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*1508 THE NINTH AMENDMENT, AS PERCEIVED BY RANDY BARNETT

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Randy Barnett laments that the Ninth Amendment "has been so tragically neglected by the Supreme Court over the past two centuries." [FN1] Not for him vainly to repine; a cure has been revealed to him. But as Justice Holmes observed, "If a thing has been practiced for two hundred years . . . it will take a strong case" for a departure from the practice. [FN2] The "latter-day rediscoverers" of the Amendment, Sanford Levinson observes, "attempt to capture the ninth amendment for . . . expanded entitlements. 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." [FN3] Rediscovery sprouted from Justice Goldberg's concurring opinion in Griswold v. Connecticut, [FN4] but he cautioned 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." [FN5]

*1509 Levinson regards the Amendment as a "mystery," [FN6] and Andrzej Rapaczynski as of "very problematic" meaning. [FN7] The mystery, in my judgment, can be dispelled by traditional analysis of the text and the " uncontroversial" history of its enactment. [FN8] Nowadays, however, academic discourse is heavily weighted with arcane philosophical musings, [FN9] and it is unfashionable to approach a constitutional issue in purely legal terms. Nevertheless, "the Constitution is a legal document." [FN10] And Barnett stresses the need to distinguish between "social-philosophical discourse and constitutional-legal discourse." [FN11] Of modern theory, with its "sources philosophical rather than legal, its arguments convoluted," Robert Bork observes, "one cannot imagine that many practicing lawyers and judges read it." [FN12] It may not be amiss to remind the avant garde of Bacon's observation:

As for the philosophers, they make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live, what is received law and not what ought to be law. [FN13]

But Barnett, one of the "warmest supporters" [FN14] of the cornucopian view of the Amendment--if not the warmest--is not satisfied with so pedestrian an approach. Instead, he proffers a "powerful method of protecting unenumerated rights" of the Ninth Amendment, a "presumption of liberty" that would require a state "to show that legislation infringing the liberty of its citizens was a necessary exercise of its 'police power.' " [FN15] This turns basic presuppositions of the Constitution upside down; it pairs unknown "liberties" with unidentified rights, a general right of liberty justly rejected by Justice Hugo Black. [FN16] And it exalts the individual over the state, contrary to the Founders' design.

*1510 I. Textual and Historical Analysis

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. [FN17] Clearly what is enumerated is embodied in the Constitution; what is retained is not. Reservations are not grants of power to deal with that which is retained. Put differently, what is retained is excluded from the federal domain. This is made clear by Madison's explanation in introducing the Bill of Rights: "The great object in view is to limit and qualify the power of Government, by excepting out of the grant of power those cases in which the Government ought not to act." [FN18] Given that the government ought not to act in the "excepted" zone, much more was such action precluded in the "retained" zone. Instead of expanding the jurisdiction of the federal government, the Bill of Rights was meant to curtail it. To obviate the implication that the nonmentioned rights "were intended to be assigned into the hands of the general Government," Madison stated, this danger would be "guarded against" by the draft precursor of the Ninth Amendment. [FN19] Justice Black observed that the Amendment "was intended to protect against the idea that 'by enumerating particular exceptions to the grant of power' to the Federal Government 'those rights which were not singled out, were intended to be assigned into the hands of the General Government.' " [FN20] Now Barnett would extract enlarged jurisdiction from amendments that were designed to cut down earlier grants. [FN21] The fact that Amendments I through VIII ***1511** were meant to limit the powers of the federal government militates against a reading of the Ninth that would confer unlimited federal judicial power to create new rights. [FN22]

Barnett acknowledges that 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, he adds, "While the meaning of the ninth amendment may be clear, its implications for constitutional adjudication are not." [FN23] "Meaning" is defined as "that which is intended"; an implication is that which is implied, i.e., "included, though not directly stated." [FN24] An implication that contradicts the clear meaning is therefore inadmissible. Essentially, Barnett argues that the unenumerated rights clearly retained by the people were handed over to the federal judiciary for enforcement. He starts with two questions: "Are the unenumerated rights judicially enforceable as the enumerated rights have come to be? If so, what exactly are those rights?" "For most," he continues, "the answer to the first of the questions hinges on the ability to answer the second . . . . Most would agree . . . that, if the uncertainty surrounding their content can be resolved, unenumerated rights should be enforceable." [FN25] This is a splendid non sequitur. Identification of the unenumerable retained rights would not automatically confer jurisdiction on a federal court to enforce them. Federal jurisdiction is peculiarly a creature of grant, and I shall show that all intendments preclude an implied grant. [FN26]

***1512** I agree that the "contents" of the rights retained by the people " are limited only by their imagination," that they are "unenumerable because the human imagination is limitless," [FN27] that, as Justice James Iredell stated in the North Carolina Ratification Convention, "it would be impossible to enumerate every one," [FN28] i.e., to specify in advance of trial exactly what the rights were.

