amendment could limit powers by reference to rights only if the "other[] [rights] retained by the people" derive from some independent source, and are not definable merely as the residuum of powers not granted to Congress. Unlike McAfee, I believe that a strong case can be made that these rights were understood to derive from the natural rights doctrine. Some crucial evidence for this view comes from Madison's speech explaining the proposed Bill of Rights in the House of Representatives. The object of the Bill of Rights, he stated, was to "expressly declare the great rights of mankind secured under this constitution." 18 Later in the speech, he elaborated on the contents of bills of rights, and distinguished five kinds of provisions (all of which, except for the first, he proposed to incorporate into the Federal Constitution):

1. In some instances, [bills of rights] do no more than state the perfect equality of mankind. . . .
2. In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government.
3. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature.
4. In other instances, they specify positive rights, which may seem to result from the nature of the social compact. Trial by jury cannot be considered a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the preexistent rights of nature.
5. In other instances, they lay down dogmatic maxims with respect to the construction of the Government;

17. See supra note 6 and accompanying text.
18. Speech of James Madison (June 8, 1789), in Creating The Bill of Rights, supra note 8, at 78.

declaring that the legislative, executive, and judicial branches shall be kept separate and distinct. Perhaps the best way of securing this in practice is, to provide such checks as will prevent the encroachment of one upon the other. 19

At first glance, the italicized phrase in Madison's speech seems to support McAfee's interpretation of the language "rights . . . retained by the people" in the Ninth Amendment. In context, however, it is clear that in the third and fourth categories, Madison is drawing a distinction between natural rights, on one hand, and positive rights deriving from the social compact, on the other. 20 Madison's speech thus contains a clear instance of using the term "those rights which are retained" to refer to natural rights. Moreover, Madison's use of this paraphrase strongly indicates that he believed that his auditors would understand the phrase in the same sense. Taken together with other evidence of the use of "retained rights" language in this sense, 21 this seems to strongly support the claim that the "other[] [rights] retained by the people" were understood to be natural rights.

In the quoted passage, Madison refers to natural rights as "those rights which are retained when particular powers are given up to be exercised by the Legislature." This highlights a further point: that there is no necessary inconsistency between the view that holds that the Ninth

19. id. at 81 (paragraph omitted and emphasis added). Among Madison's proposed amendments were declarations that all power was derived from the people and should be exercised for their benefit, as well as a provision articulating the doctrine of separation of powers. These provisions, of course, were not included in the Bill of Rights as ultimately adopted.

20. This point is confirmed by Madison's notes for the speech, which lists the following under the heading "contents of Bill of Rites."
   1. assertion of primitive equality & c.
   2. [that] all rights exercised in form of Govts.
   3. natural rights, retained as speach [illegible].
   4. positive rights result, by trial by jury.
   5. Doctrinl, arts vs. Dept. distinct electr.
   6. moral precepts for the adminstr., & natl. character—as justice—economy & c.

Madison's Notes for Amendments Speech (1789), in 2 Schwartz, supra note 7, at 1042 (Reprinted in volume 1). Except for the last point, which Madison omitted, these notes clearly set forth the structure of his discussion of the contents of bills of rights in his House speech.

21. For example, Roger Sherman's draft of the Bill of Rights contained a provision which declared that "[t]he people have certain natural rights which are retained by them when they enter into society." Creating The Bill of Rights, supra note 8, at 267 (Roger Sherman's Proposed Committee Draft, July 21-28, 1789) (Reprinted in volume 1). For differing views of the light shed by Sherman's draft on the meaning of the Ninth Amendment, see Barnett, supra note 3, at 7 n.16; McAfee, Social Contract, supra note 4, at text accompanying notes 90-108.
Amendment refers to the natural rights that individuals retain when they enter into civil society, and McAffee’s view that it refers to the rights retained by the sovereign people when they delegate powers to a government. Americans during this period often drew no clear distinction between the formation of a social contract and the establishment of a particular governmental order. Instead, the early American constitutions were often regarded as themselves social contracts. Consequently, the rights retained in entering society and those retained when granting legislative powers were the same rights.

On the natural rights interpretation of the Ninth Amendment, these retained rights need not be inferred from the delegated powers, but may be ascertained independently. One way to make this point is by means of the following thought experiment. In late eighteenth-century America, it was universally held that individuals had an inalienable natural right to be secure against unjustified invasion of their persons and property, whether by the government or by private parties. Suppose (to adapt Madison’s example) that the right to be secure against unreasonable searches and seizures had been over looked, and hence omitted, when the Bill of Rights was drafted. Suppose further that Congress subsequently considered legislation authorizing the use of general warrants to collect the federal revenue, and that this legislation was objected to in Congress, or challenged in court, on the ground that it infringed the “other[] [rights] retained by the people” that are referred to in the Ninth Amendment. It seems difficult to imagine that consideration of this objection would be confined to whether the power to authorize general warrants was within the scope of the constitutional grant of power to raise revenue, coupled with the Necessary and Proper Clause, and would not extend to whether the legislation would violate one of the natural rights retained by the people. In other words, it seems probable that when legislation was objected to under the Ninth Amendment, the inquiry would resemble that engaged in by the framers and ratifiers of the Bill of Rights when they considered whether each proposed amendment was necessary to secure a right retained by the people.

Using Natural Rights to Interpret the Scope of Congressional Powers

Finally, even if McAffee is correct that the “other[] [rights] retained by the people” were to be defined by reference to delegated powers, it does not follow that natural rights principles would have no role to play in cases implicating the Ninth Amendment. Although on this view natural rights would not constitute a barrier against the exercise of governmental powers, they might nonetheless have an important role in determining the scope of those powers.

A classic articulation of this approach may be found in Justice Story’s opinion in Wilkinson v. Leland. Story wrote:

The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.


For a classic (if somewhat later) statement of this position, see 2 James Kent, Commentaries on American Law *1–37 (1826).*
In the general warrants hypothetical posed above, Justice Story's approach would allow an appeal to natural rights principles in order to argue that the general grant of power to pass revenue laws should not be interpreted to authorize Congress to infringe the natural right to security of person and property through the use of general warrants. Again, it is difficult to believe that, under the original understanding of the Ninth Amendment, such an argument would be impermissible, and that the issue must be decided purely by a positivist construction of the grant itself.27

McAffee argues against the natural rights view on the ground that both Antifederalists and Federalists subscribed to the positivist assumption that the people forfeited any natural right that they did not secure within the written constitutional order. Whether or not this is true, it misses the mark. After the adoption of the Bill of Rights, both sides believed that all of the people's essential rights were secured under the Federal Constitution, including not only the rights contained in the first eight amendments, but also the unenumerated rights referred to in the Ninth. The difference between the independent-rights and residual-rights views relates to the mechanism by which unwritten rights were secured—whether by recognizing an independent body of unenumerated rights, or by reaffirming the constitutional scheme of enumerated powers. Whatever the method by which they were protected, however, it seems clear that the content of these rights derived primarily from natural rights doctrine. Accordingly, these rights were subject to debate on their own terms, and not solely by reference to positive grants of governmental powers.

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1. Introduction: The Unspoken Assumption of Legitimacy

Does the Constitution of the United States of America impart legitimacy on legislation enacted under its auspices? If so, how? Is a citizen bound in conscience to obey such legislation? If so, why? Does legislation create a duty of obedience simply because it was enacted by a group of persons calling themselves a "legislature," or is there some other reason? Would any constitution impart such legitimacy or is there something special about the character of those that do? If the latter, does the United States Constitution have the requisite character?

These questions are not often asked in contemporary discussions of constitutional theory, but answering them is crucial to dealing with the central issue raised by the ninth amendment: Are the rights "retained by the people" to be considered by courts when assessing the constitutionality of legislation as I and others have maintained?2 Or are these rights secured only by means of the scheme of delegated powers, potential constitutional amendment, or revolution?3 Attempting to answer these questions by reference to original intent has proved contentious,

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2. The Rights Retained by the People

Laws framed by man are either just or unjust. If they are just they should not be presumed to have done so. See Richard Tuck, Natural Rights Theories 77-81, 143, 149-56 (1979). Similarly, Locke argued against arbitrary power on the ground that no rational creature could be supposed to have consented to such power. See John Locke, The Second Treatise of Government, 131, 137, in Two Treatises of Government (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

It should be noted that Wilkinson and Calder did not involve the Ninth Amendment, but rather challenge to state legislation under the fundamental law of the state, or under other provisions of the Federal Constitution. As a part of the federal Bill of Rights, the Ninth Amendment was not regarded as applicable to the states.

McAffee might respond that, under his positivist approach, the scope of the congressional power would be determined by reference not only to the language of the provision, but also to other factors such as the original understanding, and that the original understanding might be that general warrants were not contemplated. The basis of this understanding, however, would be that general warrants violated natural or traditional legal rights. Thus, such a response would simply allow such rights in through the back door.

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18. The Ninth Amendment and Constitutional Legitimacy

Randy E. Barnett

Laws framed by man are either just or unjust. If they are just they should not be presumed to have done so. See Richard Tuck, Natural Rights Theories 77-81, 143, 149-56 (1979). Similarly, Locke argued against arbitrary power on the ground that no rational creature could be supposed to have consented to such power. See John Locke, The Second Treatise of Government, 131, 137, in Two Treatises of Government (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

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* Reprinted with revisions, by permission, from 64 Chi.-Kent L. Rev. 37 (1988).


Although the weight of the evidence suggests that the framers would hardly have been shocked by the prospect.\footnote{See Cozen, The “Higher Law” Background of American Constitutional Law, 42 Harv. L. Rev. 149, 152-53 (1928) (reprinted in volume 1); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843 (1978); Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1166, 1177 (1987). See also, Grey, The Uses of an Unwritten Constitution, 64 Chi.-Kent L. Rev. 211 (1988) (reprinted as chapter 8 of this volume); Sherry, The Ninth Amendment: Righting an Unwritten Constitution, 64 Chi.-Kent L. Rev. 1001 (1989) (reprinted as chapter 11 of this volume).}

In this essay, I propose another tack. I suggest that we cannot decide whether the judiciary should take unenumerated rights into account when evaluating the constitutionality of legislation without considering why a citizen has a moral obligation to adhere to legislation that results from constitutional processes. In most discussions of constitutional interpretation, there is an unspoken assumption that legislation resulting from constitutional processes creates at least a prima facie duty of obedience in a citizen. But the ability of constitutional processes to impart legitimacy on legislation cannot simply be assumed without argument.

According to Thomas Aquinas, only a law that is legitimate or just creates an obligation that is binding in conscience on the individual. In Part I, I present Aquinas’ criteria of legal legitimacy as a possible framework for assessing the legitimacy of legislation. Although it is a bit unusual to begin any contemporary legal analysis—much less one on the Constitution—with a discussion of the ideas of someone like Aquinas, I think his criteria of legal legitimacy are of great value to the current debate over the proper interpretation of the Constitution. For, far from increasing in sophistication, modern notions about legal legitimacy operate much within his scheme.

In Part II, I suggest that the legitimacy a constitution imparts upon legislation depends upon the practical ability of the institutions it regulates to assure that legislation conforms to these criteria of legitimacy. I examine how selected aspects of constitutional processes—in particular judicial review—may in practice create a likely correspondence between these criteria of legitimacy and individual acts of legislation. In Part III, I consider whether the effort to impart legitimacy on legislation is enhanced or hindered by taking account of the unenumerated rights “retained by the people” mentioned by the ninth amendment.

I. Criteria of Legal Legitimacy: Of Laws and Sausages

To decide how a constitution imparts legitimacy to legislation, we must first consider how it is that legislation ever creates an obligation that is binding in conscience. Such a question is by no means new. Traditionally, law has been thought to be legitimate or just if it had the “right stuff” in three ways: (1) its substance was right or good; (2) it was enacted or posited by the right persons; and (3) it took the right form. As Thomas Aquinas put it:

Now laws are said to be just both from the end, when, that is, they are ordered to the common good; and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver; and from their form, when, that is, burdens are laid on the subjects according to an equality of proportion and with a view to the common good.\footnote{Aquinas argued that human laws not satisfying these tenets did not bind in conscience, unless, under the circumstances, disobedience would itself inflict “a more grievous hurt.” Unjust laws “are acts of violence rather than laws . . . [S]uch laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right . . . .” In other words, though any law may be enacted, it carries with it no moral obligation of obedience if it lacks any of these qualities. Such laws are “acts of violence,” rather than “binding in conscience.”}

We may interpret this view to suggest that there are three dimensions of “justice” or legitimacy that, taken together, give rise to a legal obligation that is binding in conscience: the correctness or justice of (1) the substance of the law, (2) the jurisdiction of the lawgiver, and (3) the form of the law. Further, prudential concerns may sometimes argue for obeying even an unjust law if disobedience would create more harm than good.\footnote{Id. (emphasis added).}

It is important to note that, whether he was correct or incorrect, Aquinas did not maintain that human laws not satisfying the tripartite requirement of justice were not “laws” in some definitional or semantic sense. He repeatedly referred to them as laws. He was concerned,\footnote{Id. (emphasis added).}

\footnote{Id.}

\footnote{Id.}

\footnote{I am not attributing this particular formulation to Aquinas, though I think it is compatible with his approach.}
instead, with the actual (as opposed to the apparent) justice or legitimacy of human laws—with why and when individuals really had a morally binding obligation to obey a human law. In contrast, when academics today speak of legal legitimacy—as in the “legitimating” function of law—they usually mean only the perceived or apparent legitimacy of social control mechanisms, rather than with the actual legitimacy of laws.

The contrast between the traditional and modern conceptions of legal legitimacy was most famously highlighted by the jurisprudential debate between H.L.A. Hart and Lon Fuller. Hart departed from John Austin’s view of law as commands by acknowledging that legal obligation is perceived by individuals as a reason for personal conduct and that this “internal” point of view cannot be explained entirely by the physical coercion attached to noncompliance.9 For Hart, this perception of obligation was based either on the widespread acceptance of the “primary rules” regulating individual conduct or on the widespread acceptance of the “secondary rules” that regulate the making of primary rules.10 But what accounted for such popular acceptance? According to Hart:

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is inconsiderant and the social pressure brought to bear upon those who deviate or threaten to deviate is great. . . . The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.11

Legal legitimacy in Hart’s scheme, then, is largely, if not entirely, a matter of perception. Rules are legitimate and therefore binding when they are “thought important because they are believed to be necessary.”12 This is the modern approach.

In contrast, Lon Fuller tried to explain “fidelity to law” in the sense that obedience to an enactment was warranted or justified. Fuller did not deny that legality “depend[s] upon general acceptance and that to make this acceptance secure there must be a general belief that the constitution itself is necessary, right, and good.”13 But for Fuller, such beliefs were the beginning rather than the end of the realization in practice of the ideal of fidelity to law. The inquiry must immediately expand to consider what features of a legal system are truly necessary, right, and good—or, to use Hart’s phrase, whether certain rules are truly “necessary to the maintenance of social life or some highly prized feature of it.”

For Fuller, Hart’s stress on appearances and perceptions was simply too confining:

What disturbs me about the school of legal positivism is that it not only refuses to deal with problems of the sort I have just discussed, but bans them on principle from the province of legal philosophy. In its concern to assign the right labels to the things men do, this school seems to lose all interest in asking whether men are doing the right things.14

Fuller did not deny that the ability of a legal process to impart the appearance or perception of legitimacy—the modern conception of legitimacy—was important. Instead, he argued the traditional view that this perception of legitimacy is or ought to be based on a judgment that such processes actually tend to produce just law.

The Hart-Fuller debate also illustrates that modern theorists generally operate within Aquinas’ framework, though they tend to emphasize one or two of his criteria and to deny or disparage the pertinence of those that are omitted. Hart’s approach to legitimacy, for example, places great stress upon the consensual jurisdiction of the lawyer. Form and substance do not figure prominently, if at all, into his conception of legal legitimacy. Fuller, on the other hand, primarily stressed the formal characteristics of a legal system that he called the “internal morality of law.”15 He never made entirely clear how he viewed the relationship between legal legitimacy and what he termed “the external morality of law.”16

In this essay, when I refer to legal legitimacy I mean the quality or qualities of justice that legislation must have to make it binding in conscience on the individual. I assume for purposes of discussion that genuine, as opposed to perceived, legal legitimacy has a formal, a substantive, and a jurisdictional dimension. I contend that constitutional processes should be evaluated to determine if adherence to these processes yields

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10See id. at 77–96.
11Id. at 84–85.
12Id. at 85 (emphasis added).
13Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 Harv. L. Rev. 630, 642 (1958).
14Id. at 643.
15See L. Fuller, The Morality of Law 96 (rev. ed. 1969) ("As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law . . . .").
16Id.
outcomes that tend to correspond closely with these dimensions of justice. If so, then we can say that these constitutional processes impart legitimacy on legislation. To impart legitimacy is to create the appearance of legitimacy, to be sure. But imparting legitimacy also means ensuring that legislation is actually legitimate.

Of course, a complete assessment of legal legitimacy would require that actual content be given these substantive, jurisdictional, and formal dimensions of justice. Much of political and jurisprudential discourse concerns the appropriate content of these criteria and my conception of these criteria may differ widely from that of Aquinas. Nonetheless, without settling these matters here, simply by integrating the requirement of legitimacy into our discussions of constitutional interpretation, I think we can advance the debate surrounding the enforceability of unenumerated rights.

II. Legal Legitimacy and the Constitutional Enterprise

Let us begin by considering the famous aphorism widely attributed to Otto von Bismarck that “laws are like sausages. It’s better not to see them being made.” Bismarck’s point, of course, was that if we knew what disgusting things actually went into a sausages, we would lose all appetite for them and the same is true of the lawmaking process. But we can reverse the implication of Bismarck’s adage by considering why it is that we generally have confidence in the food we eat. After all, though we do not ourselves inspect each hot dog we eat for wholesomeness, we relish hot dogs nonetheless. Moreover, even health authorities do not inspect every hot dog. Instead, they inspect the hot dog manufacturing process to see if it comports with accepted standards and they also may sample a few hot dogs produced to see if they are wholesome. If both the process and the sample pass muster, we presume that the rest of the hot dogs produced by that plant are similarly wholesome.

The same can be said for laws. The actual legitimacy or justice of particular legislation corresponds to the actual wholesomeness of a sausage. Just as the perception a sausage’s wholesomeness depends on whether it is known to have been produced by a process that ensures its actual wholesomeness, the perception of a statute’s legitimacy depends on whether it was produced by constitutional processes that ensure its actual legitimacy or justice. Laws produced by defective processes might be just, but it is exceedingly difficult for a citizenry to have confidence that this is so. In this regard, creating a lawmaking process that produces laws which conform to the substantive, formal, and jurisdictional requirements of justice identified by Aquinas is like adhering to the processes by which wholesome food is produced. Both are quality control processes; both impart an imprimatur of legitimacy on the products they yield. But the legitimacy imparted by both depends on our assessment that adherence to the process ensures that the outcome of the process is actually wholesome or legitimate.

One of the essential functions of a constitution is to establish and regulate an enterprise that produces laws which can bind the conscience of the citizenry. This vision of constitutionalism invites us to inquire as to whether actual constitutional processes accomplish this objective. Suppose that Aquinas is right when he claims that, to be binding in conscience, a law must be substantively, formally, and jurisdictionally just. Do the processes established by the United States Constitution justify a presumption that enacted legislation is legitimate by these criteria?

A. Legitimacy and Constitutionality

Assessing how a constitution effectively imparts legitimacy on legislation is, at least in part, a practical problem. We must decide whether actual enactments produced by an actual constitutional process are entitled to a presumption that they conform with substantive, formal, and jurisdictional justice and therefore are binding in conscience. In practice, for a constitutional process to impart legitimacy to legal enactments, it must successfully confront the twin problems of knowledge and interest I have discussed elsewhere.

The problem of knowledge in this context refers to the ability of constitutional processes—assuming the good faith of its participants—to render accurate assessments of the proper end and form of legislation, as well as the proper jurisdiction of the lawmaker. Do the processes regulated by the United States Constitution give us any confidence that each of these assessments have been accurately made? Do we have enough confidence to conclude that enacted legislation that emerges from this process is entitled to a presumption of legitimacy?

17See R. Byrne, 1911 Best Things Anybody Ever Said 232 (1988). Although I have found scores of references to this saying, all of which attribute it to Bismarck, none includes any authority for this attribution.

The problem of interest in this context refers to the willingness of human actors in the constitutional process—assuming that they know what is just—to act on the basis of their knowledge of justice. It is not enough that one knows the just course; one must still be willing and able to act justly. We know from both experience and public choice theory that legal processes administered by human beings are subject to corruption and capture. Do the processes regulated by the United States Constitution give us any confidence that a particular enactment is not the product of corruption or capture, but is rather the product of knowledge? Do we have enough confidence to presume that enacted legislation that emerges from this process is legitimate?

The American constitutional system incorporates at least three strategies to deal with the problems of knowledge and interest: (1) popular election of the Congress and the President; (2) a structure of divided powers between branches of the federal government and between the federal government and the states; and (3) judicial review of the constitutionality of legislation by judges with lifetime tenure. The idea that popular elections and divided powers alone effectively avoid legislation resulting from corruption or capture is still voiced, at least on sunny days. It is said that the people would not consent to corrupt or captured legislators for long, and that it is much more difficult to corrupt or capture a number of distinct branches of government than just one. (Of course, popular elections do little to assure us that the lawmakers have not been captured by a majority faction.)

It is, however, far from clear how popular elections and divided powers standing alone justify a presumption that enacted legislation is a result of an accurate assessment of its substantive, formal, and jurisdictional legitimacy. The question is not whether it is possible for processes organized in this fashion to produce knowledgeable action, but whether the probability that an action is knowledgeable is sufficiently high to support a presumption that resulting legislation is likely to contribute to the common good. Or—as modern public choice theorists maintain—is there better reason to presume that resulting legislation is likely to be a successful attempt at “rent-seeking” or private enrichment by public means that is inimical to the common good? This is a question I shall not address here.

Instead, I want to explore how, if at all, judicial review makes it either more likely that legislation is knowledgeable or less likely that it is the product of corruption or capture. For the American constitutional system does not rely entirely on the popular election of decision-makers or a division of powers. It relies as well on the institution of judicial review. Of course, unlike the President who may veto legislation for any reason or no reason, the judiciary is not empowered in this scheme to reject legislation simply because it does not like it. The framers rejected the idea of a “council of revision.” The judiciary may nullify legislation only when it concludes that such legislation is unconstitutional.

Judicial review of constitutionality is sometimes said to elevate the opinion of the judiciary above that of the other branches, but this characterization is seriously misleading. The judiciary’s assessment that a law is unconstitutional is in no way privileged. If Congress decides not to enact legislation because in its opinion it is unconstitutional, no other branch may contravene its judgment. Only if Congress decides a measure is constitutional will the President have a say in the matter. If the President vetoes legislation because it is unconstitutional, only a super-majority in Congress may contravene his or her judgment, not the courts. Legislation that never reaches the judiciary will not become law notwithstanding that the judiciary might have concluded that such legislation is constitutional. In this manner, the judgment of the other branches that legislation is unconstitutional prevails without judicial input. Only if the legislative and executive branches concur that legislation is constitutional will the judiciary’s opinion matter.

The fact that legislation is stricken as unconstitutional when the judiciary disagrees with the executive and legislative branches is simply an expression of the equality of the judiciary. It is also an example of a constitutional will the judiciary’s opinion matter.

