

Stephan Kinsella

From: tmcaffee@cmail.nevada.edu
Sent: Friday, July 25, 2003 12:40 PM
To: Stephan Kinsella
Subject: RE: Ninth Amendment

Dear Stephen,

You may find it helpful to look at my book, *Inherent Rights, the Written Constitution, and Popular Sovereignty: The Founders' Understanding* (2000). I will also send a copy of, "The Bill of Rights, Social Contract Theory, and the Rights 'Retained' by the People," 16 S.I.U. L.J. 267 (1992). For some reason, I keep thinking I'm about through with all the issues related to fundamental unenumerated rights, but it just keeps coming back. My most recent publication relating to these themes is, "The Constitution as Based on the Consent of the Governed--Or, Should We Have an Unwritten Constitution," 80 Ore. L. Rev. 1245 (2001). If you would like to receive it, I would be happy to send you a reprint of this article. I will also "attach" the version I sent to them, but of course it was edited some before appearing in print.

(See attached file: UNWR.wpd)

I am also just getting ready to submit what I hope--there I go again--may well be my last article on related themes, "Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States."

(See attached file: UNWRITSTA.wpd)

Strangely enough, the years have strengthened my belief that the Ninth Amendment was not designed to secure additional limitations on government. But there was a time when I thought substantive due process was a judicial invention, and now I'm far less certain of that; it may well reflect the founders' tendency to read common law norms into magna carta; it might be the best candidate for a legitimate source for a presumption of liberty. At this point, I am finding the Amar arguments for incorporation of the Bill of Rights via the privileges or immunities clause pretty persuasive, but the Wake Forest piece attempts to explain why this incorporation did not include state constitutional versions of the Ninth Amendment. It's interesting to me that your federalism views run into your libertarian views at some point. If anything is clear, it is that this was also true of the generation that framed the federal Constitution. You might find useful an essay review I published of the Kmiec and Presser casebook on *The American Constitutional Order: History, Cases, and Philosophy* (1998), "Does the Federal Constitution Incorporate the Declaration of Independence?", 1 Nevada L.J. 138 (2001). When I presented this paper at AALS one year, I remember Randy Barnett being very disappointed that I would even suggest the possibility of the Ninth Amendment limiting the powers of the states. One irony of this is that there are large numbers of advocates of using the Ninth Amendment as a source for fundamental rights who also believe that it limits state power. The other irony is that if the Wilson/Madison arguments that lead to the Ninth Amendment begin with a presumption that there are fundamental rights that limit government power, quite apart from whether they are found in the written Constitution, one wonders why the same truth would not apply to limiting state governments; the only issue that could conceivably remain is whether such implied rights are to be implemented and enforced by federal courts or the highest courts of states. In any event, it is one of the genuine ironies of American history that the people who brought us the concepts of human equality and inalienable rights would also create a Constitution that recognized the power of states to enforce a system of human slavery. There is little question that our federal system was perceived by the framers of the federal Constitution as promoting collective self-determination and permitting experimentation as well as promoting freedom; it is also true that federalism was the main mechanism for protecting slavery. Attempting to make the federal system work, while genuinely forbidding discrimination against minorities, is what the post-14th Amendment Constitution is all about.

Sometime in the next few months, I will be publishing a co-authored book on the Ninth and Tenth Amendments. So I will keep an eye open for the Lawrence-related piece.

Keep in touch, and let me know if I can be of any help.

Best regards,

Thomas B. McAfee