The Ninth Amendment and Constitutional Legitimacy

19I have discussed three such concerns elsewhere: the corruption effect, the capture effect, and the halo effect. See Barnett, Pursuing Justice in a Free Society: Part One — Power vs. Liberty, Crim. Just. Ethics, Summer/Fall 1985, at 50, 50-56.

20Moreover, because laws are enforced, a third social problem—the problem of power—arises in the context of lawmaking. The problem of power consists of the twin problems of enforcement error and enforcement abuse. The former is a special problem of knowledge; the latter a special problem of interest. Because the use of enforcement increases both the costs of error and of bias, additional substantive, procedural, and jurisdictional safeguards may be warranted to minimize these effects.

21The same is true at the state level. Legislation that is not enacted because it is believed to be unconstitutional cannot be reviewed by the state or federal judiciary. Only if a state legislature decides that legislation is constitutional will the federal judiciary have an opportunity to review the matter.

22There remains a sense in which a judicial judgment of unconstitutionality is privileged. While a congressional assessment that a measure is unconstitutional may be overridden by a simple majority of a future congress, and a presidential veto on this ground may be overridden by two-thirds vote of the Congress, a judicial assessment that a measure is unconstitutional may be overturned only by a constitutional amendment. There are
requirement of convergence. Just as Aquinas maintained that a judgment of legislative legitimacy requires a convergence of substantive, formal, and jurisdictional analyses, a judgment of constitutionality—or "constitutional legitimacy"—requires in most cases a convergence of legislative, executive, and judicial judgments on this question. As I have explained elsewhere, multiple "redundant" methods of reaching results are valuable because convergence begets confidence, while divergence stimulates discovery.\(^2\)

Since it is possible to err either by finding a just law to be illegitimate or by finding an unjust law to be legitimate, requiring the convergence of Aquinas' tripartite assessment of legitimacy reflects a judgment that the latter is the more serious danger. Similarly, the requirement of convergence between various branches of government before finding legislation to be constitutionally legitimate reflects a judgment that, as between the error of striking down constitutional enactments and the error of enforcing unconstitutional enactments, the latter is the greater danger.

But what does a judgment of constitutional legitimacy entail, and how closely does it correspond to the criteria of legal legitimacy? The United States Constitution might have incorporated one, two, or all three of Aquinas' criteria of legal legitimacy. We must ask whether incorporating in a constitution one or more of these requirements is sufficient to impart a presumption of legitimacy on the laws made under its auspices so that these laws may be presumed to be binding in conscience on the citizenry.

Moreover, if the purpose of a constitutional enterprise is to produce legitimate law, and if a particular requirement of legal legitimacy is shown to be essential to legal legitimacy, then when a constitution neither expressly specifies nor excludes such a requirement we should assume its existence. For doing so would enhance the legitimacy of legislation found to be constitutional and would in this way contribute favorably to the constitutional enterprise. Such an interpretive strategy would serve to provide a closer fit between constitutional and legal legitimacy.


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B. *Tripartite Legitimacy and the United States Constitution*

Let us begin by supposing that a constitution specified that the legitimacy of legislation depends entirely on the will of a designated "legislature," and placed no limits on the exercise of the legislature's jurisdiction. "Jurisdiction" here would mean that the designated legislature and no other was empowered to issue enforceable directives. An enactment would then be constitutional provided only that it can be recognized as an enactment of the group designated as the legislature. So long as the "right" persons (here a legislature) are issuing a directive, then such a directive would be "constitutional" regardless of its form or content; the legislative branch would have the exclusive and plenary power to issue any directive it wished.

Would such a constitutional scheme impart any genuine legitimacy on legislation? Is there any reason to presume that the enactments of the demarcated body are substantively and formally just? Would such a grant of lawmaking jurisdiction be just? Answers to these questions depend in part upon the nature of the body to whom legislative power had been delegated.

The United States Constitution, for example, rests the jurisdiction for lawmaking in a popularly elected Congress. As was suggested above, the requirement that lawmakers be popularly elected is seen as reducing the likelihood that enacted legislation is the result of corruption or capture. If this perception is accurate, then the mere fact that legislation issued from a popularly elected body is some reason (however strong or weak) to think that it is just. That is, knowing a law was produced by a popularly elected body would be some reason to conclude that this law was not merely a product of the legislators' interests. Moreover, by requiring a convergence of judgment between a House, a Senate, and a President, each elected by different constituencies, the United States Constitution appears to reduce still further the likelihood that legislation is the result of corruption or capture and thereby to enhance the likelihood that enacted legislation is legitimate.

Let us assume that by reducing the likelihood that an enactment is the result of corruption or capture, a system of popularly elected lawmakers enhances to some degree the likelihood that resulting legislation is legitimate. We need not decide whether a grant of unlimited legislative jurisdiction to a number of popularly elected bodies is sufficient to create a presumption of legitimacy in enacted legislation for—at least at the federal level—this was not the actual jurisdictional scheme embodied in the United States Constitution. Congress is granted the power to make
In light of the problems of knowledge and interest, it would seem that
Congress should have to do more than merely assert that it is in com-
pliance with this or any other constitutional requirement.

The Constitution did not stop with jurisdictional constraints on law-
making. It also restricts Congress to use only certain means in pursuit of
its delegated powers. Among the restrictions on means provided by
article I, section 9 are prohibitions of bills of attainder and ex post facto
laws. Similarly the fifth amendment prohibits the taking of private pro-
erty for public use without just compensation. Even legislation that is
necessary and proper for the accomplishment of a delegated end is
unconstitutional if it violates a constitutional restriction on means.

Appropriate side-constraints on permissible means better assures
that resulting legislation is legitimate than a sole reliance on a scheme of
substantively limited powers, provided, once again, that (1) the side-con-
straints on legitimate means are actually conducive to the common good
and (2) that in practice there is some effective way of ensuring a fit
between particular legislation and these side-constraints. This formal
dimension of constitutional legitimacy enhances the judiciary’s claim to
review legislation on these grounds, again, lest Congress be the judge in
its own case.

In sum, if (a) the jurisdictional and formal dimension of constitu-
tional legitimacy incorporated in the United States Constitution are conducive to
the common good, and (b) actual constitutional processes—including ju-
dicial review—give us some confidence that enacted legislation complies
with these requirements of jurisdictional and formal justice, then the
Constitution would impart some degree of legitimacy on legislation
enacted under its auspices. But did the Constitution stop with jurisdic-
tional and formal constraints on lawmakers?

A constitution could also incorporate the first of Aquinas’ three
requirements of legitimacy. A judge would then be authorized to assess
whether the substance of a particular legislative act was really “ordered
to the common good.” That is, even when legislation was in compliance
with constitutional restrictions on jurisdiction and means, it might still be
unconstitutional for reasons concerning its substance. Did the Constitu-
tion of the United States incorporate a substantive dimension of legit-

We have already seen that, insofar as the jurisdiction of the lawmak-
ing branch is limited to certain substantive areas, the Constitution did
incorporate a substantive dimension of legitimacy. Congress is empow-
ered to pass only those laws that are necessary and proper to the further-

The Federalist No. 10, at 54 (J. Madison) (H.C. Lodge ed. 1888). Madison was
simply extending to the legislative branch the argument made by John Locke against the
fear of the absolute monarch:

I easily grant, that Civil Government is the proper Remedy for the Inconveni-
ce of the State of Nature, which must certainly be Great, where Men may
be Judges in their own Case, since "it is easy to be imagined, that he who was so
unjust as to do his Brother an Injury, will scarce be so just as to condemn him-
self for it: But I shall desire those who make this Objection, to remember that
Absolute Monarchs are but Men, and if Government is to be the Remedy of
those Evils, which necessarily follow from Men being Judges in their own
Cases, and the State of Nature is therefore not to be endured. I desire to know
what kind of Government that is, and how much better it is than the State of
Nature, where one Man commanding a multitude, has the Liberty to be Judge
in his own Case, and may do to all his Subjects whatever he pleases, without the
least liberty to any one to question or controverse those who Execute his Pleasure?
And in whatsoever he doth, whether led by Reason, Mistake or Passion, must
be submitted to? Much better it is in the State of Nature wherein Men are not
bound to submit to the unjust will of another: And if he that judges, judges
amiss in his own, or any other Case, he is answerable for it to the rest of Man-
kind.

J. Locke, Two Treatises of Government 316–17 (P. Laslett rev. ed. 1963) (3d ed. 1698)
(emphasis in original).
ance of constitutionally retained ends. A claim that the judiciary is empowered to meaningfully scrutinize whether legislation is truly necessary and proper for accomplishing a delegated end is, however, quite controversial.\(^{25}\)

Perhaps such scrutiny is controversial because it appears to authorize an entirely independent judicial evaluation of whether a law was good “policy”—an evaluation of the same sort as the legislative and executive branches may engage in. Such a power seems to resemble the “council of revision” idea that the framers rejected. On the other hand, as with jurisdictional and formal constraints on lawmaking, for a constitutional process to enhance the legitimacy of resulting legislation in a clash between Congress and citizen, the Congress should not be a judge in its own case.

Whatever the merits of this dispute, there is still another way that questions of substantive legitimacy could figure in an assessment of constitutionality. A law that was within the substantive jurisdiction of Congress and employed proper formal means might still be unconstitutional if it violates the “rights of the people.” Such a constraint assumes, of course, that “[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights),”\(^{26}\) an assumption that is in harmony with the declaration that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.\(^{27}\)

\(^{25}\)In his hotly contested opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall reduced the requirement of necessity to one of mere convenience: “We find that [the word ‘necessary’] frequently imports no more than that one thing is convenient, or useful, or essential to another.” Id. at 413. The “presumption of liberty” that I have proposed as a means of implementing the ninth amendment would require a showing of necessity only when a claimed exercise of governmental power restricts the exercise of a citizen’s rightful liberty. See Barnett, Implementing the Ninth Amendment (chapter 1 of this volume) (discussing the presumption of liberty).

\(^{26}\)R. Nozick, Anarchy, State, and Utopia ix (1974). Of course, the idea of using a rights analysis to evaluate the substance of human laws is not to be found in the natural law tradition of Aquinas, but develops as part of the natural rights tradition associated with such writers as John Locke.

\(^{27}\)The Declaration of Independence para. 2 (U.S. 1776). It is consistent as well with proposals of several state ratification conventions to amend the Constitution to reflect this view. See e.g. Amendments Proposed by the Virginia Convention, reprinted in Barnett, supra note 2, at 380:

That there be a declaration of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some manner as the following—

Such a declaration of rights need not be religiously based. Instead, it may rest in part on a view that the respect for certain individual rights is a prerequisite for achieving the common good;\(^{28}\) that no matter how desirable its appearance, a measure that violated a proper conception of these rights would invariably detract from the common good; that a respect for a proper conception of individual rights is the only way to achieve in practice a good that is truly common to all; that enforcing a proper conception of individual rights was within the competence of and particularly appropriate for the judicial branch; and, therefore, that judicial review on this ground would enhance the substantive legitimacy of resulting legislation.

In sum, adherence to a proper conception of individual rights may be viewed as one part of a multifaceted strategy to address the knowledge problem concerning what enactments actually contribute to the common good. And by establishing a baseline against which legislation can be assessed, a proper conception of individual rights also addresses the problem of interest by helping to detect the existence of corruption and capture.

The claim that a conception of rights is a way of determining whether acts are conducive to the common good may suggest that such rights are means, rather than ends. While there is some basis for this observation,\(^{29}\) it fails adequately to distinguish between social-philosophical discourse and constitutional-legal discourse.\(^{30}\) What may be a “means” in the former may be an “end” in the latter. In the realm of

\(^{1}\) There are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their poverty, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

\(^{2}\) There are two ways to interpret this claim. One may take a “hard” rights stance and say that any infringement of a right indicates that a measure violates the common good and is illegitimate. Or one may take a “soft” rights stance that “weights” the infringement of a right against the benefits to be gained by a particular measure. The choice between these stances has both a normative and a descriptive dimension. As a normative matter, which stance is the better of the two? As a descriptive matter, which stance was adopted by the Constitution? Although I do not wish to express an opinion on these questions here, it seems clear that the “soft” rights position has long been adopted by the Supreme Court.

\(^{3}\) Nozick, for example, refers to rights as “side-constraints” implying that they constrain means, not ends. See R. Nozick, supra note 29, at 28-33; see also S. Barber, On What The Constitution Means 113 (1984) (“Constitutional rights . . . remove certain means from those means available to the government for pursuing its authorized ends.”).

\(^{4}\) Moreover, it tends to underestimate the interrelation between means and ends discussed above. See supra text accompanying notes 13-23; L. Fuller, supra note 15; cf. S. Barber, supra note 32, at 110-15 (discussing the relationship between means and ends on constitutional analysis).
social-philosophical discourse, individual rights may be an essential means to the end of achieving the common good—which may be conceived as providing the necessary conditions for individuals to live and pursue happiness in peaceful society with each other. In contrast, in the realm of constitutional-legal discourse, the protection of individual rights that preceded the formation of government may be an end of the constitutional enterprise, while the formal safeguards imposed on governmental powers are an essential means to this end.

If the protection of a proper conception of individual rights is part of what is meant by substantive legitimacy, then there is strong support for the view that the United States Constitution incorporates such a substantive dimension. For the Bill of Rights was an affirmative extension of constitutional limitations—or “power constraints”—beyond those that are purely jurisdictional or formal. What sets the first amendment apart from the others is precisely its “substantive” dimension—insofar as it declares rights of speech, religion, and assembly that constrain the exercise of governmental powers in ways that are neither jurisdictional, nor procedural or formal.

Few would deny that the rights enumerated in the Constitution constrain the exercise of enumerated powers. Few would deny that legislation violating expressly stipulated rights may be unconstitutional and that the judicial branch is authorized to review legislation to see if it violates such rights. If the people do indeed have rights of free speech, free exercise of religion, and peaceable assembly, and if respect for these rights leads on balance to attaining the common good, then the legitimacy of legislation would be enhanced if it can survive meaningful scrutiny on these grounds. But did the Constitution stop there?

III. Legal Legitimacy and the Ninth Amendment

A. The Relevance of the Ninth Amendment

Did the United States Constitution stop at the protection of expressly enumerated rights? On its face, the ninth amendment appears to be relevant to this question. By insisting that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” it appears to acknowledge that the rights specified in the text do not exhaust the substantive or the procedural dimensions of constitutional legitimacy; that the powers of the legislature are constrained by other unnamed rights that the people had prior to the Constitution and have retained; that the substantive review authorized by the Constitution is not limited to those rights that are expressly enumerated in the text.

To be sure, the view that the unenumerated rights have the same or a similar “power-constraints” function as enumerated rights is not the only possible interpretation of the ninth amendment. The mere fact that alternative interpretations of the words of the ninth amendment may be conceivable, however, does not justify ignoring the ninth amendment or favoring an interpretation that has the same effect. The real question is whether the power-constraints conception is the best of the available interpretations of the ninth amendment.

Of course, this depends in part upon whether, as a descriptive matter, a “power-constraints” construction of the ninth amendment would conflict with our conception of other aspects of the constitutional enterprise. But, assuming that such a construction of the ninth amendment is not precluded by the text, determining the best interpretation of the ninth amendment also depends on which yields the best interpretation of the Constitution as a whole. Such an inquiry unavoidably involves the normative dimension of the constitutional enterprise. Would a constitutional process that was limited to substantive review of only expressly enumerated rights be more or less likely to result in legislation that satisfies the substantive criteria of legitimacy than a process that also considered unenumerated rights?

33See, e.g., Rapoza, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64 Chi.-Kent L. Rev. 177, 178 (1988) (contending that the retained rights may not be justiciable); Berger, supra note 3 (same); McAffee, supra note 3 (same); McConnell, A Moral Realist Defense of Constitutional Democracy, 64 Chi.-Kent L. Rev. 89, 90–91 (1988) (same) (reprinted as chapter 2 of this volume). See also Sager, Can You Raise the First, Hide Behind the Fourth, and Plead the Fifth? But What on Earth Can You Do With the Ninth Amendment?, 64 Chi.-Kent L. Rev. 237, 242–43 (1988) (summarizing and criticizing the view that unenumerated rights are nonjusticiable and other alternative interpretations) (reprinted as chapter 9 of this volume).

34Elsewhere I argue that there is no unavoidable conflict. See Barnett, supra note 2.
B. The Ninth Amendment and "Easy" Cases of Unenumerated Rights

In considering the merits of such an "open-ended" provision as the ninth amendment, there is a natural tendency to posit its import for cases perceived as "hard." Many are quick to ask what the ninth amendment has to say about abortion, sodomy, the death penalty, etc. But hard cases make bad theory, particularly when theory begins with hard cases.

As I have discussed elsewhere, we obtain moral knowledge by consulting a variety of different criteria. So, for instance, we compare an analysis of ends or results with an analysis of means as well as an analysis of jurisdiction. Easy cases are easy because our analysis and intuitions about ends, means, and jurisdiction all converge on the same result. Some hard cases are hard because we are either unsure what the proper result is or cannot confidently explain our intuitions about what we believe to be the proper result. Hard cases are also those cases where our different criteria of evaluation point in conflicting directions.

For these reasons it is more fruitful to begin legal theory with a consideration of easy cases. For example, first amendment scholars are well aware of the hard cases that can arise under the enumerated rights contained in this provision. But our basic intuitions and theories about ends, means, and jurisdiction all converge on the same result. Once we decide which theory best explains the easy cases we think this provision unconfidently explain our intuitions about what we believe to be the proper result. Hard cases are also those cases where our different criteria of evaluation point in conflicting directions.

The place to look for the "easy cases" of unenumerated rights are those unenumerated rights that have already been recognized by the courts, albeit under varying constitutional rubrics. One authority lists at least thirteen unenumerated rights that the Supreme Court has found to be fundamental.

50Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (reprinted as appendix C of this volume). In this case, the plurality opinion by Chief Justice Burger rested, in part, upon the ninth amendment. See id. at 579 n.15.
In characterizing any "acknowledged-but-unenumerated" right as "easy," we must distinguish between the existence of a right and a controversial application. Clearly the right to enjoy a "zone of privacy" is controversial in some quarters when it is used to restrict certain kinds of "morals" legislation. The right to make one's own choice about having children is highly controversial when it is used to restrict legislative prohibitions on abortion. Yet even with these two examples, there is probably a broad consensus that a right of privacy and a right to choose whether or not to have children is entitled to presumptive legitimacy and that legislation impinging on the exercise of these rights requires justification. The controversies that have arisen here typically surround the application of these generally acknowledged-but-unenumerated rights to particular sets of facts.

Consider two other examples of acknowledged-but-unenumerated rights: the right to travel and the right to the equal protection of the laws against the federal government. The right to travel within the United States has long been recognized as a right retained by the people, although it is mentioned nowhere in the Constitution. Few would contest that such an unenumerated right could and should be used, for example, to subject federal "pass laws" to searching scrutiny. In Bolling v. Sharpe, the companion case to Brown v. Board of Education, the Court held that an individual has a right to the equal protection of the laws against the federal as well as state governments, notwithstanding the fact that the equal protection clause of the fourteenth amendment applies only to the states. Few would contest that such an unenumerated right should be used to prevent the segregation of public schools in the District of Columbia.

Moreover, as I have explained elsewhere, unenumerated constitutional rights or liberties—like enumerated rights—are not absolute. Instead, they have the legal effect of shifting the burden to the government to justify its infringement. This characteristic should make the enforcement of these rights a bit less scary or anarchistic than some have assumed. Rather, rights constrain powers by placing the burden on the government to justify its exercise of power as truly necessary and proper, rather than imposing a burden on the citizen to identify that a particular right is fundamental. One way to render every protection of liberty an easy case is to adopt the presumption of liberty I have discussed elsewhere.

The ninth amendment, then, strongly suggests that rights such as these need not be enumerated in the Constitution to be protected by the enterprise established and regulated by the Constitution.

Were judges to ignore these and other acknowledged-but-unenumerated rights when evaluating the constitutionality of legislation, the constitutional process would not be as likely to produce legitimate legislation. Without considering such rights, the fact that such legislation passed judicial scrutiny would give us little, if any, reason to be confident that legislation had not infringed upon them. A finding of constitutionality would simply be unable to justify a presumption that such legislation had not violated these unenumerated rights.

Some may argue that because cases of acknowledged-but-unenumerated rights have already received protection through other interpretive devices there is little need for an invigorated ninth amendment. However, even when unenumerated rights are widely acknowledged, the judicial protection of these rights is often controversial simply because such rights are not included in the "enumeration in the Constitution of certain rights." Much of whatever doubts are raised by cases of acknowledged-but-unenumerated rights does not concern whether such rights exist, but rather the legitimacy of enforcing even widely acknowledged rights that are not expressed in the Constitution. Interpreting the ninth amendment as extending constitutional status to the unenumerated rights retained by the people would go a long way towards legitimating (now I am using the modern sense of the term) federal judicial scrutiny of congressional and executive acts and—together with the fourteenth amendment—the acts of state governments that may have violated an unenumerated right.

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51See cases cited supra note 47. Such a right was enumerated in the Articles of Confederation. See Art. of Confederation, art. IV.
54See e.g., Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 175 (1987) (testimony of Robert Bork) (reprinted in appendix B of this volume).
55See Barnett, supra note 25 (discussing the presumption of liberty); Barnett, supra note 2, at 39-44 (discussing the "presumptive method").
56Or executive actions such as the internment of United States citizens of Japanese descent during World War II. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944).
57U.S. Const. amend. IX.
This, in turn, would serve to impart legitimacy on federal and state laws that survive such judicial scrutiny.

Furthermore, as the list given above demonstrates, the judicial protection of unenumerated rights is a very long-standing practice. Few would abandon all the rights on this list. However, while many of these are easy cases for judicial review under a power-constraint conception of the ninth (or fourteenth) amendment, cases of acknowledged-but-unenumerated rights become very hard cases indeed for judicial philosophies that, notwithstanding the ninth amendment, require every judicially protected right be grounded in a specific provision of the text. At times the effort to shoe-horn acknowledged-but-unenumerated rights into one expressed provision or another is reminiscent of Ptolemaic attempts to explain the retrograde movement of Venus. Of course such attempts do "work," but in ways that serve to embarrass and betray the underlying weakness of the dominant approach and suggest the need for an alternative that can handle such "anomalies" in a more fundamental, elegant, and honest fashion. Such has been our experience with protecting unenumerated rights by looking for "penumbras, formed by emanations" from enumerated rights.

C. The Value of the Ninth Amendment for "Hard" Cases

Some fear a functional role for the ninth amendment because they project its impact upon "hard" cases. Much depends, however, on what one thinks makes a hard case hard. In a jurisprudential climate where the only rights deemed to be "real" are those that a legal system has recognized, it is not unexpected that many will equate an unenumerated right with the result in a given case. According to this view, when a legal result is controversial, the unenumerated right is automatically controversial as well. For example, when the unenumerated "right to privacy" is defined as a woman's legal right to use contraceptives or to choose abortion,

because these legal rights are controversial, a right to privacy must be controversial as well.

The background rights of the people, however, are reasons for legal results. They ought not be confused with the legal results or "legal rights" their application may yield. As I suggested in the previous section, some unenumerated rights are "easy" in the sense that they are readily acknowledged, although judicial enforcement of such rights is controversial if one believes that all rights must be textually specified. Similarly, a legal result or legal right can be controversial, although the existence of an underlying or background unenumerated right is accepted.

For our purposes, then, a case is "hard" not only when the existence of an unenumerated right is controversial, but also when protecting an acknowledged-but-unenumerated right leads to a result or legal right that is controversial. On the issues of abortion or capital punishment, for example, many disagree about the right legal outcome—although many would agree that persons have rights to privacy and against cruel and unusual punishments. To the extent that each side of such disputes views an unenumerated rights analysis to be congenial to its opponent, it will be very suspicious of granting the ninth amendment any role whatsoever in constitutional analysis.

Unless one is willing to claim that there are no such rights deserving of judicial protection—a claim that is undermined by the easy cases just discussed above—the bare fact that a particular application of an unenumerated right may lead to a controversial legal result need not undermine the legitimacy of protecting unenumerated rights. For, until judges examine an issue, it is difficult to know whether a controversy surrounds the existence of the unenumerated right, its application to the facts—that is, the result or legal right—or both.

Moreover, until we evaluate a judge's attempt to defend a legal result in an articulated opinion, it is difficult to know that either the underlying unenumerated right or its application to particular facts is properly controversial. After all, some cases create rather than settle controversies because their reasoning seems less than compelling to many thoughtful observers. How do we find this out until judges attempt to decide such cases or "controversies"?

In short, in the effort to avoid controversial results, jurisdictional bars to considering claims based on

58See T. Kuhn, The Structure of Scientific Revolutions 68 (2d ed. 1970):
[For the planets, Ptolemy's predictions were as good as Copernicus'. . . . Given a particular discrepancy, astronomers were invariably able to eliminate it by making some particular adjustment on Ptolemy's system of compounded circles. But as time went on, a man looking at the net result of the normal research effort of many astronomers could observe that astronomy's complexity was increasing far more rapidly than its accuracy and that a discrepancy corrected in one place was likely to show up in another.]

(footnote omitted).

59Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

60In describing the scope of judicial power, article III uses the terms "cases" and "controversies" interchangeably.
unuumerated rights cut short the very processes that are needed to settle such controversies or avoid them altogether.

Even when an unenumerated right (as opposed to the legal result) is controversial at a particular moment in time, this may not always remain the case. Consider the example stressed by Sanford Levinson: chattel slavery. The slavery example is useful, because although it was at one time a hard or controversial case (like the death penalty or abortion cases are today) both in terms of result and (in some quarters) also of underlying right, it is hard no longer. In hindsight, there is no one who would not place the right to be free from involuntary servitude (except as punishment for a crime) in the same category of “easy” cases as the right to travel or to the right to equal protection of federal laws that were discussed in the previous section. Before the thirteenth amendment, however, such a right could only be characterized as an unenumerated background right.

Nor can the right enumerated in the thirteenth amendment be viewed in exclusively jurisdictional terms. In two cases discussed by Professor Levinson, The Antelope and Dred Scott v. Sanford, the Supreme Court of the United States had opportunities within its jurisdiction to take some action inimical to slavery, but declined to reach an anti-slavery result that would most certainly have been controversial. Still, this nineteenth-century controversy does not prevent us from now acknowledging what would have been right even prior to the enactment of the thirteenth amendment—and, at least in the case of Justice Marshall, what was known to be right at the time of the decision. In hindsight, we know that the Court in the Antelope and Dred Scott cases was wrong and why.

Perhaps, given the jurisdictional limitation of the Bill of Rights to protecting only against violations by the federal government (though this limitation is nowhere expressed in the text), the unenumerated rights referred to in the ninth amendment would not have provided a sufficient justification for federal interference with state laws supporting slavery. Perhaps article IV of the Constitution did justify the Court’s decision in Prigg v. Pennsylvania that the Fugitive Slave Act of 1793 was constitutional. Without expressing a view on these issues, it seems clear to me that permitting judges to protect unenumerated rights does not guarantee a happy result in every hard case where unenumerated rights clash with expressed, but mistaken, provisions of the text.

Still, a judicial philosophy that was willing to completely ignore claims based on unenumerated rights—including the rights of those then held in bondage—did nothing to ensure that governmental actions within the proper scope of judicial review were legitimate. As it turns out, the decision in The Antelope that returned the slaves to their European masters was neither mandated by the text, nor binding in conscience, and the Court gave us little reason to think otherwise.

Of course, had the ninth amendment been used to support a decision against slavery in either The Antelope or the Dred Scott case, such a decision would certainly have been politically divisive. Indeed, many advocate judicial deference to legislative will in controversial cases on the grounds that the alternative course is divisive and deference is expedient. But this argument presupposes a knowledge of the truly expedient course that is open to question. After all, the path chosen by the Court in these two cases was hardly expedient in preventing the ultimate in socially divisive activities: a civil war. It is very difficult to say what the consequences of an anti-slavery decision—particularly an early one—would have been. Our knowledge of the expedient course of action may be no more certain than our knowledge of the right course of action.

I do not mean to suggest that judges are authorized simply to reach whatever result they have reason to think is substantively right. The legitimacy of a judicial decision also requires proper jurisdiction and the procedural protections of the rule of law. The example of slavery reveals,

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62Id. at 150, 153.
6460 U.S. (19 How.) 393 (1856).
65Marshall acknowledged that slavery was contrary to the law of nature. . . . That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.
23 U.S. (10 Wheat.) at 120. And the Attorney General understood this as well: These Africans are not “effects” or “merchandise.” To say that they are so, is to beg the whole question in controversy.
66U.S. Const. art. IV, § 2 reads in part: No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.
6731 U.S. (16 Pet.) 539 (1842).
however, that an exclusive reliance on jurisdiction and formal due process, while ignoring substantive concerns, undermines the legitimacy of what constitutional processes produce, and thereby the legitimacy of these processes themselves.

IV. Conclusion: The Ninth Amendment and Constitutional Legitimacy

Perhaps, then, there is reason to think that a constitutional process that refused to evaluate legislation to see if it violated acknowledged-but-unenumerated individual rights would impart less legitimacy on enacted legislation than a process that took such rights into account. And a constitutional process that evaluated legislation to see if it violated controversial unenumerated rights—where the better arguments of the day strongly support the existence of such rights—might well impart more legitimacy on enacted legislation than a process that failed to take such rights into account. Moreover, adopting a presumption of liberty would avoid the need to identify specific liberty rights and thereby would reduce the controversies surrounding their identification. Controversies would still exist as to whether the infringement of a liberty was truly necessary and proper, but this would shift the debate to what should be at issue: the propriety of the government action rather than the existence of a retained right.

If imparting legitimacy on legislation is an important end of the constitutional enterprise, then when there is no expressed barrier to the judicial protection of unenumerated rights, an interpretation of a clause like the ninth amendment that permits such review seems preferable to one that rejects such scrutiny. A constitutional process that ignored unenumerated rights when evaluating legislation would give citizens no reason to believe that such legislation did not violate the rights retained by the people. Without this review, legislation would enjoy a weaker presumption that it is binding in conscience or perhaps no such presumption at all.

Ultimately, the legitimacy of the Constitution itself may hinge on the ability of the enterprise it establishes to convey legitimacy on legislation. A power-constraints conception of the ninth amendment would, I think, contribute favorably and importantly to this constitutional enterprise.

Appendix A: Madison’s Speech on the Constitutionality of the Bank of the United States.1

The House resumed the consideration of the bill sent from the Senate to incorporate the subscribers to the Bank of the United States.1 The bill being on its passage,

Mr. Madison began with a general review of the advantages and disadvantages of banks. The former, he stated, to consist in, first, the aid they afford to merchants, who can thereby push their mercantile operations further with the same capital. Second. The aids to merchants in paying punctually the customs. Third. Aids to the Government in complying punctually with its engagements, when deficiencies or delays happen in the revenue. Fourth. In diminishing usury. Fifth. In saving the wear of gold and silver kept in the vaults, and represented by notes. Sixth. In facilitating occasional remittances from different places where notes happen to circulate.

The effect of the proposed bank, in raising the value of stock, he thought had been greatly overrated. It would no doubt raise that of the stock subscribed into the bank; but could have little effect on stock in general, as the interest on it would remain the same, and the quantity taken out of the market would be replaced by bank stock.

The principal disadvantages consisted in, first, banishing the precious metals, by substituting another medium to perform their office. This effect was inevitable. It was admitted by the most enlightened patrons of banks, particularly by Smith on the Wealth of Nations. The common answer to the objection was, that the money banished was only an exchange for something equally valuable that would be imported in return. He admitted the weight of this observation in general; but doubted whether, in the present habits of this country, the returns would not be in articles of no permanent use to it.

1 Debates and Proceedings in the Congress of the United States (Joseph Gales, ed.) 1894–1902 (1834).
be deprived of the opportunity of exercising the rights of legislation; respect for our constituents, who have had not opportunity of making known their sentiments, and who are themselves to be bound down to the measure for so long a period; all these considerations require that the irrevocable decision should at least be suspended until another session.

It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the Constitution; was condemned by the rule of interpretation arising out of the Constitution; was condemned by its tendency to destroy the main characteristic of the Constitution; was condemned by the expositions of the friends of the Constitution, whilst depending before the public; was condemned by the apparent intention of the parties which ratified the Constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation by the vote of this House.

Appendix B: Testimony of Recent Supreme Court Nominees Concerning the Ninth Amendment, Unenumerated Rights, and Natural Law

NOMINATION OF ROBERT H. BORK
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 15, 1987

U.S. Senate, Committee on the Judiciary, Washington DC.

The committee met, pursuant to notice, at 10 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Hatch, Simpson, Grassley, Specter, Humphrey.

The CHAIRMAN... Let's talk about the Griswold case. Now, while you were living in Connecticut, that State had a law—I know you know this, but for the record—that it made it a crime for anyone, even a married couple to use birth control. You indicated that you thought that law was "nutty," to use your words and I quite agree. Nevertheless, Connecticut, under that "nutty" law, prosecuted and convicted a doctor and the case finally reached the Supreme Court.

The Court said that the law violated a married couple's constitutional right to privacy. You criticized this opinion in numerous articles and speeches, beginning in 1971 and as recently as July 26th of this year. In your 1971 article, "Neutral Principles and Some First Amendment


Problems,"3 you said that the right of married couples to have sexual relations without fear of unwanted children is no more worthy of constitutional protection by the courts than the right of public utilities to be free of pollution control laws.

You argued that the utility company's right or gratification, I think you referred to it, to make money and the married couple's right or gratification to have sexual relations without fear of unwanted children, as "the cases are identical." Now, I am trying to understand this. It appears to me that you are saying that the government has as much right to control a married couple's decision about choosing to have a child or not, as that government has a right to control the public utility's right to pollute the air. Am I misstating your rationale here?

Judge Bork. With due respect, Mr. Chairman, I think you are. I was making the point that where the Constitution does not speak—there is no provision in the Constitution that applies to the case—then a judge may not say, "I place higher value upon a marital relationship than I do upon an economic freedom." Only if the Constitution gives him some reasoning. Once the judge begins to say economic rights are more important than marital rights or vice versa, and if there is nothing in the Constitution, the judge is enforcing his own moral values, which I have objected to. Now, on the Griswold case itself—

The Chairman. Can we stick with that point a minute to make sure I understand it?

Judge Bork. Sure.

The Chairman. So that you suggest that unless the Constitution, I believe in the past you used the phrase, textually identifies, a value that is worthy of being protected, then competing values in society, the competing value of a public utility, in the example you used, to go out and make money—that economic right has no more or less constitutional protection than the right of a married couple to use or not use birth control in their bedroom. Is that what you are saying?

Judge Bork. No, I am not entirely, but I will straighten it out. I was objecting to the way Justice Douglas, in that opinion, Griswold v. Connecticut, derived this right. It may be possible to derive an objection to an anti-contraceptive statute in some other way. I do not know.

But starting from the assumption, which is an assumption for purposes of my argument, not a proven fact, starting from the assumption


that there is nothing in the Constitution, in any legitimate method of constitutional reasoning about either subject, all I am saying is that the judge has no way to prefer one to the other and the matter should be left to the legislatures who will then decide which competing gratification, or freedom, should be placed higher.

The Chairman. Then I think I do understand it, that is, that the economic gratification of a utility company is as worthy of as much protection as the sexual gratification of a married couple, because neither is mentioned in the Constitution.

Judge Bork. All that means is that the judge may not choose.

The Chairman. Who does?

Judge Bork. The legislature.

The Chairman. Well, that is my point, so it is not a constitutional right. I am not trying to be picky here. Clearly, I do not want to get into a debate with a professor, but it seems to me that what you are saying is what I said and that is, that the Constitution—if it were a constitutional right, if the Constitution said anywhere in it, in your view, that a married couple's right to engage in the decision of having a child or not having a child was a constitutionally-protected right of privacy, then you would rule that that right exits. You would not leave it to a legislative body no matter what they did.

Judge Bork. That is right.

The Chairman. But you argue, as I understand it, that no such rights exists.

Judge Bork. No, Senator, that is what I tried to clarify. I argued that the way in which this unstructured, undefined right of privacy that Justice Douglas elaborated, that the way he did it did not prove its existence.

The Chairman. You have been a professor now for years and years, everybody had pointed out and I have observed, you are one of the most well-read and scholarly people to come before this committee. In all your short life, have you come up with any other way to protect a married couple, under the Constitution, against an action by a government telling them what they can or cannot do about birth control in their bedroom? Is there any constitutional right, anywhere in the Constitution?

Judge Bork. I have never engaged in that exercise. What I was doing was criticizing a doctrine the Supreme Court was creating which was capable of being applied in unknown ways in the future, in unprincipled ways. Let me say something about Griswold v. Connecticut. Connecticut never tried to prosecute any married couple for the use of contraceptives.
That statute was used entirely through an aiding and abetting clause in the general criminal code to prosecute birth control clinics that advertised. That is what it was about.

The Chairman. But, in fact, they did prosecute a doctor, didn't they, for giving advice?

Judge Bork. Well, I was at Yale when that case was framed by Yale professors. That was not a case of Connecticut going out and doing anything. What happened was some Yale professors sued to have that—because they like this kind of litigation—to have that statute declared unconstitutional. It got up to the Supreme Court under the name of Poe v. Ullman. The Supreme Court refused to take the case because there was no showing that anybody ever got prosecuted.

They went back down and engaged in enormous efforts to get somebody prosecuted and the thing was really a test case on an abstract principle, I must say.

The Chairman. Well, let me say it another way then, without doing it in a case. Does a State legislative body, or any legislative body, have a right to pass a law telling a married couple, or anyone else, that behind—let's stick with the married couple for a minute—behind their bedroom door, telling them they can or cannot use birth control? Does the majority have the right to tell a couple that they cannot use birth control?

Judge Bork. There is always a rationality standard in the law, Senator. I do not know what rationale the State would offer or what challenge the married couple would make. I have never decided that case. If it ever comes before me, I will have to decide it. All I have done was point out that the right of privacy, as defined or undefined by Justice Douglas, was a free-floating right that was not derived in a principled fashion from constitutional materials. That is all I have done.

The Chairman. Judge, I agree with the rationale offered in the case. Let me just read it to you and it went like this. I happen to agree with it. It said, in part, “would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with the right of privacy older than the Bill of Rights. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. The association promotes a way of life, not causes. A harmony of living, not political face. A bilateral loyalty, not a commercial or social projects.”

Obviously, that Justice believes that the Constitution protects married couples, anyone.

Judge Bork. I could agree with almost every—I think I could agree with every word you read but that is not, with respect, Mr. Chairman, the rationale of the case. That is the rhetoric at the end of the case. What I objected to was the way in which this right of privacy was created and that was simply this. Justice Douglas observed, quite correctly, that a number of provisions of the Bill of Rights protect aspects of privacy and indeed they do and indeed they should.

But he went on from there to say that since a number of the provisions did that and since they had emanations, by which I think he meant buffer zones to protect the basic right, he would find a no provision of the Constitution applied, so that he—

The Chairman. What about the ninth amendment?

Judge Bork. Wait, let me finish with Justice Douglas.

The Chairman. All right.

Judge Bork. He did not rest on the ninth amendment. That was Justice Goldberg.

The Chairman. Right. That is what I was talking about.

Judge Bork. Yes. And I want to discuss first Justice Douglas and then I would be glad to discuss Justice Goldberg.

The Chairman. OK.

Judge Bork. Now you see, in that way, he could have observed, equally well, that various provisions of the Constitution protect individual freedom and therefore, generalized a general right of freedom that would apply where no provision of the Constitution did. That is exactly what Justice Hugo Black criticized in dissent in that case, in some heated terms—and Justice Potter Stewart also dissented in that case.

So, in observing that Griswold v. Connecticut does not sustain its burden, the judge's burden of showing that the right comes from constitutional materials, I am by no means alone. A lot of people, including Justices, have criticized that decision.

The Chairman. I am not suggesting whether you are alone or in the majority. I am just trying to find out where you are. As I hear you, you do not believe that there is a general right of privacy that is in the Constitution.

Judge Bork. Not one derived in that fashion. There may be other arguments and I do not want to pass upon those.

The Chairman. Have you ever thought of any? Have you ever written about any?

Judge Bork. Yes, as a matter of fact, Senator, I taught a seminar with Professor Bickel starting in about 1963 or 1964. We taught a seminar called Constitutional Theory. I was then all in favor of Griswold v. Connecticut. I thought that was a great way to reason. I tried to build a course around that, only I said: we can call it a general right of freedom, and let's then take the various provisions of the Constitution, treat them the way a lawyer treats common law cases, extract a more general principle and apply that.

I did that for about 6 or 7 years, and Bickel fought me every step of the way; said it was not possible. At the end of 6 or 7 years, I decided he was right.

The Chairman. Judge, let's go on. There have been a number of cases that flow from the progeny of the Griswold case, all relying on Griswold, the majority view, with different rationales offered, that there is a right of privacy in the Constitution, a general right of privacy, a right of privacy derived from the due process, from the 14th amendment, a right of privacy, to use the Douglas word—the penumbra, which your criticize, and a right Goldberg suggested in the Griswold case, from the ninth amendment. It seems to me, if you cannot find a rationale for the decision of the Griswold case, then all the succeeding cases are up for grabs.

Judge Bork. I have never tried to find a rationale and I have not been offered one. Maybe somebody would offer me one. I do not know if the other cases are up for grabs or not.

The Chairman. Wouldn't they have to be if they are based on the same rationale?

Judge Bork. Well, it may be that—I have written that some of these cases were wrongly decided, in my opinion. For some of them I can think of rationales that would make them correctly decided but wrongly reasoned. There may be other ways, that a generalized and undefined right of privacy—one of the problems with the right of privacy, as Justice Douglas defined it, or did not define it, is not simply that it comes out of nowhere, that it does not have any rooting in the Constitution, it is also that he does not give it any contours, so you do not know what it is going to mean from case to case.

* * *

Senator Thurmond. Judge Bork, the ninth amendment to the Constitution provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. What do you believe the ninth amendment means?

Judge Bork. That is an extremely difficult question, Senator, because nobody has ever to my knowledge understood precisely what the ninth amendment did mean and what it was intended to do. And throughout almost all of our history, no court ever relied upon it. And in fact, the Supreme Court has yet to rely on it. Justice Goldberg did in one case.

I have seen—not mastered, but seen—some historical research appearing in the Virginia Law Review which suggests that what this amendment means is that the enumeration of Federal rights in the Bill of Rights shall not be construed to deny or disparage the rights retained by the people in their State constitutions. And that is the only explanation that has any plausibility to it that I have seen so far.

* * *

Senator Kennedy. Thank you very much, Mr. Chairman. Judge Bork, I wanted to pick up, for a moment, one aspect of the line of questioning of the Chairman. As I understand your discussion of the Griswold case, your view is that there is no right to privacy in the Constitution. It is up to the legislature. Doesn't that lead you to the view that you would uphold a statute requiring say, compulsory abortion, if a legislature enacted it by majority?

Let me just continue. Some of your strongest supporters have made an issue of the allegation that there may be compulsory abortion in the People's Republic of China. As I understand it, under your peculiar constitutional philosophy, you would be prepared to uphold compulsory abortion in America if some future legislature enacted it. We have just heard you say that the State of Connecticut had the right to pass a law prohibiting married couples from using birth control.

I think the real question is, Where do you draw the line? I think you have opened up a whole can of worms, quite frankly, here. What about a State statute that says families with more than two children cannot send their children to public schools? What about all sorts of other statutes that a legislature might enact with some theoretically-plausible ratio-

I believe, Mr. Bork, that in your world, the individuals have precious few rights to protect them against the majority and I think this is where the Bill of Rights comes in and what the Bill of Rights is all about, that there are some things in America which no majority can do to the minority or to the individuals. The provisions of the 14th amendment under section 1, include "nor shall any State deprive any person of life, liberty or property without the due process of law."

Isn't included in the concept of liberty, the right of privacy? In reading that term with the ninth amendment, which provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage other retained by the people," I would be interested in your reaction or response because it seems to me that the issues of privacy have been carefully enshrined within the Constitution by court decisions over the period of the last 60 years.

They are rights which are enshrined in such a way and respected and valued so importantly that I would think Americans would have serious questions, I certainly do, about placing someone on the Supreme Court that is willing to find some kind of rationale or appears to find some rationale, not to respect it.

Judge Bork. Senator Kennedy, at the outset let me say this. I have the greatest respect for the Bill of Rights and I will enforce the Bill of Rights. I have enforced the Bill of Rights. What we were talking about here was a generalized, undefined right of privacy which is not in the Bill of Rights. Now, as I said in my opening statement, a judge has to apply the law and the law comes from the text, the history and the structure of the Constitution.

There are important aspects of privacy in the Bill of Rights. This Congress has increased privacy in many ways by statute. As a society, we value it, but as a judge, I do not think I can tell the American people they may not have a law that in no way conflicts with the written and historical Constitution. Now, you raise the question of—

Senator Kennedy. I want you to complete your answer. What I was really springing from is your response to the chairman's questions with regard to the Griswold. We remember that the majority in that case found that the provisions in a State statute that restricted married couples from using contraception would be violative of their right to privacy. You've indicated that you took issue with the rationale.

I think you continued and said, well, perhaps someone can come up with a different rationale so that you might be able to reach a different decision. But in response, I think, to the chairman's question, you talked about the importance of the majority in the State legislatures. You did not find, at least at this time, that you were prepared to state a philosophy or legal justification for the overruling of that Connecticut statute. I believe, quite frankly, following that rationale, that you could lead yourself into the kinds of situations which I've posed here. If I am wrong, I would like to hear from you on that.

Judge Bork. Well, let me repeat about this created, generalized and undefined right of privacy in Griswold. Aside from the fact that the right was not derived by Justice Douglas, in any traditional mode of constitutional analysis, there is this. The right was no—we do not know what it is. We do not know what it covers. It can strike at random. For example the Supreme Court has not applied the right of privacy consistently and I think it is safe to predict that the Supreme Court will not.

For example, if it really is a right of sexual freedom in private, as some people have suggested, then Bowers v. Hardwick, 6 which upheld a statute against sodomy as applied to homosexuals, is wrongly decided. Privacy to do what, Senator? You know, privacy to use cocaine in private? Privacy for businessmen to fix prices in a hotel room? We just do not know what it is.

Senator Kennedy. Well, there are some things that people would understand—they would feel that government intrusion, in terms of the married couple in the Griswold case, in terms of their use of contraceptives, did go across that line; and in the kind of examples that I have given you, it would seem to me that that would be equally clear, that a State statute that required compulsory abortion would certainly violate what I think most Americans would feel would be the right to privacy. And I believe as well that, once you have the State dictating the size of families, it would do so as well.

What I am interested in is how you reach that conclusion, if that would be the conclusion, under your rationale, that if a State has got a majority and it has got a basis for passing that statute, then it is not up to Judge Bork to look behind that.

Judge Bork. It is not up to Judge Bork to look behind that unless he has got law to apply. I was going to say, furthermore, that I do not think—I have never found it terribly useful, in testing constitutional theories, to

6478 U.S. 186 (1986).
use examples that we know the American people will never enact. The founders of this nation banked a good deal upon the good sense of the people, as well as upon the courts.

... Senator Hatch... I don't think conservatives are any more justified in trying to impose their conservative activism than liberals are in the courts.

Now, in this context, I think it is helpful to re-examine this case for a few minutes, Griswold v. Connecticut. And this case, as you defined it, was when the Supreme Court invalidated a Connecticut law banning the use of contraceptives.

In the first place, do you, as a personal matter, have anything against the use of contraceptives of the personal choice of individuals to use them or not?

Judge Bork. Nothing whatsoever. I think the Connecticut law was an outrage and it would have been more of an outrage if they ever enforced it against an individual.

Senator Hatch. But they never did.

Judge Bork. No.

Senator Hatch. You will not be surprised to know that your personal feelings about the Connecticut law are similar to those of Justice Hugo Black, the primary dissenter in the Griswold case. He said, "I feel constrained to add that the law is every bit as offensive to me as it is to my brethren in the majority." Nonetheless, Justice Black, who certainly was one of the great all time Justices in our age, who was joined by Justice Stewart, whose wonderful wife is here with us today—and, of course, he was another judicial giant in my opinion—they both dissented in that case.

Now, can you explain why these great jurists could have allowed that law banning contraceptives to stand?

Judge Bork. Justice Stewart called it an uncommonly silly law, which I think it certainly was, at a minimum. I think they would have allowed it to stand simply because they could find no warrant in the Constitution for them, as judges, to override a legislative enactment.

Senator Hatch. In other words, there was no source of authority within the Constitution to rule the way they ruled?

Judge Bork. That is what they concluded.
let alone, or the right to be free of taxation, or the right to a balanced budget?

Judge Bork. That's right. I remember some judges who sued under the Constitution for the right to an indexed salary.

Senator Hatch. I agree that—

Judge Bork. And they quite properly lost.

Senator Hatch. Actually, some of those rights would seem very attractive. A right to be let alone. You know, some judge could just say “well, we all ought to have that right,” if he wanted to, but it isn’t in the Constitution.

Judge Bork. Judging requires careful thought and the making of close distinctions. Once you just put rhetoric into the constitutional adjudication, you don’t know where it will go or what it will do.

Senator Hatch. What happens if the courts start creating rights that are not found in the Constitution?

Judge Bork. In my view, it’s illegitimate.

Senator Hatch. Well, we’re going to be a government not of laws but of the whimsies of the courts; isn’t that right?

Judge Bork. Yes.

Senator Hatch. Isn’t that basically your criticism?

Judge Bork. That’s basically what I have been objecting to for 16 years, and throughout these hearings.

Senator Hatch. It has got to be a little irritating to you as it has to be to anybody who is fair-minded, to be criticized for having criticized Griswold v. Connecticut on the grounds that you might possibly have wanted to sustain that statute, any more than it was the desire of Hugo Black or Mr. Justice Potter Stewart to have done that.

Judge Bork. It is, Senator, as you know, a regular form of rhetoric to say that, if you would say a statute is not unconstitutional, that must be because you like the statute. That is not right. The question is never whether you like the statute; the question is, is it in fact contrary to the principles of the Constitution.

Senator Hatch. I think I'm starting to understand why you have never been reversed, Judge. I hope the people in this country are, too, because you’re right down the middle on these things. You just want the laws to be made by elected representatives and the judges to interpret those laws in accordance with appropriate constitutional application.

Judge Bork. That is true, Senator.

Senator Hatch. I don’t know how anybody could find fault with that. And in every one of these cases, I think when you get into the complexities, I think the American people would basically say “I might disagree with Judge Bork on the philosophy on some of these cases, but I cannot disagree on the jurisprudence or the actual application of law.” I think most people would feel that way.

By the way, this discussion leads to another important case governed by the so-called privacy doctrine, and that is the case of Roe v. Wade. You have been criticized for having been critical of this abortion case called Roe v. Wade.

Can you explain your apprehensions about this particular case?

Judge Bork. It is not apprehension so much, Senator, as it is—if Griswold v. Connecticut established or adopted a privacy right on reasoning which was utterly inadequate, and failed to define that right so we know what it applies to, Roe v. Wade contains almost no legal reasoning. We are not told why it is a private act—and if it is, there are lots of private acts that are not protected—why this one is protected. We are simply not told that. We get a review of the history of abortion and we get a review of the opinions of various groups like the American Medical Association, and then we get rules.

That’s what I object to about the case. It does not have legal reasoning in it that roots the right to an abortion in constitutional materials.

Senator Hatch. Well, let me just say this.

By the way, I presume your concerns about the reasoning of the Roe v. Wade case do not necessarily mean that you would automatically reverse that case as a Justice of the Supreme Court?

Judge Bork. No. If you want to hear me on that, I will tell you exactly what I would consider.

Senator Hatch. We would be glad to hear it.

Judge Bork. If that case, or something like it, came up, and if the case called for a broad up or down, which it may not, I would first ask the lawyer who wants to support the right, “can you derive a right of privacy, not to be found in one of the specific amendments, in some principled fashion from the Constitution so I know not only where you got it but what it covers.”

There are rights that are not specifically mentioned in the Constitution, like the right to travel. You know, it's conceivable he could do that, I don't know. If he could not do that, I would say, “Well, if you can't derive

7 410 U.S. 113 (1973).
a general right of privacy, can you derive a right to an abortion, or at least to a limitation upon anti-abortion statutes legitimately from the Constitution?"

If after argument, that didn’t sound like it was going to be a viable theory, I would say to him, “I would like you to argue whether this is the kind of case that should not be overruled.” Because, obviously, there are cases we look back on and say they were erroneous or they were not compatible with original intent, but we don’t overrule them for a variety of reasons.

A moment ago, in response to a question, I ran through some of the factors. So I would listen to that argument.

As I have said before, a judge with an original intent philosophy, which goes back, by the way, to Marshall and Joseph Story, needs a strong theory of precedent to keep from getting back into matters that are long settled, even if incorrectly settled.

**Wednesday, September 16, 1987**

Senator DeConcini. . . You said yesterday, relating to a question that Senator Hatch asked you regarding Roe v. Wade and the ninth amendment, its application—and correct me please—you said something that nobody really knows what that amendment means. Is that correct?

Judge Bork. I do not know. I know of only one historical piece. There may be more. You know, this is not a subject I have researched at great length, but most people say they do not know what it means.

Senator DeConcini. Do you know what it means?

Judge Bork. It could be—you know, I can speculate.

Senator DeConcini. Do you have an opinion on the ninth amendment?

Judge Bork. The most sensible conclusion I heard was the one offered in the Virginia Law Review, which was that the enumeration, as the ninth amendment says—

Senator DeConcini. Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Judge Bork. That is right, Senator. And I think the ninth amendment therefore may be a direct counterpart to the 10th amendment. The 10th amendment says, in effect, that if the powers are not delegated to the United States, it is reserved to the States or to the people.

And I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions. That is the best I can do with it.

Senator DeConcini. Yes. You feel that it only applies to their State constitutional rights.

Judge Bork. Senator, if anybody shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.

Senator DeConcini. I do not have any historical evidence. What I want to ask you is purely hypothetical, Judge. Do you think it is unconstitutional, in your judgement, for the Supreme Court to consider a right that is not enumerated in the Constitution —

Judge Bork. Well, no.

Senator DeConcini. —to be found under article IX?

Judge Bork. There are two parts to that. First, there are some rights that are not enumerated but are found because of the structure of the Constitution and government. That is fine with me. I mean that is a legitimate mode of constitutional analysis.

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says “Congress shall make no” and then there is an ink blot 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 ink blot if you cannot read it.

Senator DeConcini. Let me ask you this question: If you had to speculate, what do you think Madison or some of the framers had in mind as to unenumerated rights?

Judge Bork. They might have had in mind—this is pure speculation, which I do not think is—

Senator DeConcini. I understand. I said this is all hypothetical.

Judge Bork. All right. They might have had in mind what I just said about the enumeration of these does not entitle judges to override the state constitutional rights. They also might have had in mind perhaps a fixed category of what they regarded as natural rights, although if they did have in mind a category of natural rights, I am a little surprised they did not spell it out and put it into the Constitution, because they specified all the other rights.
There is no evidence that I know of that this was to be a dynamic category of rights, that is that under the ninth amendment the court was free to make up more Bill of Rights. There is no evidence of that at all that I know of. And I think that had that been their objective, they could have spelled it out a lot better, and a lot of the constitutional debates we had right after the Constitution was formed, and John Marshall began applying the Constitution and so forth, would have been irrelevant debates because the court is just entitled to make up constitutional rights.

Senator DeConcini. Would you say that in your judgment it would be unconstitutional for the Supreme Court to find a right—we will not say what it is but Right A—

Judge Bork. If a Supreme court makes—

Senator DeConcini. [continuing.] Because it is not enumerated here.

Judge Bork. If the Supreme Court makes up a new right for which there is not historical evidence, then I think it has exceeded its powers under the Constitution.

Senator DeConcini. That is vis-a-vis your criticism of the Griswold case.

Judge Bork. Yes, insofar as they did not explain adequately where it came from and what it was.

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The Chairman. . . . And, lastly, you said you heard of no arguments about the ninth amendment that would lead you to believe it has some applicability along the lines being discussed, and you cite the Virginia article. Have you read Patterson's "Forgotten Ninth Amendment"?

Judge Bork. No. The ninth amendment has never been a center of my concerns.

The Chairman. I am not suggesting you should have. I just want to know if you had, because I will not question you on it if you have not read it.

Judge Bork. And the Supreme Court has never relied upon the ninth amendment.

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Senator Grassley. . . . You are probably tired of having us ask questions about the Griswold case, but probably much needs to said. In Griswold, Justice Black, in dissent, wrote that the ninth amendment was passed to assure the people that the Constitution was intended to limit the federal government to the powers expressly granted to it, or by implication necessary for it to operate. Yesterday, Senator Thurmond asked you about the purpose of the ninth amendment.

Let me ask you this: In more than 150 years between enactment of the ninth amendment and the Griswold case, had the Supreme Court ever used the ninth amendment as a weapon of federal power to prevent State legislatures from passing laws they considered necessary?

Judge Bork. I believe the Court had never, and I believe the Court to this day has never done so. I think only a concurrence by Justice Goldberg really relied upon the ninth amendment in the Griswold case. It has just never been an amendment that Court has ever found to have much force, just as they have not found the 10th amendment to have much force.

Senator Grassley. So then the Griswold case was a rather radical decision in terms of the history of Supreme Court jurisprudence?

Judge Bork. Oh, the Griswold case was an enormous innovation, yes. It was a radical departure from what they had been doing.

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Senator Helms. Now on the general right of privacy—well, first, let me quote what you have been quoted and this comes from magazines and some of your writings—if it is incorrect, then correct me—Roe v. Wade is in itself an unconstitutional decision, a serious and wholly-unjustifiable usurpation of either legislative authorities. Is that correct recital of a statement you have made?

Judge Bork. I made that statement, yes.

Senator Helms. All right, sir.

Now we go back to the general right of privacy, upon which Roe v. Wade is based coming out of Griswold, and you had two, one Justice Goldberg out of the ninth amendment and the other one from Justice Douglas which is called the penumbra, which is sort of a vague term, but I understand that is something to do with astronomy and various shadows and unclear things, but it comes from the specific mentioning of rights of privacy, as you have enumerated to me in various other amendments.

Now you in your studying it and making a statement like that, do you really believe that you can find anywhere a general right of privacy that you would accept from the Constitution?

Judge Bork. I do not know, Senator. I certainly would not accept emanations and penumbra analysis, which is I think less an analysis than a metaphor. And the ninth amendment part gives me difficulty because it
THE RIGHTS RETAINED BY THE PEOPLE

is a little hard to know what category of rights, if any, were supposed to be preserved by the ninth amendment unless it is the State constitutional rights.

But there may be some way to do it. I have heard fairly strong moral arguments for abortion, just as I have hard [sic] fairly strong moral arguments against it. Whether those moral arguments could be rooted to the constitutional material, I really do not know.

What I do unfortunately, I suppose, is take Supreme Court opinions that seem to me unsatisfactory as matters of constitutional reasoning and criticize them. And I have not gone back into the history and other things in an attempt to construct a new—

Senator Thurmond. Judge, keep your voice up so we can hear you.

Judge Bork. All right, Senator—a new right of privacy that has some other meaning. Maybe, as I say, one of the moral arguments would apply perhaps only to abortion because Griswold and Roe are quite different cases in quite different situations, and I do not know if you want me to rehearse some of the moral argumentation I have heard or not, but I do not know—I have not heard anybody yet root it in the Constitution.

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THURSDAY, SEPTEMBER 17, 1987

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The CHAIRMAN. As I said at the outset, the disagreement that you and I have relates not to you as a man, not to your personal views, but to your judicial philosophy, because I think you are a man of integrity and you are applying a judicial philosophy with which I think I have—just as you had strong disagreement with the majority on the court on substantive due process, I have strong disagreement with you and your dislike of it.

Judge Bork. Yes.

The CHAIRMAN. Now, having said that, let me move along the same lines to this notion that has come up in the past of core ideas that people mention. Let me be more specific.

Yesterday you indicated that although you did not like the generalized right of privacy or use of substantive due process, you time and again pointed out that certain core ideas were protected and they were protected in first amendment you pointed out, privacy. First amendment, fourth amendment, fifth amendment, eighth amendment. You went down the list.

Now, what I would like to ask you is this. If Justices Harlan, Powell, Frankfurter, Jackson, Cardozo had found a fundamental right of privacy or a fundamental liberty to be protected under another specific amendment to the Constitution, there would not have been any occasion to see that the Constitution also contains the basic right of privacy.

Obviously they could not find it in any single amendment. Therefore, my question is putting aside all the specific amendments you have mentioned either now or during the past several days do you believe that the Constitution recognizes a marital right to privacy?

Judge Bork. A marital right to privacy? I do not know. It may well. I have seen arguments to that effect, but I have never investigated that. It is certainly one that I entirely agree with. I mean, I agree with the concept, and I think it is very important that it be maintained.

But I have never worked on a constitutional argument in that area.

The CHAIRMAN. As you know, in Griswold, for example, both the concurrent opinion and the lead opinion uses and refers to a marital right of privacy.

Judge Bork. Yes.

The CHAIRMAN. And it seems to me, Judge, that you can’t find that marital right to privacy in the first, the fourth, the fifth, the eighth amendments. The only place you can find it, that anybody has been able to find it, is either in the ninth and/or in the 14th amendment, and both of which either through substantive due process or through the ninth amendment, you reject—"reject" may be the wrong word—you are very leery of the use of the ninth amendment at all as you have outlined for us, and you don’t like substantive due process.

So quite frankly, Judge, I don’t see how you can find—you, and by your theory, a marital right to privacy.

Judge Bork. I have two answers to that. Let me just clear up the ninth amendment business. If somebody shows me historical evidence of what they meant by the ninth amendment, I have no problem using it. I just don’t know the historical evidence.

You mentioned a book. I have not read it.

The CHAIRMAN. I know, but at some point, because I do not want to take the time of the hearing, at some point I really would like to know fully and sit down with you. It would be an education for me, and maybe I could even show you something on the ninth amendment.

Judge Bork. All right. As to the marital right of privacy, I think it is essential to a civilized society. I do not know of any state, including Con-
necticut, that has ever tried to interfere with it because even the law in Connecticut was never used—nobody ever went in [and] threatened it, and I do not think it could be enforced given the fourth amendment and given the lack of enforcement.

So I don't know offhand—I cannot construct just sitting here a constitutional argument. Maybe I could if I spend a few days at it, but I don't think it is a live issue because no state has ever tried to enforce such a law.

Senator Thurmond. Judge Bork, yesterday, in response to a question, you indicated that there are some rights that are not enumerated in the Constitution, but are recognized because of the structure of the Constitution and government.

Could you give us an example of one of those.

Judge Bork. Well, the right to travel, I think, Senator, was the first derived—I have not re-read the case, recently, but I remember, it is in Crandall v. Nevada, a couple years before the 14th amendment was ratified.

Nevada was taxing people a dollar every time they left the State, and the Supreme Court struck down that tax in saying there was a right to travel without hindrance by the State, and it did so on structural reasoning about the nature of the Federal Union, and how you have to travel, and so forth.

But the oldest of structural reasoning in the law—I do not know if it is the oldest, but the best—is Chief Justice John Marshall's opinion in McCulloch v. Maryland, where entirely on structural grounds, he first establishes the right of the United States to create a national bank, the Bank of the United States, and then establishes that that bank must be free from State taxation of its commercial instruments. An entirely structural argument, entirely sound argument.

**Senator Specter.** Judge Bork, I want to turn now to a statement you made in Barnes v. Kline, which has been the subject of some discussion as to standing. But in your enumeration of the powers of the President, you said this in your dissent, at page 55 of the opinion: It—referring to the Constitution—quote, "was to allow room for the evolution of the powers of various offices and branches, that the Constitution's specification of those powers was made somewhat vague. The framers contemplated organic development, not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint."

There, obviously, you treat executive powers as a blueprint in the Constitution with a fuller statement to be developed as organic law.

Why not such a similar interpretation for the Bill of Rights? Why the necessity to find a specific constitutional right as a prerequisite for dealing with State legislative action?

Judge Bork. For this reason, Senator. I said specifically the only time I got into a debate with my colleagues over this—and the colleague I was having the debate with was Judge Scalia—was in the Ollman case, where I found a column protected by the First Amendment. And as I explained there, there will be an evolution of the Bill of Rights as new threats to the freedoms guaranteed develop—whether those threats are developments in legal doctrine, as in libel law, or threats coming from technology, or whatever it is; and you do have an organic growth. And there is a lot of freedom in that. I mean, these are questions of degree and questions of judgment, which is why you need judges and not just read the Constitution.

But I do no think that I can ever justify a judge putting a freedom or value in the Constitution that the framers or the ratifiers in no way contemplated. Now, they did not contemplate the circumstances, so you may get an evolution for that reason. They did not contemplate future developments, so you may get an evolution of a value that is in the Constitution. But I think they have to put the value there.

Senator Specter. But in your quotation in Barnes v. Kline, when it comes to executive power, you allow for growth. In your opinion in Ollman v. Evans and Novak, where Judge—now Justice—Scalia criticized

873 U.S. (6 Wall.) 35 (1868).
917 U.S. (Wheat.) 316 (1819).

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**FRIDAY, SEPTEMBER 18, 1987**

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Senator Specter. But in your quotation in Barnes v. Kline, when it comes to executive power, you allow for growth. In your opinion in Ollman v. Evans and Novak, where Judge—now Justice—Scalia criticized

10759 F.2d 21 (1985).
12759 F.2d at 55.
you as going beyond the intent of the framers, you did expand the constitutional right, and your opinion in *Ollman v. Evans and Novak* might be said to have some similarities to Justice Douglas' opinion in *Griswold v. Connecticut*. That is an articulation by a judge of a constitutional right which at least Justice Scalia said was not within the intent of the framers.

Now, why not that as a general principle of constitutional law?

Judge Bork. In *Ollman*, I had a constitutional freedom specified in the Constitution, and the question was what it takes to protect that freedom, and I evolved that. Justice Douglas did not point to any freedom or value specified in the Constitution, and I think that is the difference between the two cases.

Senator Specter. Well, liberty is in the Preamble of the Constitution. You have objected to an interpretation or a specification of liberty rights in your writing on *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, but why not liberty in the very Preamble of the Constitution as a basis for privacy in *Griswold v. Connecticut*?

Judge Bork. Senator, I think the reason for that is—and you can use liberty in the 14th amendment; it speaks of no person may be deprived of life, limb, or liberty without due process of law—

Senator Specter. Well, I do not pick that one up because it is due process, which you have objected to. That is why I picked the fundamental of liberty from the preamble. But take liberty either place. It is a cherished value; it is the cornerstone of the Constitution. It seems to me very rational—as rational to say that privacy is derived from liberty that liberty implies privacy, as it does to say that freedom of the press implies the Evans-Novak rights which you found in the *Ollman* case.

Judge Bork. Well, the difficulty, I think, Senator, is that if I decide that I am going to protect liberty, just in general, not without any specific provision of the Constitution, then I have no—obviously, I cannot say everybody is free to do whatever they want to do, and no statute may exist because it interferes with liberty; we cannot have anarchy. So then I have to define what liberties—I have to define it without guidance from the Constitution—what liberties people ought to have and what liberties they ought not to have.

Now, that is exactly the effort I engaged in for about 6 or 7 years in that course on constitutional theory that I thought with Alex Bickel. And I became convinced that it was an utterly subjective enterprise and that I was running my values into what I was coming up with. I do not know—each of us may have a different idea about what liberty requires. And if we have no guidance from the Constitution itself, it is just the judge legislating the Constitution—you know, if a judge said, "I think I will enact a statute," we would all recognize that that was improper. But a statute, I assume Congress could repeal. If a judge legislates the Constitution, I think the situation is far more serious, and I do not want judges, including me, going around, saying, "You have this liberty, you do not have that liberty," and I cannot explain why I got it.

Senator Specter. But why should you be as free to find additional executive powers, as you say you can in *Barnes v. Kline*, moving from a blueprint?

Judge Bork. Let me see what I said.

Senator Specter. You said the Constitution's specification of those powers was made somewhat vague—

Judge Bork. Yes—

Senator Specter. [continuing.] That the framers contemplated organic development. Why not organic development for liberty? Why only organic development for executive power?

Judge Bork. But it is not executive power; it is also congressional power. There has been an organic development of congressional power, too, in this country.

Senator Specter. All right, all right. This really focused on executive power. But take it as you have articulated it—why organic development for congressional or executive power, but why not organic development for people power, defined as liberty?

Judge Bork. Well, there is one decisive difference between you and me, Senator Specter, and that is you were elected; I was not. And if the people do not like what you are doing with respect to liberty, they have a cure. If they do not like what I am doing with respect to liberty, they have no recourse.

Senator Specter. You were not elected when you decided the *Ollman* case.

Judge Bork. That is right. But I had a constitutional provision, a constitutional liberty, specified for me, and I was empowered to do my best to ask what is required in this case to protect that freedom.

Senator Specter. Well—

Judge Bork. Now, I do not mean to say that judges do not have latitude, and they may not decide different things differently. But at least I
knew that I had a constitutional liberty with a lot of Supreme Court decisions about how broad that liberty was supposed to be, with a history of our country, and I could decide it. But I could not go off and say, well, I will take the first amendment and decide a case about minimum wage laws.

Senator Specter. But Judge Bork, in the tradition of our law, and as the Supreme Court has interpreted the decisions, including Holmes and Black and Frankfurter, there are traditional expansions of liberty very much within the framework that you articulated in *Barnes v. Kline* and that you applied in the *Olman* case, in terms of the contours of the law which do not have any more specification.

For example, Frankfurter, who you characterized as one of the stars of the Supreme Court, had this to say in *Rochin v. California*—and I hope to take up with you some criminal law cases at a later time and some of the due process considerations generally, but it fits right here—this is what he said in citing tradition from Cardozo—and it might be worth just a moment of explanation to say that *Rochin* was a criminal law case where police officers in California broke into a person’s house and pumped his stomach, and the Supreme Court suppressed the evidence and found for the defendant in the case. And Frankfurter quotes Cardozo as saying there are values, quote, “so rooted in the tradition and conscience of our people as to be ranked as fundamental”—language which is very close to what your colleague Professor Bickel used. And then Frankfurter says, “The vague contours of the due process clause do not leave judges at large.” That is what you are concerned about. And Frankfurter goes on and says, “We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial functions. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process.” And he refers to Cardozo’s “Nature of the Judicial Process”, one of the most famous law books ever written, that I know you are familiar with.

Now, that is the contour of the interpretation of the law. That is the contour you follow in *Olman*. That is the contour you articulate in *Barnes v. Kline*. Why not a similar contour for liberty?

Judge Bork. Because, Senator, I can do anything with the concept of liberty which is unstructured. I can reach any result I want to. For example—


Senator Specter. You can do that pretty much with freedom of the press.

Judge Bork. I have to be talking about a press case, and I have to be talking in terms of the kinds of categories that have been built up in libel cases in the past, rhetorical hyperbole and so forth; actual malice, all that. There is a whole structure there.

Now, we should remind ourselves that there was a time when the word “liberty” in the 14th amendment was used by judges to strike down social reform legislation. They struck down minimum wage laws in the name of liberty; they struck down laws in the *Lochner* case, law regulating the hours that bakers could work. They went through social reform laws very fast, in the name of liberty, and struck them down. And I cannot say they are right or wrong about liberty. I can say they were wrong because they were using a concept to reach results they liked, and the concept did not confine them, and they should not have been using that concept.

Senator Specter. Judge Bork, I do not think the Supreme Court has to be right all the time. The question is what are the powers of the Court.

Judge Bork. That is right.

Senator Specter. The Court has a consistent tradition, starting with *Fletcher v. Peck*, 17 where Chief Justice Marshall talks about values rooted in the conscience of the people, which moves away from the specific language of a particularized right, so that you have a very long history in the Constitution of the United States, of constitutional interpretation, which does not require a particularization of a specific right.

Judge Bork. I think *Fletcher v. Peck*, if memory serves, the statement by Marshall was somewhat ambiguous. He refers to the nature of society, that maybe there is something in the nature of society. But in any event, he did not use that nature of society in that case—didn’t he use the contract clause?

Senator Specter. He used the contract clause, and he also used the language which is more generalized, and this is what *Fletcher v. Peck* held. And when you say it is vague and generalized, I would not disagree with that. You can say that about most of the Supreme Court decisions, with all due respect. But he says this, at page 139 of the opinion: “If a State is neither restrained by the general principles of our political institutions,
nor by the words of the Constitution, from impairing the obligation of its own contracts, such defense would be a valid one."

Well, that is fair to read as an alternative holding to freedom of contracts or to the "general principles of our political institutions".

So you go back to 1810, with Marshall, in *Fletcher v. Peck*, on the power of the court again and again and again.

And I grant you that the *Lochner* decision is a bad one. And I think the Court is going to come to bad decisions. But a more fundamental issue for me is what is the power of the Court to do; and if you restrict the power of the Court to an articulated right, then you very much limit, as I see it, the tradition of the Court.

And I see in your own writing, *Barnes v. Kline*, when you deal with executive and congressional power, and it raises a question raised by others, as to whether there is not a broader expanse as you interpret law, as contrasted with the interpretation of law as it relates to the individual, that individual liberty.

Judge Bork. Well, I do not think so, Senator. I hate to say what I have said before, but the fact is I have decided some constitutional cases, I have decided first amendment cases, and found for individual liberty. I decided a double jeopardy clause case just the other day and found for individual liberty. There is no problem that way. My only problem is I do not want to be a free-floating legislator of constitutional law; I just do not.

Once a judge gets to the point where he says he is allowed to use the concept of liberty do to whatever he thinks liberty requires, then in a nomination hearing like this, that judge should be asked to make campaign promises about what he thinks liberty requires in specific instances, so that you would be satisfied he is going to do the right thing.

And we have been proceeding on the assumption, which I think is quite correct, that I should not be asked to make promises about particular cases. But if I am free to decide liberty, then you ought to ask me what I am going to do about the minimum wage law.

Senator Specter. Judge Bork, I would not ask you what you are going to do about the minimum wage law, just as I would not ask you about what you are going to do about the abortion case.

Judge Bork. No, but that is only because you think I am confined by some principles and not free to make up liberty as I see fit.
The point I want to raise with you is there seems to be an underlying tension here; that you talk about liberty as being a spacious phrase, and you insist at the same time that the constitutional text must be our principal reference.

Although I have my own view of what you mean by that—and they are not incompatible, those two phrases, as I see it—I would like you to give us your view of the liberty clause. Do you believe that the textual reference to liberty in the 5th and 14th amendments and in the Preamble of the Constitution provides a basis for certain fundamental unenumerated rights?

Judge Kennedy. Senator, of course, the great tension, the great debate, the great duality in constitutional law—and this has been true since the court first undertook to interpret the Constitution 200 years ago—has been between what the text says and what the dictates of the particular case require from the standpoint of justice and from the standpoint of our constitutional tradition. The point of my remarks—and we can talk about the Canadian speech in detail, if you choose—was that it is really the great role of the judge to try to discover those standards that implement the intention of the framers.

The framers were very careful about the words they used. They were excellent draftsmen. They had drawn 11 constitutions for the separate states. This, they recognized, was a unique undertaking. But the words of the Constitution must be the beginning of our inquiry.

Now, how far can you continue that inquiry away from the words of the text? Your question is whether or not there are unenumerated rights. To begin with, most of the inquiries that the Supreme Court has conducted in cases of this type have centered around the word “liberty.” Now, the framers used that, what I call “spacious phrase,” both in the fifth amendment, almost contemporaneous with the Constitution, and again in the 14th amendment they reiterated it.

The framers had an idea which is central to Western thought.

The Chairman. Western thought?

Judge Kennedy. Thought. It is central to our American tradition. It is central to the idea of the rule of law. That is there is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go.

Now, the great question in constitutional law is: One, where is that line drawn? And, two, what are the principles that you refer to in drawing that line?

The Chairman. But there is a line?

Judge Kennedy. There is a line. It is wavering; it is amorphous; it is uncertain. But this is the judicial function.

The Chairman. It is not unlike, as I understand what you have said, one of your predecessors—if you are confirmed—discussing shared traditions and historic values of our people in making that judgment, and another of your predecessors suggesting that there is a right to be let alone, left alone.

Let me ask you, Judge Kennedy, Justice Harlan, one of the great true conservative Justices, in my view, of this century, had a similar concern; and as I understand it—correct me if I am wrong—expressed it not dissimilarly to what you are saying when he said no formula could serve as a substitute in this area for judgment and restraint, and that there were not any “mechanical yardsticks” or “mechanical answers.”

Do you agree with the essence of what Justice Harlan was saying?

Judge Kennedy. It is hard to disagree with that. That was the second Mr. Justice Harlan. Remember, though, Senator, that the object of our inquiry is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document broadly expressed.

One of the reasons why, in my view, the decisions of the Supreme Court of the United States have such great acceptance by the American people is because of the perception by the people that the Court is being faithful to a compact that was made 200 years ago. The framers sat down in a room for three months. They put aside politics; they put aside religion; they put aside personal differences. And they acted as statesman to draw a magnificent document. The object of our inquiry is to see what that document means.

The Chairman. Judge, it will come as no surprise to you that one of the storm centers of our last debate and discussion whether or not there were unenumerated rights and whether the document was expansive.

Would you agree with Justice Harlan that, despite difficult questions in this area, the Court still has a clear responsibility to act to protect unenumerated rights, although where it draws that line depends on the particular Justice’s view?

Judge Kennedy. Yes, although I am not sure that he spoke in exactly those terms.

The Chairman. No, I am not quoting him.
Judge Kennedy. I am not trying to quibble, but it may well be the better view, rather than talk in terms of unenumerated rights to recognize that we are simply talking about whether or not liberty extends to situations not previously addressed by the courts, to protections not previously announced by the courts.

The Chairman. Let us be more fundamental than that. There are certain rights that the courts over the years have concluded that Americans have either retained for themselves or have been granted that do not find specific reference in the Constitution—the right of privacy being one, as you pointed out in your speech, the right to travel.

So what we are talking about here, what I am attempting to talk about here and you are responding, is that whether or not in the case of the 14th amendment the word “liberty” encompasses a right that maybe heretofore has not been articulated by the court and does not find residence in some text in the Constitution, and whether or not the ninth amendment means anything.

Could you tell me what the ninth amendment means to you? And for the record, let me read it. I know you know it well. "The enumeration of certain rights shall not be construed to deny or disparage others retained by the people."

Can you tell me what you think the framers meant by that?

Judge Kennedy. I wish I had a complete answer. The ninth amendment has been a fascination to judges and to students of the Constitution for generations.

When Madison—and he was the principal draftsman of the Bill of Rights—wrote the Bill of Rights, he wanted to be very sure that his colleagues, the voters, and the world understood that he did not have the capacity to foresee every verbal formulation that was necessary for the protection of the individual. He was writing and presenting a proposal at a time when State constitutions were still being drafted, and he knew that some State constitutions, for instance the Virginia Bill of Rights went somewhat further than the Constitution of the United States.

In my view, one of his principal purposes, simply as a statesman, was to give assurance that this was not a proclamation of every right that should be among the rights of a free people.

Now, going beyond that, I think the sense of your question is: Does the ninth amendment have practical significance—

Senator Thurmond. Please keep your voice up so we can hear you.

Judge Kennedy. Does the ninth amendment have practical significance in the ongoing determination of constitutional cases?

As you know, the Court has rarely found occasion to refer to it. It seems to me the Court is treating it as something of a reserve clause, to be held in the event that the phrase “liberty” and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

The Chairman. Judge, I do not want to hurt your prospects any, but I happen to agree with you, and I find comfort in your acknowledgement that it had a purpose.

There are some who argue it has no purpose. Some suggest it was a water blot in the Constitution. But I read it as you do. It does not make either of us right, but it indicates that there is some agreement, and I think the historical text, and the debate surrounding the Constitution sustains the broad interpretation you have just applied.

And is it fair to say that in the debate about unenumerated rights, and the right of privacy in particular, that there is a question of crossing the line, acknowledging the existence of unenumerated rights, and the existence of the right of privacy? The real debate for the last 40 years has been on this side of the line, among those who sit on the bench and the Supreme Court, who acknowledge that there is, in fact, for example, a right to privacy, but argue vehemently as to how far that right extends.

Some believe that extends only to a right of privacy to married couples. Others would argue, and will argue, I assume at some point, that the right of privacy extends to consensual homosexual activity. But the debate has been on this side of the line, that is, as to how far the right extends, not if the right exists.

Do you have any doubt that there is a right of privacy? I am not asking you where you draw the line, but that it does exist and can be found, protected within the Constitution?

Judge Kennedy. It seems to me that most Americans, most lawyers, most judges, believe that liberty includes protection of a value that we call privacy. Now, as we well know, that is hardly a self-defining term, and perhaps we will have more discussions about that.

... ...

Senator DeConcini. I would like to turn to another subject matter. The Chairman touched on it somewhat this morning, regarding your Canadian Institute speech that you made in December of 1986, and as it relates particularly to the privacy question.

On page 9 of that text, you state that:
It is difficult for courts to determine the scope of personal privacy when it is specifically mentioned in a written constitution, and that courts confront an even greater challenge when the Constitution omits language containing the word privacy, or private.

Now in discussing the legislation, and the legitimate sources for the right of privacy, you mentioned the Supreme Court cases, the Bowers case, and the Griswold case.

And it appears from reading your speech, that you have concluded, without question, that there is a fundamental right to privacy. And I think the Chairman had you state that, and that is your position, correct?

Judge KENNEDY. Well, I have indicated that is essentially correct. I prefer to think of the value of privacy as being protected by the liberty clause; that is a semantic quibble, maybe it is not.

Senator DECONCINI. But it is there, is that—

Judge KENNEDY. Yes, sir.

Senator DECONCINI. No question about it being in existence?

Judge KENNEDY. Yes, sir.

Senator DECONCINI. Now the Chairman also touched a little bit on the ninth amendment, and just out of education for this Senator, do you have an opinion why the Supreme Court seems to shy away from using that ninth amendment for some of these unspecified rights that have been, I think quite clearly enunciated by the Court, vis-a-vis the right of privacy?

Judge KENNEDY. Again, I am not sure. I think the Court finds a surer guide in the 14th amendment or the fifth amendment, because the word liberty is there. In the ninth, of course, it is simply an unenumerated right.

I think also that the Court has this problem: as we have indicated, Mr. Madison, and his colleagues, were concerned with the ninth amendment to assure the States that they had adequate freedom for the writing of their own constitutions, but under the incorporation clause that is flipped around.

Under the incorporation clause, the ninth amendment would actually be used as a constraint on the States, and I think the Court may have some difficulty in moving in that direction. I do not think the Court has foreclosed that, and I do not think, for reasons—as I have indicated—that it should address the issue until it has to.

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Senator HERLIN. In this Canadian Institute speech you deal with unenumerated rights, and in that speech you state that most rights in the Constitution are enforced as negatives or prohibitions, not affirmative grants, and you list as examples, Congress shall make no law respecting the establishment of religion, no warrant shall issue but upon probable cause, or nor shall any state deprive any person of life, liberty or property without due process of law.

You seem to view these prohibitions in the Constitution as limiting the expansion of judicial power. Are they also, though, a means of preventing government from denying individuals their fundamental rights?

Judge KENNEDY. I would agree that they certainly are, Senator. And in the negative form they are easily understood well, not always easily enforced, but I think easily understood.

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Senator GRASSLEY. . . . Judge Kennedy, during the committee's consideration of Supreme Court nominees over the past several months, it has been asserted several times by different people that one of the jobs of a judge is to find and create rights which are not in fact mentioned in the Constitution, but which the Judge might deem to be very “fundamental.” Fundamental in terms of the mind of the judge and the judge’s own abstract moral philosophy.

Do you see any dangers with such an undefined standard as a foundation for constitutional analysis? In other words, how confident can we be that judges, fallible human beings as they are, will exercise that mighty power appropriately?

Judge KENNEDY. I am not sure how you can be satisfied that a judge will not overstep the Constitution bounds. What you must do is, number one, examine the judge’s record; document his or her qualifications and commitment to constitutional rule.

As I think Mr. Justice Jackson said, judges are not there because they are infallible; they are infallible because they are there.

I think that comment is somewhat inappropriate. I do not think judges think of themselves as infallible at any point. Certainly the history of the Supreme Court in which the Court has been willing to recognize its errors and to overrule its decisions, indicates that the justices take very conscientiously their duty to interpret the Constitution in the appropriate way.
Senator Grassley. If we do not recognize the dangers of judges using undefined standards, aren't we doomed to end up with a small group of unelected, unrepresentative judges making the law in this country?

Judge Kennedy. That, Senator, is one of the great concerns of any scholar of the Constitution. This is not the aristocracy of the robe.

Judges are not to make laws; they are to enforce the laws. This is particularly true with reference to the Constitution.

Tuesday, December 15, 1987

Senator Leahy... In the Stanford University speech that everybody has talked about here, you said that it is important to distinguish between essential rights in a just system, and essential rights in our own constitutional system. And as I understand your speech, the rights in the first category—rights that some may consider essential to a just system but not essential rights in our own constitutional system—are not enforceable by our courts. Is that correct?

Judge Kennedy. That is correct. I was quite willing to posit that the framers did not give courts authority to create a just society.

Senator Leahy. Now those rights that are essential to a just system are those things like providing adequate housing, nutrition, education, those kind of rights?

Judge Kennedy. Yes, sir.

Senator Leahy. And that requires affirmative government action?

Judge Kennedy. Mostly affirmative government action, although the Supreme Court in a case, Plyler v. Doe,19 held that the State of Texas could not altogether deprive illegal aliens of education.

Senator Leahy. So there are essentials?

Judge Kennedy. So even here there is an area for the courts to participate in.

Senator Leahy. So there are some essential rights in our own constitutional system, to use your words, that are not explicitly spelled out in the Constitution, but are enforceable by our federal courts?

Judge Kennedy. The equal protection jurisprudence makes that rather clear.

Senator Leahy. Now, earlier this year in the Ninth Circuit Judicial Conference speech, you said that each branch of government—and I assume you include courts in that—is bound by an unwritten constitution that consists of our ethical culture, our shared beliefs, our common vision.

Are there rights included in this unwritten constitution?

Judge Kennedy. Well, I would think so, yes.

Senator Leahy. Such as?

Judge Kennedy. My point about the unwritten constitution, I suppose, has been to try to explain how that term was used by early political philosophers.

Plato, Aristotle, Hobbes, all talked about the constitution. And what they meant was, the whole fabric of a society.

As you know, there are something like 160 written constitutions in the world today. Very few of them work like ours does. And yet their terms in some cases are just as eloquent, and perhaps even more eloquent.

Their terms are somewhat more far-reaching in the grant of the positive entitlements that we have talked about, the right to adequate housing, food, shelter.

But they do not work. The reason ours works is because the American people do have a shared vision. And I think important in that shared vision is the idea that each man and woman has the freedom and the capacity to develop to his or her own potential.

That is somewhat different than the Constitution states it, but I think all Americans believe that. And I think that has a strong and a very significant pull on the legislature and on the courts.

Senator Leahy. At the same time, an unwritten constitution—you say that it instructs government to exercise restraints. What does the court do when another branch of government ignores that counsel and takes some unrestrained action? Say the action of another branch does not violate a specific constitutional prohibition, can the courts strike that down because it violates this unwritten constitution that restrains all branches?

Judge Kennedy. No. But, again, this is the consensus that our society has that makes it work. One of the great landmark—

Senator Leahy. How do you square them if you have got these essential rights out there one way—that is, at the same time you have got the essential rights pushing here, but you have some unrestrained action pushing there. Do they square?

Judge Kennedy. Well, I hope they square.
Senator Leary. Can the courts make them square?
Judge Kennedy. Absent an abiding respect by the people for the judgments of the court, the judgments of the court will not work. And the Constitution does not work if any one branch of the Government insists on the exercise of its powers to the extreme.

One of the great landmarks in the constitutional history was when President Truman complied within the hour with the Supreme Court's order to turn back the steel mills. President Nixon did the same thing with the tapes. That is what makes the Constitution work.

The Constitution fails when a governor stands in front of the courthouse with troops to prevent the integration of the schools subject to a Supreme Court order. The Constitution does not work very well when that happens.

Senator Leary. Judge, let me ask you about another right that was not mentioned in your Stanford speech—the right of the press and the public to attend criminal trials. In the case of Richmond Newspapers, Inc. v. Virginia, the Supreme Court recognized this right, though the court acknowledged that “The Constitution nowhere spells out a guarantee for the right of the public to attend trials”.

You have had occasion to enforce what apparently is an unenumerated right to attend trials. I believe that in one of DeLorean trials, you did. Do you think the Supreme Court made a right or wrong turn when it recognized the right of public access in the first place, in the Richmond Newspapers decision?

Judge Kennedy. Well, rather than comment specifically on the opinion, I would say that right of access generally is an important part of the first amendment and is properly enforced by the courts.

Should I wait?
Senator Leary. No. Just a bomb going off. Senator Heflin does sort of a bomb alert, but we never clear the room for little things like that.

Judge Kennedy. In the DeLorean case, incidentally, the question was whether or not newspapers could inspect sentencing documents.

Senator Leary. You say that from the first amendment, but that is an expansive reading of the first amendment, is it not?

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Senator LEAHY. So are those rights—you find a right of privacy—but as to the rights in Meyer, I did not quite follow your last answer. That threw me a bit. Would you repeat that, please?

Judge KENNEDY. Well, it is not clear to me that each and every one of the rights set forth in Meyer can sustain a complaint for relief in a federal court. I would be very puzzled if I received a complaint that alleged that the plaintiff was denied his right to happiness.

Senator LEAHY. Well, in fact, that is sort of like what you said in the Stanford speech. Let me just take one quote out of there. You say, "It seems intuitive to say that our people accept the views set forth in Meyer, but that alone is not a conclusive reason for saying the court may hold that each and every right they have mentioned is a substantive, judicially enforceable right under the Constitution."

What do you look for beyond just the feeling that our people accept these rights to make them such fundamental rights that they are judicially enforceable?

Judge KENNEDY. Well, there is a whole list of things, and one problem with the list is that it may not sound exhaustive enough. But essentially, we look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers.

Those are the kinds of things you look at, but it is hardly an exhaustive list. You, of course, must balance that against the rights asserted by the State, of which there are many.

Senator LEAHY. What if some of those rights that you see felt by our people, strongly felt, conflict with your own personal views? What then?

Judge KENNEDY. I think that the judge, in assessing what the society expects of the law, must give that great weight rather than his or her own personal views.

Senator LEAHY. Where do you look, what do you look to to find out, you know, what these rights are—and I realize we are talking in a very gray area. Probably to some who might be listening this may seem like an academic discussion that is wonderful for a classroom. And somebody suggested yesterday your students will be watching to see how you answer this. I have to think that these are the same kinds of questions that have gone through judges’ minds to a greater or lesser degree when we have made some of the major moves in our Constitution—some of the cases we now refer to as milestones and others would refer to as abrupt and unforgivable changes, depending upon which side you are on.

But what do you look to when you try to determine what those rights are that are so solid in our people, those senses or right? How do you find them?

Judge KENNEDY. Well, I wish I could give a good, clear answer to the question. I think in that same speech I said in frustration, "Come out, come out, wherever you are", looking for the sources and the definitions of unenumerated rights.

You look in large part to the history of our own law. This is what stare decisis is all about. You look to see how the great Justices that have sat on the Court for years have understood and interpreted the Constitution, and from that you get a sense of what the Constitution really means.

Senator HUMPHREY. . . . [Y]ou write your own speeches; is that correct?

Judge KENNEDY. Yes, Senator; for better or worse.

Senator HUMPHREY. Well, they are very good. The ones I have read are very, very good. Inasmuch as you write them yourself, that gives us some insight into your thinking. I find your logic to be very clear.

The Stanford speech is one that has been examined a number of times. That is an important speech. It is a very good speech, would you not say so?

Judge KENNEDY. I enjoyed it. I want to make clear that I never speak from notes.

Senator HUMPHREY. Yes.

Judge KENNEDY. I gave the Senate what notes I had. I think that speech came out about that way.

Senator HUMPHREY. Yes.

Judge KENNEDY. One of the dangers is you sometimes forget the principal part of the speech until after you have given it.

Senator HUMPHREY. Well, we all understand that. I think it is a very good speech. I want to examine a few parts of that and then parts of some other speeches, if I have time.

Let me quote from your Stanford speech.

"One can assume that any certain or fundamental rights should exist in any just society. It does not follow that each of those essential
rights is one that we, as judges, can enforce under the written Constitution."

"The due process clause is not a guarantee of every right that should inhere in an ideal system."

Is that a correct quote?
Judge Kennedy. That is a correct quote, and I think it is a correct concept.
Senator Humphrey. You have not changed your mind since 1986?
Judge Kennedy. No, sir.
Senator Humphrey. "The due process clause is not a guarantee of every right that should inhere in an ideal system." So it is not a blank check?
Judge Kennedy. Certainly not.
Senator Humphrey. How about the ninth amendment?
Judge Kennedy. Well, as I indicated yesterday, the meaning of the ninth amendment, and even its purpose, is shrouded in doubt, and the Court has not, in my view, found it necessary to refer to that amendment in order to stake out the protections for liberty and for human rights that it has done so far in its history.
Senator Humphrey. Never used the ninth amendment to ground an opinion—
Judge Kennedy. Yes. There may be some quarrel with that statement because of an isolated reference by Mr. Justice Douglas in the Griswold case, and by the concurring opinion of Mr. Justice Goldberg in the same case.
Senator Humphrey. Well, if judges—in your opinion—if judges cannot enforce each of the essential rights which should exist in a just society, what should the Court do to move us toward a more ideal system when the political branches fail to act?
Judge Kennedy. I suppose the Court can cry in protest if it sees an injustice in a particular case. The law is an ethical profession, and the law is designed to seek justice.

And if courts see an injustice being done, I think the oath of our profession requires us to bring that to the attention of the Congress. On the other hand, judges who are appointed for life cannot use the judiciary as a platform for their own particular views. So there is a duality there.

Senator Humphrey. What do you mean by "judges bringing that to the attention of the Congress"?

Judge Kennedy. Well, from time to time, in our opinions we tell the Congress, please look at this statute and see the way we are enforcing it. Do you really want us to do this? I think that is quite a legitimate function of the Court.

I have said that in some of the RICO cases. Some of my other colleagues have, too. It is just not at all clear to us that the way we are enforcing RICO is what Congress really had in mind, but we are following where the words lead us.

Senator Humphrey. I want to go back to the ninth amendment. Yesterday, you said it seems to me the Court is treating it as something of a reserve clause to be held in the event that the phrase liberty, and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

You say, it seems to me the Court is treating it as a reserve clause.

Is that your view, that it ought to be treated as a reserve clause, to be held in the event that the spacious phrases are inadequate to the matter at hand?
Judge Kennedy. My characterization was what I thought the philosophy of the Court was to date, and I think it is important that the Court not confront such an ultimate and difficult issue unless it has to.

A case grounded solely on the ninth amendment requires the judge to search in the very deep recesses of law, where I am not sure there are any answers.

Senator Humphrey. Well, if I have time, I want to come back to the ninth amendment and discuss the historical context, the intent of the authors and the framers, which seems to have been ignored in some of the discourse in this hearing so far.

Senator Humphrey. . . . I want to go back to the ninth amendment, Judge Kennedy. If I understood some of the questions correctly, some Senators seem to be trying to get you to say that there are some privacy rights hiding there in the ninth amendment waiting to come out, come out, wherever you are. That seems to me to be a very generous reading of the intent of the authors and ratifiers of the ninth amendment. Wouldn't your agree?

Would you give us your understanding of the historical intent of the ninth amendment?
Judge KENNEDY. Well, as I have indicated, the intent is really much in doubt. My view was that Madison wrote it for two reasons. Well, they are really related. He knew, as did the other framers, that they were engaged on an enterprise where they occupied the stage of world history; not just the stage of legal history, but the stage of world history. These were famous, famous men even by the standards of a day unaccustomed to celebrities. And he was very, very careful to recognize his own fallibilities and his own limitations.

So he first of all wanted to make it clear that the first eight amendments were not an exhaustive catalogue of all human rights. Second, he wanted to make it clear that State ratifying conventions, in drafting their own constitutions, could go much further than he did. And the ninth amendment was in that sense a recognition of State sovereignty and a recognition of State independence and a recognition of the role of the States in defining human rights. That is why it is something of an irony to say that the ninth amendment can actually be used by a federal court to tell the State that it cannot do something. But the incorporation doctrine may lead to that conclusion, and that is the tension.

Senator HUMPHREY. May lead to that conclusion.

Judge KENNEDY. May. May lead to that conclusion.

Senator HUMPHREY. Well, let me ask you this, finally. I do hope we will have an opportunity to think about matters further and ask further questions of you. Let me just ask you this, finally, with regard to privacy rights.

What standards are there available to a judge, a Justice in this case, to determine which private consensual activities are protected by the Constitution and which are not?

Judge KENNEDY. There are the whole catalogue of considerations that I have indicated, and any short list or even any attempt at an exhaustive list, I suppose, would take on the attributes of an argument for one side or the other.

A very abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.

On the other hand, the rights of the State are very strong indeed. There is the deference that the Court owes to the democratic process, the deference that the court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given to the legislature because it knows the values of the people.

Senator HUMPHREY. Those, especially the first category, sound like very subjective judgments.

Judge KENNEDY. The task of the judge is to try to find objective referents for each of those categories.

... 

Senator HUMPHREY. I remain uneasy about what you said regarding the ninth amendment. You said, it seems to me, the Court is treating it as something of a reserve clause to be held in the event the phrase "liberty" and the other spacious phrases in the Constitution appear to be inadequate for the Court's decision.

I don't know why you choose to be so vague, and in my mind so—leave things in such a worrisome suspension, when the Court has never used the ninth amendment to invent new rights. Indeed one of the most liberal of the liberals, William O. Douglas, said in his concurring opinion in Doe that "the ninth amendment obviously does not create federally enforceable rights," against that finding by Justice Douglas, against history of the Court, against the clear—there are few amendments that have a clearer historical context, where the intent is clearer, than the ninth amendment.

And now the thing has been reversed—if we apply the doctrine of incorporation illogically to it, and you seem to hold open that possibility, the thing is reversed in its intent—

Judge KENNEDY. Yes.

Senator HUMPHREY. [continuing]. Intended application, and now you are saying that the Court is holding it in reserve. In case it can't find something else in the Constitution, why it always has this to fall back on.

Judge KENNEDY. Well, to begin with, don't shoot the messenger. I am describing the jurisprudence of the Court as I think it exists. The Court has simply not had the occasion to reach the ninth amendment for the resolution of its cases, and it seems to be inappropriate for me to announce in advance what its meaning is. I have indicated what I think, what I understand its original purpose to be, which was actually a disclaimer that the Constitution of the United States was intended to constrain the States in any respect in the adoption of their Bill of Rights.

Senator HUMPHREY. Well, do you find—do you consider the intent of the ninth amendment to be pretty clear?

Judge KENNEDY. No.

Senator HUMPHREY. Even given the historical—

Judge KENNEDY. Well, the purpose of it is as I believe I have described it.

Senator HUMPHREY. Well, what is the difference between the purpose and the intent?

Judge KENNEDY. Its meaning is somewhat unclear. The reason for Madison's using it as a device is not completely clear. I think the explanation I gave is the best one, but that is not completely clear.

Senator HUMPHREY. Well, his words are pretty clear on the point, if I just knew where to find them. I am getting paper fatigue at this point. You have got fatigue yourself I am sure. Here it is.

He said that "It has been objected also against the Bill of Rights that by enumerating particular exceptions to the grant of power it would disparage those rights which were not placed in that enumeration, and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government and were consequently insecure."

And so this was a clarification on the part of the Federalists that even though certain rights were enumerated that didn't mean that everything else was denied to the States.

Judge KENNEDY. I think that that is the most plausible interpretation of the amendment.

... 

Senator HUMPHREY.... In your Stanford speech you point out that in the post-Griswold privacy cases the debate shifts to the word "privacy" rather than to the constitutional—to a constitutional term such as "liberty."

What is the significance in that statement? What are you trying to say?

Judge KENNEDY. Well, I was trying to indicate that simply because we find a new word we don't avoid a whole lot of very difficult problems. It is not clear to me that substituting the word "privacy" is much of an advance over interpreting the word "liberty," which is already in the Constitution.

And I indicated that, to illustrate that, that the Convention on Human Rights, which contains the word "private," produced a case which had many of the same issues in it that we would have to confront, and so that the word "privacy" should not be something that convinces us that we have much certainty in this area.

Senator HUMPHREY. Are you saying that these privacy cases would be better dealt with under the liberty clause?

Judge KENNEDY. That is why I have indicated that I think liberty does protect the value of privacy in some instances.

Senator HUMPHREY. You would prefer then to deal with privacy cases under the liberty clause?

Judge KENNEDY. Yes.

Senator HUMPHREY. As opposed to dealing with them under emanations of penumbrae?

Judge KENNEDY. Yes, sir.

Senator HUMPHREY. Ever seen an emanation? That is a real term of art, isn't it? I am not a lawyer. Had that ever been used before?

Judge KENNEDY. Certainly not in a constitutional case.

Senator HUMPHREY. That is really a, that one is really a shameless case of—

The CHAIRMAN. Senator, excuse me.

Senator HUMPHREY. Yes?

The CHAIRMAN. The Senator from West Virginia would like to ask you a question.

Senator BYRD. Did you say emanation? To emanate? What is the word you are referring to?

Judge Kennedy. Emanations.

Senator BYRD. Emanations?

Judge Kennedy. Emanations, yes. "Penumbras and emanations" was the phrase used in the Griswold case.

Senator BYRD. Thank you. That word is not in the Constitution, though, is it?

Judge Kennedy. Not at all. And I have indicated it is not even in any previous—the Senator indicated it was not even in any previous cases.

Senator BYRD. But the word "liberty" is in the Constitution?

Judge Kennedy. Yes, sir.

Senator BYRD. I like that word "liberty" in the Constitution.

Senator HUMPHREY. Do you think there are a whole lot more emanations from this penumbra?

Judge KENNEDY. I don't find the phrase very helpful.
Senator Humphrey. Good. Well, two hopes. Hope number one is that you will at least once a year read your Stanford speech. Hope number two is that you will not intrude on our turf. Thank you.

Judge Kennedy. Thank you, Senator. I will certainly commit to the former, and I will try to comply with the latter.

The Chairman. Judge, have you had a chance to read "The Forgotten Ninth Amendment" by Bennett P. Patterson?

Judge Kennedy. I think I glanced at it some years ago, Senator.

The Chairman. Well, while we are hoping I hope you read it again.

Judge Kennedy. All right.

The Chairman. We will have an opportunity, the Senator and I, as long as we are here to debate the meaning of the ninth amendment, but in here he liberally quoted from Madison's utterances at the time. It may be somewhat selective, I think not. And the point one of the authors makes is, "The last thought"—referring to the ninth amendment—"The last thought in their minds was that the Constitution would ever be construed as a grant to the individual of inherent rights and liberties. Their theory"—meaning the Founding Fathers—"Their theory of the Constitution was that it was only a body of powers which were granted to the government and nothing more than that."

And it seems, if you read the ninth amendment, how anyone could avoid the conclusion that the word "retained" means "retained." Now you can argue whether it is retained by the States, or retained by individuals. That is a second argument. I won't go into that at the moment. But it seems to me that one of the—I have not found any reason, which I think in part disturbs my friend from New Hampshire, to disagree with any of the points you have made about your interpretations of the Constitution.

As I have indicated earlier, I find your reading of the Constitution, your finding of the word "liberty" in the Constitution and that it has some meaning and application, and your attitude about the fourteenth amendment in general, the fifth amendment, to be a conservative, mainstream and fundamentally different than Judge Bork's.

* * *

The Chairman. . . . Now, Judge, there has been, obviously, we have just had some discussion about your view on the ninth amendment. As you know, Justice Goldberg, as you mentioned, in the birth control case and Justice Burger in the Richmond Newspaper case both treated the ninth amendment as a rule of somewhat generous construction, not just a reminder that States can protect individual rights in their constitution, an idea that would have made the ninth amendment in my view redundant in light of the fact we had a 10th amendment that provides for just that.

In the view of Justices Goldberg and Burger the ninth amendment announces that the word "liberty" in the fifth amendment and later in the 14th amendment is broader than specifically enumerated rights contained in the Bill of Rights. The ninth amendment, in other words, in my view confirms in the text of the Constitution that spacious reading of liberty, the so-called Liberty Clause, that you have said you thought was a proper reading.

I understood you yesterday as embracing the view of Goldberg and Burger in the regard that the notion of liberty, the Liberty Clause as being one of those spacious phrases.

Former Chief Justice Burger thought that the ninth amendment shows a belief by the framers that fundamental rights exist that are not expressly enumerated in the first eight amendments, and the intent of the rights included in the first eight amendments are not exhaustive.

I would like to quote from a case. Justice Burger says:

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, the right to be judged by a standard of proof beyond reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or the Bill of Rights. Yet, these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Then there is a footnote, Footnote 15. "Madison's comments in the Congress also revealed a perceived need for some sort of Constitutional saving clause, which, among other things, would serve to foreclose application of the Bill of Rights of the maximum that the affirmation of particular rights implies the negation of those not expressly defined."

"Madison's efforts, culminating in the ninth amendment, serve to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding other."

Now, Judge, in general terms do you share the view of Justice Burger about enumerated rights?
Judge Kennedy. Well, in general terms, it is not clear to me that Chief Justice Burger's position would be any different if the ninth amendment were not in the Constitution. I think liberty can support those conclusions he reached, and the meaning, purpose, and interpretation of the ninth amendment, I think the Court has very deliberately not found it necessary to explore.

The Chairman. But I think Justice Burger used almost the same words you used yesterday that the Senator from New Hampshire would very much like for you to recant. He uses the phrase "saving clause."

Judge Kennedy. I think I used the words "reserve clause."

The Chairman. You used the word "reserve" clause.

Judge Kennedy. And I think the Court as a whole—I am not talking about individual Justices—has taken that view of the amendment, that they just find it unnecessary to reach that point.

The Chairman. Are they not also, with good reason, a little bit afraid of the amendment, because once you start down the road on that amendment—I find the ninth amendment clear, and I think most Justices have found it clear, in fact.

But they are reluctant to use it because once you start down the road on the ninth amendment, then it becomes very difficult to figure where to stop; what are those unenumerated rights.

Judge Kennedy. And it is the ultimate irony that an amendment that was designed to assuage the States is being used by a federal entity to tell the States that they cannot commit certain acts.

The Chairman. Well, ironically, I think that it was, in fact, not designed, that amendment, in particular, to assuage the States as it related to the rights of the States. I think it was designed to assuage the representatives of the various States to allay their fears that any government—in this case, the only one they were dealing with at the moment, the central government—was going to, as a consequence of the first eight amendments, conclude that they were the only rights that, in fact, were retained by the people.

Judge Kennedy. I understand that position.

The Chairman. That is a very tactful answer and you would make one heck of an ambassador. Maybe there are State Department representatives, but I do not think it is appropriate for me to push you any further on this because I, quite frankly, think you have left us all where I think it is proper to be left, quite frankly, and that is I do not think anyone here and anybody not here, including the President of the United States, and I suspect, Judge not even you, knows how you are going to rule on some of these issues.
NOMINATION OF DAVID H. SOUTER TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, SEPTEMBER 13, 1990

U.S. Senate, Committee on the Judiciary, Washington, DC

The committee met, pursuant to notice at 10:05 a.m., in room 215, Senate Hart Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding. Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

... 

The CHAIRMAN: Judge: Do you agree with Justice Harlan's opinion in Griswold that the due process clause of the 14th amendment protects a right of a married couple to use birth control to decide whether or not to have a child?

Judge SOUTER: I believe that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy. . . .

... 

The CHAIRMAN: Now, in the Griswold case, I am curious what proposition you think it stands for. Do you believe it is a case in a long line of cases, establishing an unenumerated right to privacy, a right the Constitution protects, even though it is not specifically mentioned in the document?

Judge SOUTER: I think probably it would be fairest to say that it is a case in a confused line of cases and it is a case which, again referring to the approach that Justice Harlan took, it is a case which to me represents at least the beginnings of the modern effort to try to articulate an enforceable doctrine.

My own personal approach to that derivation begins with, I suppose, the most elementary propositions about constitutional government, but I do not know of any other way to begin. I am mindful not only of the national Constitution of 1787, but of the history of State constitution-making in that same decade.

If there is one generalization that we can clearly make, it is the generalization about the intended limitation in the scope of governmental power. When we think of the example of the national Constitution, I think we are at the point in our history when every schoolchild does know that the reason there was no Bill of Rights attached to the draft submitted to the States in the first instance after the convention recessed, was the view that the limitations on the power to be given to the National Government was so clearly circumscribed, that no one really needed to worry about the possible power of the National Government to invade what we today group under the canon of civil liberties, and we know the history of that response.

We know that there were States like my own which were willing to ratify, but were willing to ratify only on the basis of requesting that the first order of business of the new Congress would be to propose a Bill if Rights in New Hampshire, like other States, who was not bashful about saying would not be in it.

The CHAIRMAN: Did you wish to continue?

Judge SOUTER: If I may. This attitude did not sort of spring up without some antecedent in 1787. I am not an expert on the constitutions of the original States, but I do know something about my own.

One of the remarkable things about the New Hampshire Constitution, which began its life at the beginning of that same decade, is the fact that it began with an extraordinarily jealous regard for civil rights, for human rights. The New Hampshire Constitution did not simply jump in and establish a form of government. They did not get to the form of government until they had gotten to the Bill of Rights first.

They couched that Bill of Rights with an extraordinary breadth and a breadth which, for people concerned with principles of interpretation, requires great care in the reading. But the New Hampshire constitutionalists of 1780 and 1784 were equally concerned to protect a concept of liberty, so-called, which they did not more precisely define.

So, it seems to me that the starting point for anyone who reads the Constitution seriously is that there is a concept of limited governmental power which is not simply to be identified with the enumeration of those specific rights or specifically defined rights that were later embodied in the bill.

If there were any further evidence needed for this, of course, we can start with the ninth amendment. I realize how the ninth amendment has bedeviled scholars, and I wish I had something novel to contribute to the jurisprudence on it this afternoon, which I do not.
The CHAIRMAN. It is novel that you acknowledge it, based on our past hearings in this committee. [Laughter.]

One of the last nominees said it was nothing but a waterblot on the Constitution, which I found fascinating. At any rate, go ahead.

Judge SOUTER. Well, I think it is two things—maybe it is more. I have no reason to question the scholarship which has interpreted one intent of the ninth amendment as simply being the protection or the preservation of the State bills of rights which preceded it.

Neither, quite frankly, do I find a basis for doubting that, with respect to the national bill of rights, it was something other than what it purported to be, and that was an acknowledgment that the enumeration was not intended to be in some sense exhaustive and in derogation of other rights retained.

The CHAIRMAN. Is that the school to which you would count yourself a graduate?

Judge SOUTER. I have to count myself a member of that school, because, in any interpretive enterprise, I have to start with the text and I do not have a basis for doubting that somewhat obvious and straightforward meaning of the text.

The CHAIRMAN. Now, do you agree with Justice Harlan that the reference to liberty in the 5th and 14th amendments provide a basis for certain—not all, but certain—unenumerated rights, rights that the Constitution protects, even though they are not specifically enumerated within the Constitution?

Judge SOUTER. I think the concept of liberty as enforceable under the due process clause is, in fact, the means by which we enforce those rights. It is sterile, I think to go into this particular chapter of constitutional history now, but you will recall that Justice Black was a champion at one point of the view that the real point of the fourth [sic] amendment, which was intended to apply unenumerated substantive rights, was the privileges or immunities clause, and not due process. Well, as a practical matter, that was read out of the possibility of American constitutionalism, at least for its time, and it has remained so by the *Slaughterhouse Cases*.

What is left, for those who were concerned to enforce the unenumerated concepts of liberty was the liberty clause and due process, and by a parity of reasoning by the search for coherence in constitutional doctrine,

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Senator GRASSLEY. Judge Souter, yesterday, you mentioned the ninth amendment. I understand the historical context of the ninth amendment to view it as, I suppose, somewhat of a savings or reserve clause to foreclose application to the Bill of Rights the maxim that the affirmation of particular rights implies a negative of those not expressly defined.

But at this point, I have a problem. There is a kind of “rights’ industry” out there that we read about and we deal with all the time in the Congress and maybe the courts deal with it more than we deal with it. We have various groups making their essentially political claims in terms of so-called fundamental rights—whether it is people claiming an unrestricted right to taxpayer’s financed abortion or an artist claiming an unconditional right to taxpayer subsidized art, or the right to, as I said before, panhandle in the New York City subways.

You are an avid reader of Oliver Wendell Holmes. Is this situation I just described perhaps what he meant when he warned that “all rights tend to declare themselves absolute to their logical extreme?”

Judge SOUTER. I think what he was getting at there, yes, I think what he was getting at is if we simply focused on one interest and the desirability of that interest alone, there is a tendency to self-development that is simply unchecked. That is why, as I said a moment ago, it is important, in my view, to approach the problem much as Justice Harlan did.

But in any event, whether by the Harlan approach or by any other, it is essential for us—as judges, who have to declare in some objective way the extent of the interest that can be recognized—it is essential for us to have some idea of the criterion that we are going to employ to find values which are not simply reflections of our own feelings at the moment and our own feelings about the desirability of the claims that may be pressed before us.

Senator GRASSLEY. Judge Souter, when unaccountable judges rather than legislators create these rights, I would like to ask you if you could imagine how that could lead to polarization, resentment, and even bitterness among the public?
Judge Souter. I think the key to the response to that, Senator, is in one of the terms that you used, when an unelected judiciary creates rights. There is a sense in which the judiciary, I suppose, particularly at the State level and dealing with common law issues, do create rights. They are dealing in areas which, by definition, the legislature has left to the courts to develop.

But when we reach the level that I think you are talking, and I know that you are referring to this morning, it is essential to observe the distinctions between the creation of rights, which implies that the Court is simply sitting there and coming up with notions of what it thinks may be desirable, and the recognition, on the other hand, of rights which are implicit in the text of the Constitution, itself, in which it is the responsibility of the judiciary to find and to state in ways that we can understand. The difference between the creation of rights and the recognition of rights is the difference between unbridled personal preference, that knight errantry that Cardozo was speaking of, and a disciplined approach to constitutional meaning, on the other hand.

I think when the people who are, like us, subject to the decisions that ultimately appellate courts must make, have a sense that the courts are conscientiously engaged in a search for meaning, that their task is to decide what should be recognized and what is created, that that will make and can make all the difference in the acceptance which is given to the decision when they come down, even if they are not the most popular.

... 

Senator Humphrey. ... I want to start by reciting what for me is the most fundamental statement, indeed the most eloquent statement on human rights ever written: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator"—and I emphasize "creator"—"with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

As you know, and as I will point out for my colleagues, the New Hampshire Bill of Rights, the New Hampshire Constitution, the first part, the Bill of Rights incorporates that very same concept, not as a lofty expression, but as a concrete part of our Constitution.

I read articles I and II: "All men are born equally free and independent, therefore, all government of right originates from the people, is founded in consent, and instituted for the general good."

Article II: "All men have certain natural, essential and inherent rights, among which are the enjoying and defending life and liberty, acquiring, possessing and protecting property and," in a word, "seeking and attaining happiness."

Do you agree with the declaration in the first two articles of the New Hampshire Constitution, Judge Souter, that there are certain rights which precede even the State?

Judge Souter. Yes, I think, in fact, that is the kind of concept which is recognized and which is reflected in the theory of limited governmental power and which is at the focus of our search for an appropriate meaning to the scope of liberty protections.

Senator Humphrey. So, when you say, as you did yesterday, something to the effect that power comes from the people, you do not mean to suggest that a majority of the people have—that a majority of the people may violate, even through government, certain inherent rights of each human being?

Judge Souter. I mean, as you suggest, that power can only come from the people, yes.

Senator Humphrey. That is not quite my question, though. You made it quite clear in the response to my first question that you believe that there are certain inherent rights that precede the State. My question now is can a majority of people, acting through government, even acting through government, violate such inherent rights?

Judge Souter. Well, we know that some of those inherent rights, of course, are reflected in the specific provisions of the Bill of Rights, and I have also said in the course of my testimony today that it is one of the objects as we know analyze these problems, is one of the objects of the liberty clause, both in the State constitution and in the National Constitution, to define and protect this point beyond which government simply cannot go or cannot go without the most strong justification.

... 

Senator Simon. In discussing the right of privacy, you used the phrase "the fundamental marital right to privacy." Let me ask why that is fundamental more than other rights to privacy, including, say, the right to have privacy in a phone conversation or other things.

Judge Souter. Well, I used that not as an implicit exclusion of something else but as a subject matter that we have become familiar with. Our approaches to it, our judicial formulations of it have varied back and forth over the years. But going right back to the time of the often disputed cases of Meyer v. Nebraska and Pierce v. Society of Sisters, the Court has confronted, whether precisely or imprecisely, the fact that there is a core
set of family values which, in the general understanding and the traditional understanding of the American people, are protected. And so we, in fact, have had a great deal of time in this century to be thinking in those terms, and that is the most familiar focus for what we are talking about. But I do not mean that to be a focus which implicitly excludes other interests.

As I said a moment ago, there is no question that the judiciary of the United States is going to be spending a significant amount of time in the years ahead trying to give attention to other claims—indeed, giving attention to other claims and trying to adjudicate.

Senator Simon. Yesterday, in discussing the right to privacy, there was a discussion of the 9th amendment and the 14th amendment. But in the Constitution there are other provisions which guarantee the right to privacy as well. You can't come into my home without a very specific search warrant. The Constitution says you can't quarter militia in my home. There is in the Constitution a sense of a right to privacy. That is not a question. I guess I should reverse that. Is there in the Constitution a generality sense of the right of privacy?

Judge Souter. Well, I think perhaps it is wrong to go back and say you have answered my question for me.

Senator Simon. Yes.

Judge Souter. But you have there. We find, as you point out on the provisions against the quartering of troops, the provisions against unreasonable search and seizures, the provisions against compelled self-incrimination, which gets you out of a kind of physical context. There are, indeed, reflections of what we could in a general way describe as privacy interests there. And as it goes without saying, the great debate has been the extent to which a privacy interest not so specifically recognized must be assumed under the concept of liberty. I have taken the position, although I cannot say here what its extent may ultimately be determined to be or what I would find it to be, yes, there is a core that goes beyond those specific pinpoints.

Monday, September 17, 1990

Senator Metzenbaum. . . . I would like to return to the discussion of last week as to how you go about deciding whether a right is fundamental.

Last week, you and I discussed what is at stake for a woman in the debate over reproductive rights. You indicated that through personal experiences you could empathize with a woman who was faced with a very difficult—very difficult—decision as to whether to terminate a pregnancy. And I appreciate your candor in response to my question.

I asked those questions not because I believe we will once again allow women to die from botched illegal abortions, nor do I believe that the American people would stand by for 1 minute for putting women in jail for having abortions or for granting periodic testing of women to determine if they have had an abortion. Even President Bush has said he would not put women in jail.

My point is just this: It is inconceivable that we would take these steps in order to prevent a woman from making a decision to terminate an unintended pregnancy. That is precisely why it is a fundamental right. It is a personal and basic freedom for a woman to make her own reproductive choices. It is basic to her health and to her dignity.

In your view, are these considerations I have described an essential part of determining whether a particular right is fundamental?

Judge Souter. Senator, those considerations to me point exactly to the kind of inquiry which the Court must make. As I said, in dealing with the question of what unenumerated rights may be regarded as fundamental and what require a lesser standard of scrutiny, the courts from time to time have tried different tests. One of those test was the one that is identified with *Palko v. Connecticut* in which we asked whether the right in question is essential to or comprehended by the concept of ordered liberty.

I think I indicated that my own view of the best approach to these problems is the one which is probably best identified with the late Justice Harlan. Justice Harlan said that we cannot approach these questions of weighing the value of asserted rights without an inquiry into the history and the traditions of the American people, in order to try to find on a historically demonstrable basis their commitment to a set of values which either do or do not support the claim that a particular right in question is fundamental.

I think Justice Harlan, in taking that approach— I am convinced that Justice Harlan in taking that approach was, in effect, asking for a broader inquiry than we might be engaging in if we limited ourselves to the formulation in *Palko v. Connecticut*, the concept of ordered liberty, because, as

was demonstrated in many other cases, there are many limitations upon what we regard as almost garden variety constitutional rights which still could be found in a society which we would not say was fundamentally unjust. Do we have a right to a jury of 6 or a jury of 12, for example?

I think Justice Harlan, although he himself quoted the Palko formulation from time to time, I think he was clearly pointing to a broader inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation or a finding of no fundamental valuation should rest. And I think he was right.

* * *

Senator HUMPHREY. . . . Well, I would like to address this murky subject of privacy rights. Where do they begin and where do they end, and how do you know?

Judge SOUTER. Well, I think where they begin is in the several textual references in the Constitution to the assumption that there are some rights not expressly enumerated. As I said to you, my thinking on the subject goes back to the State constitutions which form a preface to the National Constitution of 1787, including our own, with its recognition of unenumerated liberty interests. It includes the express reservation in the ninth amendment.

As I said, I have found as a matter of our constitutional history that, given the other interpretations that have been placed or interpretations of section 1 of the 14th amendment, that the appropriate place to focus a question about the existence of a particular unenumerated right is with reference to the liberty clause of the 14th amendment or of the fifth amendment.

What we have to find, what we are looking for, when we raise a question as to whether a given right is protected as fundamental liberty, is the kind of question on which I said I preferred the approach of the late Mr. Justice Harlan above all others, and that is we are making a search on his approach into the principles that may be elucidated by the history and tradition of the United States, and ultimately the kind of search that we are making is a search for the limits of governmental power, because it seems to me if there is one point that is clearly established by both State and National constitutional history, it is that the powers of the Government were not intended to be unlimited, that the grant of legislative power was intended to have limits, and those limits are reflected in the liberty concept.

The CHAIRMAN. Let me conclude, as I said, with three questions; and this will be the end.

Judge, when deciding—and I want to go back to methodology for a minute; slightly different than your overall judicial philosophy. When deciding if there is a fundamental unenumerated right, applying your methodology, you say, in quote: There should be a quest not for evidence, which is a matter of definition or a matter of absolute necessity, has either got to be of narrow compass or of general compass. Rather, it has got to be a quest for reliable evidence, and there may be reliable evidence of great generality. End of quote.

That was in response to my question yesterday about footnote six in the Michael H. 26 case.

Judge SOUTER. Yes.

The CHAIRMAN. Now, I have two key questions. How old does this tradition that you are seeking to determine whether or not it has been established have to be before it is considered a tradition worthy of protecting under the Constitution?

I am not looking for an exact number of years. But do you look at the whole continuum? Give me a sense of what you look at.

Judge SOUTER. Well, I think it is fair to say that you look at the whole continuum for whatever the evidence may be worth. The whole continuum may tell you something about what you can extrapolate from it as a principle which either is or is not continuous through our history.

I do not think there is a point at which you can say, well, I draw the line and I will consider no evidence after this point or no evidence before this point. But the point is, at whatever historical period the evidence may come into existence, what we are really looking for is a principle of liberty which can reasonably be said to have been assumed in the Constitution.

The CHAIRMAN. The reason I ask the question is we are in the midst of such phenomenal technological change. In this country we are considering items that will be on your agenda in the year 2020, if confirmed, God willing, you are living out the expected, your life expectancy, that relate to everything from genetic engineering to potentially cloning, to surrogate parenthood, all of which by the time you are making decisions in the year 2020 may be very much established traditions. There may be 30 years of it being an accepted and protected practice in the 50 States and territories for surrogate parenthood, something that, although you may find a

principle to be protected, clearly was not something that anyone considered not only at the birth of our Constitution but in 1970, let alone 1950. And that is why I asked the question.

So, it will, there could be 30 years of an established practice that could make the tradition, assuming there were a principle found within that tradition, make that a sufficient amount of time to find a protection of such an asserted liberty right. Is that correct?

Judge Souter. Well, I guess my only cavil is, I do not, I do not think it is, it is probably right to phrase it by saying that is a sufficient amount of time. That is certainly indicative of the acceptance of a principle during that time, and that is good evidence. The question is, is there any other evidence? Is there evidence to the contrary? Is the evidence of whatever principle may be behind the 30 year or the 50 year or whatever year tradition, a sufficiently reliable indication of an enduring principle of liberty.

The CHAIRMAN. The hearing will come to order. Good morning, Judge. Welcome to the blinding lights. It's a pleasure to have you here and let me begin also by indicating that the morning is going to be painless, Judge, or maybe the most painful part of the whole process because you're going to hear from all of the committee who have an opening statement and then a half a dozen senators who are going to introduce you. And so you'll hear from about 20 senators before you get to speak. It could be the most painful part of the process. But let me begin today, Judge, on a slightly more serious note. This committee begins its sixth set of Supreme Court confirmation hearings held in the last five years—a rate of change that is unequaled in recent times. If you're confirmed, Judge Thomas, you will come to the Supreme Court in the midst of this vast change. In four years, Justices Powell, Brennan and Marshall will have been replaced by Justices Kennedy, Souter and Thomas. Because of these changes, many of the most basic principles of constitutional interpretation of the meaning that the Supreme Court applies to the words of the Constitution are being debated in this country in a way they haven't for a long time—in a manner unlike anything seen since the New Deal.

In this time of change, fundamental constitutional rights which have been protected by the Supreme Court for decades are being called into question. In this time of change, the Supreme Court's self-restraint from interference in fundamental social decisions about the regulation of health care, the environment, and the economy are also being called into question.

Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee. This is particularly true because of the period of vast change in which your nomination comes before us. Judge, to explain why this is such an important question, at least to me, we need only look at the three types of natural law thinking which have in fact been adopted by the Supreme Court of the United States in the past, and which are being discussed and debated by constitutional scholars today. One of these views sees natural law as a moral code, a set of rules saying what is right and what is wrong; a set of rules and a moral code which the Supreme Court should impose upon the country. In this view, personal freedom to make moral choices about how we live our own lives should be replaced by a morality imposed on the conduct of our private and family lives by the court.

The Supreme Court, as you know, Judge, actually took such an approach in the past, holding in 1873, for example, that women could not become lawyers because it was not, in the Court’s phrase, “in their nature.” Now, no one wants to go back to 1873; no one wants to go back that far today. But there are natural law advocates who extol the 20th century version of this philosophy, for they believe that it’s the job of the courts to judge the morality of all our activities, wherever they occur, pay no respect to the privacy of our homes and our bedrooms. They believe the courts should forbid any activity contrary to their view of morality and their view of natural law. Those who subscribe to this moral code of view of natural law call into question a wide range of personal and family rights, from reproductive freedom, to each individual’s choice over procreation, to the very private decision we now make about what is and what is not a family. They want to see the government make these choices for us by applying, to quote one report, “their values and norms,” or if the legislature doesn’t do it, by judges applying their values and norms.

Needless to say, Judge Thomas, this sort of natural law philosophy is one which I believe this nation cannot accept. But it’s not the only radical natural law philosophy that is being debated as we sit here today—is being debated in the law schools and among the philosophers of this country. For there is another group that wants to revivify another period of the Supreme Court’s past when the Court used natural law to strike down a whole series of government actions aimed at making the nation a better place for Americans to live. Those natural law rulings struck down such laws as the child labor laws, minimum wage laws and laws that required safe working conditions. They held that the natural law freedom of contract and the natural law right to property created rights for businesses and corporations that rose above the efforts of government to prevent the ills they created. They put these so called economic rights into a zone of protection so high that even reasonable laws aimed at curbing corporate excesses were struck down.

Now, Judge Thomas, you have made it abundantly clear that you do not subscribe to the most extreme of these views. But you have said that you find some of these views, to quote you, “attractive” and that you support the idea, quote, “of an activist Supreme Court that would strike down laws regulating economic rights,” end of quote. And again, this is a version of natural law, a vision of natural law, that we have moved far beyond and that most Americans have no desire to return to.

And there’s a third type of natural law, Judge. It’s the one that mirrors how the Supreme Court has understood our Constitution for the bulk of this century. And it’s the one that I believe most Americans subscribe to. It is this view of natural law that I believe—I personally, to be up front about it—think is appropriate. In this view of natural law, the Constitution should protect personal rights falling within the zone of privacy, speech and religion the most zealously. Those rights that fall within that zone should be most zealously protected. These personal freedoms should not be restricted by a moral code imposed on us by the Supreme Court or by unjust laws passed in legislatively bodies. Indeed the Supreme Court has protected these freedoms by striking down laws that would prohibit married couples from using contraception, deny the right
of people to marry whomever they wish, or laws that tell parents that they
could not teach their children a second language or could not send them
to a private school. They struck down those legislative initiatives in the
past. But while recognizing that natural law and our Constitution protect
these rights, the same court has also recognized that government must
act to protect us from many of the dangers of modern life: That govern-
ment should stop polluters from polluting, stop businesses from creating
unsafe working conditions and so on. Yes, these government actions do
limit freedom. They do limit freedom. They limit the freedom to con-
tact. They limit the freedom to use one's property exactly as they would
wish. They limit the freedom to pollute. They limit freedom.

Or, as we saw in North Carolina recently, they limit the freedom of a
factory worker to lock his employees into a building where twenty-five of
them perished in a fire. But this limitation on property, recognized as
constitutional by the Court, is a balanced liberty that we've come to
expect our government to provide. This is the balance, in my view, that
the framers of our Constitution enshrined in that great document. They
wanted to use their words "an energetic government," but they also
wanted a government to protect fundamental personal freedoms. And
today we've achieved that balance by having the Supreme Court extend
great protection to personal freedoms while declining to block laws that
reasonably regulate our economy, our society, our property. Now adopt-
ing a natural law philosophy that upsets that balance, either by lessening
the protection given those rights falling within the zone of personal and
family privacy in speech and religion, or adopting a natural law philoso-
phy that lessens the power of government to protect the environment,
lessens the power of government to regulate corporate excesses or less-
ens the power of government to create institutions like Social Security,
would in my view be a serious mistake and a sharp departure from where
we have been for the last forty years.

Judge Thomas, there are signs in your writing and speeches that you
accept the present balance, but there are also signs that you would apply
natural law to affect changes in the balance I've just referred to: Changes
to replace our freedom to make personal and family choices without gov-
ernment imposing their moral code, and to thrust the Court into eco-
omic and regulatory disputes that it now stays out of. Judge, if this
Committee is to endorse your confirmation to the Senate, we must know
in my view—we must know with certainty that neither of these radical
constitutional departures is what you have in mind when you talk about
natural law.

So, Judge, over the course of these hearings, I'll be asking you about
how your natural law philosophy applies to each of these areas: both to
the areas of personal freedom and to the areas of economic issues. It will
take some time to cover it, Judge. And some of it, as you know, as well or
better than I, is somewhat esoteric. But cover it we will, and we will cover
it carefully.

In closing, Judge Thomas, I want to return to where I started: The
importance of your nomination. Some people say that the Supreme
Court is already conservative and they ask what difference it makes to
have an additional conservative on the bench. Well, I think that's the
wrong question, and I reject that argument. First of all, I do not deny the
President the right to appoint a conservative. As a matter of fact, I would
be dumbfounded if he didn't. And so I fully expect the Supreme Court to
be a more conservative body after Justice Marshall's successor is con-
firmed than before Justice Marshall retired. But such an additional move
to the right, which I expect, pales in comparison to the radical change in
direction some are urging on the court under the banner of natural law;
pales in comparison to some of the changes that some of the people who
are your strongest supporters have been urging on the philosophic
thought and the notion of constitutional interpretation for the past
decade. Thus, we're not seeking here to learn—at least I am not seeking
here to learn whether or not you're a conservative. I expect no less, and I
believe you when you say you are. Instead, what we must find out is what
sort of natural law philosophy you would employ as a justice of the
Supreme Court, for that court is in transition, and if you are confirmed
you would play a large role in determining what direction it will take in the
future.

Judge, because of your youth, and God bless you for it—I never
thought I'd be sitting here talking about the youth of a nominee to the
Supreme Court, but I am. Heck, you're six, seven years younger than—I'm 48. How old are you, Judge, 42, 43?

Judge Thomas. Well, I've aged over the last 10 weeks, but—(laugh-
ter)—43.

The CHAIRMAN. Forty-three years old. Because of your youth, Judge,
you will be the first Supreme Court justice the Senate will ever have con-
firmed, if it does, that will most likely write more of his opinions in the
21st century than he will write in the 20th century. To acknowledge that
fact alone, Judge, is to recognize the unique significance of your nomination and the care with which this committee must look at it.

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The Chairman. . . . Judge, as Senator Danforth said, he hopes we have read your speeches. I assure you, I have read all of your speeches, and I have read them in their entirety. And as I indicated in my opening statement, what I want to talk about a little bit is one of the things you mention repeatedly in your speeches, so that I can be better informed about what you mean by it.

Whether you're speaking—on the speech you delivered on the occasion of Martin Luther King's birthday, the national holiday and whether it should be one, to a conservative audience, making the point that he should be looked to with more reverence, or whether or not it was your speech at the Pacific Institute or whether or not it's the Harvard Journal, whatever it is, you repeatedly invoke the phrase “natural rights” or “natural law.”

And as I said at the outset, there is good natural law, if you will, and bad natural law, in terms of informing the Constitution. And there is a whole new school of thought in America that would like very much to use natural law to lower the protections for individuals and the zone of personal privacy, and I will speak to those later, and who want to heighten the protection for businesses and corporations.

Now one of those people is a Professor Macedo, a fine, first-class scholar at Harvard University. Another is Mr. Epstein, a professor at the University of Chicago. And in a speech you gave in 1987 to the Pacific Research Institute you said, and I quote, “I find attractive the arguments of scholars such as Stephen Macedo, who defend an activist Supreme Court that would strike down laws restricting property rights.”

My question is a very simple one, Judge, what exactly do you find attractive about the arguments of Professor Macedo and other scholars like him?

Judge Thomas. Senator, again it has been quite some time since I have read Professor Macedo and others, that was, I believe '87 or '88. My interest in the whole area was as a political philosophy. My interest was in reassessing and demonstrating a sense that we understood what our Founding Fathers were thinking when they used phrases such as “All men are created equal,” and what that meant for our form of government.

I don't—I found Macedo interesting, and his arguments interesting as I remembered. Again, it has been quite some time. But I don't believe that in my writings I have indicated that we should have an activist Supreme Court, or that we should have any form of activism on the Supreme Court.

Again, I found his arguments interesting, and I was not talking—particularly with natural law, Mr. Chairman—in a context of adjudication.

The Chairman. Well, I'm not quite sure I understand your answer, Judge. You indicated that you find the arguments not interesting—attractive—and you explicitly say one of the things you find attractive—I'm quoting from you—“I find attractive the arguments of scholars, such as Steven Macedo, who defend an activist Supreme Court that would strike down laws restricting property rights.”

Now, it would seem to me you—what you were talking about is you find attractive the fact that they're activist and they like to strike down existing laws that impact on restricting the use of property rights—

Judge Thomas. Well—

The Chairman. Because you know that's what they write about, that's—

Judge Thomas. Let me—let me clarify something. I think it's important, Mr. Chairman. As I indicated, I believe, or attempted to allude to in my confirmation to the Court of Appeals, I don't see a role for the use of natural law in constitutional adjudication. The—my interest in exploring natural law and natural rights was purely in the context of political theory. I was interested in that, there were debates on—that I had with individuals, and I pursued that on a part-time basis. I was an agency chairman.

The Chairman. Well, Judge, I—in preparing for these hearings, some suggested that that might be your answer, so I went back through some of your writings and speeches to see if I misread them. And quite frankly, I find it hard to square your speeches—which I'll discuss with you in a minute—with what you are telling me today. Just let me read some of your quotes.

In a speech before the Federalist Society at the University of Virginia, in a variation of that speech that you published in the Harvard Journal of Law and Policy, you praised the first Justice Harlan's opinion in Plessy v. Ferguson. And you said, “Implicit reliance on political first
principles was implicit rather than explicit, as is generally appropriate for the Court's opinions. He gives us a foundation for interpreting not only cases involving race, but the entire Constitution and its scheme of protecting rights. You went on to say, “Harlan’s opinion provides one of our best examples of natural law and higher law jurisprudence.” And then you say, “The higher law background of the American government, whether explicitly applied to appeal to or not, provides the only firm basis for a just and wise constitutional decision.”

And Judge, what I’d like to know is, I find it hard to understand how you can say that—what you’re now saying, that natural law was only—you’re only talking about the philosophy in a general philosophic sense and now how it informed or impacted upon constitutional interpretation.

Judge Thomas. Well, let me attempt to clarify. That, in fact, was my approach. I was interested in the political theory standpoint. I was not interested in constitutional adjudication. I was not at the time adjudicating cases. But with respect to the background, I think that we can both agree that the founders of our country, or at least some of the drafters of our Constitution and our declaration believed in natural rights. And my point was simply that in understanding overall our constitutional government, that it was important that we understood how they believed, or what they believed in natural law or natural rights.

The Chairman. For what purpose, Judge?

Judge Thomas. My purpose was this; in looking at this entire area, the question for me was from a political theory standpoint, you and I are sitting here in Washington, DC with Abraham Lincoln or with Frederick Douglas, and from a theory how do we get out of slavery. There is no constitutional amendment, there is no provision in the Constitution. But by what theory? And repeatedly Lincoln referred to the notion that all men are created equal. And that was my attraction to—or beginning of my attraction to this approach. But I did not—I would maintain that I do not feel that natural rights or natural law has a basis or has a use in constitutional adjudication.

The Chairman. Well, Judge, what was the—let’s go back to Macedo then. What was the—what was the political theory you found so attractive that Mr. Macedo was espoused?

Judge Thomas. The only thing that I could think of with respect to—and I’ll tell you how I got to the issue of property rights and the issue of the approach or what I was concerned about. What I was concerned was this: If you ended slavery and it’s something that I don’t know whether I alluded to it in that speech, but something that troubled me even in my youth, if you ended slavery and you had black codes, for example, or you had laws that did not allow my grandfather to enjoy the fruits of his labor, prevented him from working—and you did have that, you had people who had to work for three dollars a day, I told you what my mother’s income was—by what theory do you protect that? I don’t think that I have explicitly endorsed Macedo. I found his arguments interesting. And again—

The Chairman. (Off mike)—about any of those things, Judge.

Judge Thomas. I understand that. I read more than explicit on areas. I read about natural law, even though my grandfather didn’t talk about natural law.

The Chairman. But, I mean, isn’t it kind of—well, without—I guess we’ll—I’ll come back to Macedo, but let me—you also said in that speech out at the Pacific Research Institute, you said, quote, “I am far from being a scholar on Thomas Jefferson, but two of his statements suffice as a basis for restoring our original founding belief and reliance on natural law, and natural law when applied to America means not medieval stultification but the liberation of commerce.”

You speak many times—I won’t bore you with them, but I have pages and pages of quotes where you talk about natural law not in the context of your grandfather, not in the context of race, not in the context of equality, but you talk about it in the context of commerce, just like it is talked in that context by Macedo and by Epstein and others in their various books, a new, fervent area of scholarship that basically says: Hey, look, we, the modern day court, has not taken enough time to protect people’s property, the property rights of corporations, the property rights of individuals, the property rights of businesses, and so what we have to do is we have to elevate, elevate the way we’ve treated protecting property, we have to elevate that to make it harder for governments to interfere with the ability of, in the case of Epstein, the ability to have zoning laws, the ability to have pollution laws, the ability to have laws that protect the public welfare.

And then you say in another place in one of your speeches, you say, “Well, look, I think that property rights should be given”—let me find the exact quote—“should be given the exact same protection as”—you say, “Economic rights are as protected as much as any other rights” in a speech to the American Bar Association.
Now Judge, understand my confusion. Economic rights now are not protected as much as any other rights, they are not protected that way now. They are given—if they pass a rational basis test in effect, it's all right to restrict property. But when you start to restrict things that have to do with privacy and thought, and process, then you have to have a much stricter test. And so, you quote Macedo, you talk about the liberation of commerce and natural law, whatever you want to call it, natural law or not, and then—then you say economic rights—and by the way, you made that speech to the ABA the day after you made the speech where you praised Macedo. Can you tell me, can you enlighten me on how this was just some sort of philosophic musing?

Judge Thomas. Well, that's exactly what it was. I was interested in exactly what I have said I was interested in, and I think I have indicated in my confirmation to the Court of Appeals that I did not see a role for the application of natural rights to constitutional adjudication and I stand by that.

The Chairman. Judge, you argue Harlan did just that and it was a good thing for him to have done. He applied this theory of natural rights, as you say, in his dissent in *Plessy*, and he should have, you say?

Judge Thomas. Well, the argument was I felt that slavery was wrong, that segregation was wrong.

The Chairman. Right.

Judge Thomas. And again, I argue and I have stood by that, that these positions that I have taken, I have taken from the standpoint of philosophical or from the standpoint of political theory.

The Chairman. Well Judge, let me—

Judge Thomas. Well let me, if I could have an opportunity, Mr. Chairman.

The Chairman. Sure, oh please, please.

Judge Thomas. My interest in this area started with the notion, with a simple question, how do you end slavery? By what theory do you end slavery? After you end slavery by what theory do you protect the right of someone who was a former slave, or someone like my grandfather, for example, to enjoy the fruits of his or her labor?

At no point did I or do I believe that the approach of natural law or that natural rights has a role in constitutional adjudication. I attempted to make that plain, or allude to that in my confirmation to the Court of Appeals and I think that that’s the position that I take here.

The Chairman. Okay Judge, well look, let's not call it natural law, natural rights, whatever. What do you mean when you say, “Economic rights are protected as much as any other rights in the Constitution.” What do you mean by that?

Judge Thomas. Well, the simple point was that notions like—for me at this point—and again, I have not gone back and I don’t know the texts of all those speeches—but there are the takings clause—there is the takings clause in the Constitution and there's also a reference to property in our Constitution. That does not necessarily mean that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor did I suggest that in constitutional adjudication that that would happen. But it certainly does preserve some protection. But certainly the right of my grandfather to work deserves protection.

The Chairman. The right of my Grandfather Finnegan to work, too, deserved protection and your grandfather to work. But the issue here is whether—look. Let me explain to you why I'm concerned about this. You know why and this makes sure other people know why. There's a whole new school of thought that up until about five years only spoke to one another that is now receiving wider credence and credibility to the point that former Solicitor General Charles Fried in his book, *Order and Law*—not a liberal Democrat, Reagan's Solicitor General—said in his book about this group of scholars to whom Macedo and others like you refer—maybe you didn't mean the same thing—but this group of scholars, meaning Macedo and Epstein and others who I'll mention in a moment—he says, “Fledgling federalist societies and often devotees of the extreme libertarian views of Chicago Law Professor Richard Epstein had a specific aggressive, and it seemed to me a quite radical project in mind”—meaning for the administration—and it seemed to me a quite radical project in mind, to use the takings clause”—and I don't have much time so I won't go into it, but you and I both know the takings clause is that portion of the Fifth Amendment that has nothing to do with self-incrimination. It says if the government is going to take your property, they have to pay for it. Except historically we've said: If it's regulating your property, it is not taking it. If it's regulating under the police power to prevent pollution or whatever else, then it's not taking it and it doesn't have to pay for it. And what these guys want to do is they want to use that takings clause like the Fourteenth Amendment was used during the Lochner era.
This is Fried speaking. It says, "... had a specific aggressiveness seemed to me a quite radical project in mind"—to use the takings clause of the Fifth Amendment to serve as a break upon federal and state the whole landscape with respect to economic rights should be changed, and I criticize that.

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**Wednesday, September 11, 1991**

Senator Leahy... Let me ask you this: Would you keep an open mind on cases which concern the question of whether the Ninth Amendment protected a given right? I assume you would answer yes.

Judge Thomas. The Ninth Amendment, I think the only concern I’ve expressed with respect to the Ninth Amendment, Senator, has been a generic one and one that I think that we all would have with the more open-ended provisions in the Constitution, and that is that a judge, who is adjudicating under those open-ended provisions, tether his or her ruling to something other than his or her personal point of view. Now, the Ninth Amendment has, to my knowledge, not been used to decide a particular case by majority of the Supreme Court, and there hasn’t been as much written on that as some of the other amendments. That does not mean, however, that —

Senator Leahy. That does not what? I’m sorry. I didn’t hear that.

Judge Thomas. That does not mean, however, that there couldn’t be a case that argues or uses the Ninth Amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I’m fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator Leahy. But you’re saying that you’d have an open mind on Ninth Amendment cases?

Judge Thomas. That’s right.

Senator Leahy. Because I ask that because you’ve expressed some very strong views, as you know better than all, on the Ninth Amendment, and you had an article that was reprinted in a CATO Institute book, an article—the book was on the Reagan years, but you referred to Justice Goldberg’s invention, using the Ninth Amendment in his concurring opinion in *Griswold*. And you said, and let me quote from you, you said, “Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.” A pretty strong statement, but you would say, would you not, Judge, notwithstanding that strong statement, if a Ninth Amendment case came before you, you’d have an open mind?

Judge Thomas. Again, Senator, as I noted, my concern was that I didn’t believe that—it’s such an open-ended provision as the Ninth Amendment. It was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is okay or that right is okay. I believe the approach that Justice Harlan took in *Poe v. Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator Leahy. That’s not really the—my point. The point I’m making is that you expressed some very strong views, and you have here too, about the Ninth Amendment, but my question is, if—notwithstanding those very strong views you’ve expressed about the Ninth Amendment, pretty adverse views about it, would you have an open mind in a case before you where somebody is relying on the Ninth Amendment?

Judge Thomas. The answer to that is, Senator, yes.

Senator Leahy. But if you were to express similar views regarding the principles and reasoning of *Roe v. Wade*, you feel that somehow it would preclude you from having that same kind of objectivity as the reasoning you’ve expressed under the Ninth Amendment?

Judge Thomas. I don’t believe, Senator, that I’ve expressed any view on the Ninth Amendment beyond what I’ve said in this hearing after becoming a member of the judiciary. As I pointed out, I think it’s important that, when one becomes a member of the judiciary, that one ceases to accumulate strong viewpoints and rather begins to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

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Senator Simon. On the question of privacy; you have been critical of the use of the ninth amendment. And when you were asked by Senator Metzenbaum, I believe, about the question of privacy, you referred to the 14th Amendment. There are at least three members of the Supreme Court who have referred to the right of privacy as a fundamental right.

The ninth amendment, as I am sure you’re aware, grew out of correspondence between Madison and Hamilton, where Hamilton said, “If you have a Bill of Rights, some people will say, ‘These are the only rights people have.’” And so the ninth amendment was added, which says, “The
enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” That is not just in isolation there. In the Constitution you also have a provision—you can’t have a search into your home without a search warrant. That is, in a sense, right of privacy. The Constitution says you can’t have militia quartered in your home. That is, in a sense, a right of privacy. When you put that all together—together with the ninth amendment, it seems to me that there is fairly clearly a right of privacy implied. Now, that becomes significant because if you use the 14th Amendment as a basis for the right of privacy, that comes later in our history then. It has not been a part of our whole—of the tradition of our country to have a right of privacy. Do you have any reactions to that. And do you consider the right of privacy a fundamental right?

Judge THOMAS. Senator, to my knowledge, the Supreme Court—no majority has used the ninth amendment to establish as a basis for a right. Of course, it was used by Justice Goldberg and by Justice Douglas on—in Griswold. With respect to the approach that I indicated that I thought was the better approach, it was Justice Harlan’s approach. But, with that said, my bottom line was that I felt that there was a right to privacy in the Constitution and that the marital right to privacy, of course, is at the core of that and that the marital right to privacy, in my view, and in certainly the view of the Court, is that it is a fundamental right.

THURSDAY, SEPTEMBER 12, 1991

The CHAIRMAN. . . . Now, Judge, I want to see if I can come away from this round of questions with a better understanding of the method—the method, not the result—the method that you would apply to interpreting the very difficult phrases in the Constitution, which have been phrases that have been matters of contention for 200 years or more, and when interpreted, have sent the country off in one direction or another.

Now, you’ll be pleased to know, I don’t want to know anything about abortion. I don’t want to know how you think about abortion, I don’t want to know whether you ever thought about abortion, I don’t know—want to know whether you ever even discussed it, I don’t want to know whether you’ve talked about it in your sleep. I don’t want to know anything about abortion. I mean that sincerely. Because I don’t want that red herring, in my case at least, to detract from what I’m just trying to find out here—is how do you think about these things. When you and I talked on Tuesday, you said, and I quote—in this hearing, “I don’t see a role for the use of natural law in Constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory.” Now that struck me as something different than you said in many speeches, and I gave you some of those speeches yesterday so that you’d know what I wanted to talk about today. And you know I want to talk about this subject with you so I can understand it better.

So let’s start with what you—not said in the speeches, but what you told the committee so far about whether natural law does or does not impact on the Constitution. Yesterday, you told us that the framers of the Constitution, quote, “subscribed to the notion of natural law,” end of quote. But, you emphasized that any such belief, any belief held by the framers based on natural law, had to be reduced to positive law. That is, put in the Constitution for it to have any effect or impact on adjudication. The framers, you said, sometimes, quote, “reduced to positive law in the Constitution aspects of life principles they believed in. For example, liberty. But when it’s in the Constitution, it’s no longer natural rights. It is a constitutional right. And that’s an important point.” So, as I heard that statement, I began to think I’m beginning to understand your thinking on this, but I want to be sure. Do you recall saying that yesterday?

Judge THOMAS. I generally recollect that.

The CHAIRMAN. And is that a fair rendition of—

Judge THOMAS. I think it is.

The CHAIRMAN. Then you went on to say, and I quote, “positive law is our Constitution. And when we look at constitutional adjudication, we look at that document.”

(Aside.) Let me have a copy of the Constitution, please.

(Returning.) So, it is purely positive law, it’s purely that Constitution, this document, when you as a judge are interpreting it. The fact that the framers based the Constitution—may or may not have based the Constitution on natural law, and you and I think they did—

Judge THOMAS. Yeah.

The CHAIRMAN. —that does not impact on adjudication unless it was reduced to writing in the Constitution. Then, it’s positive law. That’s what you mean by positive law, right?

Judge THOMAS. That’s right.

The CHAIRMAN. Now—and so, it’s purely positive law that you as a judge look to in order to decide a case. Is that right?
Judge THOMAS. I think I indicated in later testimony—and this is an important point and it's one, as I read your op-ed piece, it's one that I think you asked in a different way. You say, is it rigid—is this concept of natural law rigid? For me, that question would be, is the concept of liberty rigid?

The CHAIRMAN. I see.

Judge THOMAS. And in our constitutional tradition, the concept of liberty—liberty is a concept that has been flexible. It's one that has been adjudicated over time, looking at history, tradition, of course starting with what the Founding Fathers thought of the concept of liberty, but not ending there.

The CHAIRMAN. Okay. I'm beginning to understand. So, natural law informed the notion of liberty. You and I have both read—because of our backgrounds, I suspect—we've both read—I won't get into Aquinas and Augustine and all that, but Locke looked back to the concept of natural law as an evolving notion. Montesquieu talked about it. Jefferson understood it. He was in Paris. He was probably the only one that fully understood it. But others who were there writing the Constitution, they talked about it, they had what they wrote—both the Declaration, as you say, in other places and in the Constitution—they reduced these broad notions of natural law—the natural rights of man to this document.

Now you say that they put some of these natural law principles in the document and words like “liberty” you just mentioned, you indicate that once liberty was in the Constitution, it becomes positive law. But now comes the hard question, as you and I both know. A judge has to define what liberty means. Now how does a judge know what the ambiguous term “liberty” means in the Constitution? And I want to start with the key term in the Constitution. One that protects the right of privacy and many other rights. And that's the word you mentioned yesterday, you mentioned again here today—liberty.

Yesterday you told the committee, “Our Founders and our drafters did believe in natural law.” In addition to whatever else, philosophers, they had and I think they acted to some extent on those beliefs in drafting portions of the Constitution. For example, the concept of liberty in the Fourteenth Amendment. So the concept of natural law, liberty, is embodied, you say, and I agree with you, in the Fourteenth Amendment. You also then said, “To understand what the framers meant and what they were trying to do, it's important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body to get your understanding,” end of quote.

Now as I understand this, Judge, while you reject any direct application of natural law—that is, you sitting there and saying, I think natural law means, therefore, I rule—even though you reject the direct application of natural law in constitutional adjudication, you would use natural law to understand what the framers had in mind when they interpreted these broad notions. Isn't that correct?

Judge THOMAS. Not quite, Senator. Let me make two points there. The framers view of the principle of liberty is the important point.

The CHAIRMAN. Right, okay.

Judge THOMAS. Whatever natural law is, is separate and apart. The important point is what did the framers think they were doing? What were their views?

The CHAIRMAN. Gotcha.

Judge THOMAS. The second point is this, that is only a part of what we conceive of this notion in our society. The world didn't stop with the framers. The world didn't stop with the framers. The concept of liberty wasn't self-defining at that point and that's why I think it's important, as I have indicated, that you then look at the rest of the history and tradition of our country.

The CHAIRMAN. I agree with you completely, which may worry you, but I agree with you completely. [Laughter]

Now—as a matter of fact you used that argument to take on the original intent people in some of your speeches. You basically say, “Hey, you folks who just go original intent and are pure positivists, you've got to look at intent, the real intent, and the real intent of these guys is not just static, it goes on. It's informed by changes in time.” And also you've got to understand, as I understand you, that they used the word “liberty” because they believed it to be a natural right of man.

I mean to be specific you say—and it's what you said here, “Our founders believed in natural law but they reduced the natural law to positive law and one of those concepts in natural law they reduced was liberty, to positive law because the word ‘liberty’ appears in the Constitution, in the Fourteenth Amendment in particular.”

Now in a speech before the Pacific Research Institute, which I gave you yesterday, you praised the opinion of Justice Scalia in Morrison v. Olson. That's the case where the Supreme Court upheld, as you know,
seven-to-one, the right of the Congress to say there can be a special prosecutor like Walsh, like the Iran-Contra. It wasn't about Iran-Contra, but the special prosecutor. Scalia filed the lone dissent and you praised his dissent and you said the following, "Justice Scalia's remarks," excuse me, "Justice Scalia's remarkable dissent in Morrison points the way toward the correct principles and ideas. He indicates how again we might relate natural rights to democratic self-government and thus protect the regime of individuals rights."

You go on to say that the principles and ideas indicated by the opinion and the Massachusetts bill of rights, which you quote, refers to, quote, and you're referring now, you say, "summarizes well the tie between natural rights and limited government. Beyond historical circumstances, sociological conditions and class bias, natural rights constitutes an objective basis for good government. So the American founders saw it, and so should we. But we don't. Try talking to a Justice Department attorney about natural rights. And when you mention the venerable term, they assume that you want an activist Court along the lines of Mr. Justice Brennan. That such an assumption must be fought reveals the extent to which the term natural rights has been corrupted and misunderstood, and not only among the class of conservative sophisticates in Washington."

Now, I don't know any other way to read this passage than to conclude that you believe that natural law and natural rights should help judges decide constitutional decisions.

Judge Thomas. No, Senator. I've said that over—I've repeated that continually here. Senator—

The Chairman. I know, but it doesn't gibe.

Judge Thomas. But Senator, I was speaking as a chairman of EEOC. And let me explain to you what my interests were. I was not—I have, under oath, in my confirmation for the Court of Appeals and for this Court, tried to explain as clearly as I possibly could what I was attempting to do. Speech after speech, I talked about the ideals and the first principles of this country—the notion that we have three branches so that they can be in tension and not impede on the individual.

That's what this case is about. At bottom, the case is about an individual who could be in some way—whose rights could be impeded by an individual who's not accountable to one of the political branches. That was the sole point.

The Chairman. I understand the point.
Judge Thomas. — and you have an individual. Now, let me give you an example of my point; talking about the ideal. I think that we agree that the idea that all men are created equal is an ideal. It is certainly one that was in our declaration.

The Chairman. Is it based on natural rights?
Judge Thomas. It was based on our founders' belief in natural right.

The Chairman. Right.
Judge Thomas. But slavery existed even as that idea—even as that ideal existed.

The Chairman. Right. Right.
Judge Thomas. That did not mean that slavery was right or comport with that ideal, it did not mean that you could end slavery without a constitutional amendment.

The Chairman. Agreed. That's the point, Judge. The point is you say, our founders looked to natural law to inform what they put in the Constitution. But it doesn't matter. The fact they said all men are created equal didn't mean anything until the Thirteenth and Fourteenth Amendment to stop slavery. But once they put it in, this natural law principle in 1866, it became part of the law. Now, we have to treat it as law.

But because it is uncertain what that means—for example, does “all men” mean all women? That's what the Fourteenth Amendment was about. We concluded it does. Because we don't know what it means, because it's broad and ennobling, we have to go back, you said, and look at the framers and what they meant.

Judge Thomas. As a starting point.

The Chairman. As a starting point. So, at least, Judge, will you not acknowledge you conclude that natural law indirectly impacts upon what you think a phrase in the Constitution means?

Judge Thomas. To the extent that impact had—to the extent that the framers beliefs—

The Chairman. Right.
Judge Thomas. —comport with that.

The Chairman. What the framers thought natural law meant.

Judge Thomas. But the— the important point is what the framers believed. I, for example, I think I said in—I'm trying to find the precise statement here.

The Chairman. Take your time. We have a lot of time. Take your time.
With respect to my concern, the larger concern, it was that these efforts would be to enlarging the government at the expense of the individual. Not so much a commentary on the Ninth Amendment, but as the overall point that I've made throughout these speeches—the relationship of the government to the individual.

Senator Simon. Earlier, Senator Heflin asked you about the Fifth Amendment in privacy implications. Let me—I mentioned yesterday or, I guess, the day before—we were talking about the Ninth Amendment, and there are, in the Constitution, some specific privacy things about ordering militia and searching your home. When you combine those specifics with the history of the Ninth Amendment, is there a privacy implication also, in your opinion, in the Ninth Amendment?

Judge Thomas. Senator, I think I've made two points with respect to that and with respect to the finding of the right of privacy. I indicated that I felt that it was—the analysis that I tended to agree with or agreed with was the finding of that interest or that right in the liberty component of the due process clause. The approach that you're talking about, of course, and I think we discussed, was the approach that Justice Douglas took, and similar to that was Justice Goldberg's approach. I think that there's—no one really knows the extent to which the Ninth Amendment can be used. No one—there's a considerable amount of scholarly work being done, as I said before, and there may be a point where the Court has a case before it in which an asserted privacy right or privacy interest is or could be found in the Ninth Amendment. To date, though, the majority of the Supreme Court has not done that. I would not foreclose it, Senator, but I, with respect to the privacy interests, would continue to say that the liberty component of the due process clause is the repository of that interest.

Senator Simon. Let me just lobby you here now, if I may. This is the only chance we get to lobby future Supreme Court justices. I think the Ninth Amendment is a very fundamental protection of basic liberty, and I would hope—there is an article written by I believe a person named Rappaport at the University of—maybe it's William and Mary—I'm not sure where it is. But I will send you the article. It gives some background on—some additional background on the Ninth Amendment. I think that is important.


Mr. Chief Justice BURGER announced the judgment of the Court and delivered an opinion, in which Mr. Justice WHITE and Mr. Justice STEVENS joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

Editor's Note: In this excerpt, the footnotes have been renumbered.
tion. We have no doubt as to the correctness of those decisions. They support the reasoning in Roe relating to the woman’s liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in Griswold, Eisenstadt, and Carey. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

It was this dimension of personal liberty that Roe sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. Roe was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting pre-natal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in Roe itself and in decisions following it.

While we appreciate the weight of the arguments made on behalf of the State in the case before us, arguments which in their ultimate formulation conclude that Roe should be overruled, the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis. We turn now to that doctrine.

Bibliography on the Ninth Amendment

Books
Bennett B. Patterson, The Forgotten Ninth Amendment (1955).

Symposia
Randy E. Barnett, Foreword: The Ninth Amendment and Constitutional Legitimacy.
•• Morris S. Arnold, Doing More Than Remembering the Ninth Amendment.
•• Sotirios A. Barber, The Ninth Amendment: Inkblot or Another Hard Nut to Crack.
•• Thomas C. Grey, The Uses of an Unwritten Constitution.
•• Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment.
•• Stephen Macedo, Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson.
•• Lawrence G. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?

* Reprinted or excerpted in volume one.
** Reprinted or excerpted in this volume.
Commentary on the Symposium on Interpreting the Ninth Amendment, 64 Chi.-Kent L. Rev. 981-1014 (1989).

**Earl M. Maltz, Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium, 64 Chi.-Kent L. Rev. 981 (1989).**

**Calvin R. Massey, Antifederalism and the Ninth Amendment, 64 Chi.-Kent L. Rev. 987 (1989).**

**Suzanna Sherry, The Ninth Amendment: Righting and Unwritten Constitution, 64 Chi.-Kent L. Rev. 1001 (1989).**


**Thomas B. McAffee, The Bill of Rights, Social Contract Theory and the Rights “Retained” by the People.**


**David N. Mayer, The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee.**

**Steven J. Heyman, Natural Rights, Positivism and the Ninth Amendment: A Response to McAffee.**

Monographs

U.S. Department of Justice, Office of Legal Policy, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause (September 15, 1987).

Articles


*Randy E. Barnet, Reconceiving the Ninth Amendment, 74 Corn. L. Rev. 1 (1988) (revised version appears as the Introduction to volume 1).**


Joseph L. Call, Federalism and the Ninth Amendment, 64 Dick. L. Rev. 121 (1960).


__________, The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229.


*Norman Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N.Y.U. L. Rev. 787 (1962).*

*The Ninth Amendment, in 3 The Encyclopedia of the American Constitution 1316-20 (L. Levy ed. 1982).*


**Notes, Comments, and Reviews**


**Selected Books Discussing the Ninth Amendment**


Selected Articles Discussing the Ninth Amendment


Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 709 & 716 (1975).


Michael S. Moore, Do We have an Unwritten Constitution?, 63 S. Cal. L. Rev. 107, 126-27, 137-139 (1989).


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