To my query "How does one effectuate an imaginary right?", Barnett curtly replies that "Berger seems to think this play on words is a genuine argument." [FN29] Words convey ideas. Rights that are "unenumerable because the human imagination is limitless" reside in the imagination. Imagination connotes consideration of "events not yet in existence." [FN30] Such events are "imaginary" for they exist "only in imagination or fancy; not really existing." [FN31] Be it assumed that some claimed rights can be fleshed out; the vast bulk of the "limitless" rights cannot. How, indeed, can a judge enforce an unidentified, unarticulated right that exists only in a claimant's imagination? Barnett himself admits that at present "the only rights deemed to be 'real' are those which a court has recognized." [FN32] "Such rights only ought to be expressly secured as were certain and fixed." [FN33]

To meet one of my objections, Barnett asserts that courts have been "developing the common law of property, contract, tort and other bodies of doctrine which distinguish rightful from wrongful conduct," [FN34] and are therefore well equipped to mine the unenumerable retained rights. Whether they are better equipped than legislatures to deal with the "right" to sell addictive drugs, for example, is at least debatable. At any rate, expertise does not confer jurisdiction. Let us look at the course of the common law. In the beginning, English courts of the Crown could ***1513** take cognizance of a suit only if authorized by a writ from the king. [FN35] By the Statute of Westminster II (1285), the Action on the Case allowed judges to afford relief in similar cases. [FN36] This development took place in suits between private parties; no judge could afford a remedy against the Crown. Nor could he set aside a statute. [FN37] Barnett's attempt to wrest fresh power from an amendment designed to limit it would revise the Constitution. No delegation was made to our courts to revise the Constitution. To the contrary, Chief Justice Marshall stated that the judicial power "cannot be the assertion of a right to change that instrument." [FN38] And in Marbury v. Madison he held that Congress may not "alter" the Constitution. [FN39] Federal judges are not authorized by the Ninth Amendment nor by Article III to fish for cases in the pool of unidentified rights "retained" by the people.

II. Responses to Barnett

A. The Rule of Law

Avoiding rights-fishing responds to the rule of law; a law which is to govern conduct must advise a person before he acts that, in Blackstone's words, "thou shalt, or shall not." [FN40] Patently, no one of the unidentified unenumerated rights conveys such a command, which distinguishes them altogether from the rights enumerated in the first eight amendments. Then too, as Barnett recognizes, there is a separation of powers problem: "When faced with textual provisions as completely open-ended as these, any judicial interpretation of unenumerated rights hardly seems an interpretation at all. Enforcing unenumerated rights in the absence of a text would seem instead to be a purely legislative act." [FN41] For the specific command required by the rule of law, Barnett would substitute a "set of values":

The rule of law is not a commitment to rules simpliciter; it is not the law of ***1514** rules, though some e.g., Justice Scalia talk as though it is. It is a commitment to a particular set of values--in particular, the value of enabling persons to discern the requirements of justice in advance of action (and in advance of subsequent litigation). Individuals and associations must know what justice requires before acting . . . . [FN42] But he concludes that the "informational requirements can be satisfied by means other than general rules--for instance, by general principles." [FN43] A rule is "general" in so far as it covers a class rather than an individual; it is specific, however, as to the conduct it regulates. Before a person acts, Barnett agrees, he is entitled to be "informed" that the contemplated conduct is forbidden. "General principles" are not calculated to inform everyman. What "principle" advises a person not to park within twenty feet of a hydrant--twenty rather than ten? There may be a wide difference of opinion whether a "general principle" governs a particular case; there can be little or none as to a specific command. In declaring the Constitution to be "the supreme Law of the Land," the Framers were not thinking of foggy principles that might entrap the uninformed or curtail the "residuary" sovereignty of the states, but of the clearly enunciated prohibitions and mandates contained in the document. Not Barnett's "set of values" but Blackstone's definitions were before them.

B. State Sovereignty

Barnett overlooks the potent influence exercised by the states' attachment to control over their own internal affairs. Midway in the Convention, Washington complained that "independent sovereignty

is so ardently contended for" that "the local views of each State . . . will not yield to a more enlarged scale of politicks." [FN44] Judge Edmund Pendleton assured the Ratifiers, "Our dearest rights--life, liberty and property--as Virginians, are still in the hands of our State legislature." [FN45] The prevailing sentiment was later summarized by Justice Story: the Constitution "is ***1515** founded on a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States." [FN46] To apply the Bill of Rights to the states, Judge Richard Posner observes, is to "weaken the states tremendously by handing over control of large areas of public policy to the federal judges." [FN47] Every federal enlargement of individual rights reduces state sovereignty, a state's right to regulate its internal affairs, whereas Judge Pendleton and his fellows looked to the states for protection of their rights. [FN48] So, President Jefferson wrote to John Adams's wife, Abigail, "While we deny that Congress have a right to controul freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so." [FN49] Chief Justice Marshall said, "These amendments including the Ninth demanded security against the apprehended encroachment of the general government--not against those of the local government." [FN50]

Because the Bill of Rights was inapplicable to the states, the Ninth Amendment did not authorize federal judges to enforce the Amendment against the states. Madison had emphasized in The Federalist No. 40 that the federal "general powers are limited," adding that "the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." [FN51] A surrender of that sovereignty to federal judges was the more unlikely because of fear of "twisted construction": "A cultural suspicion of judicial 'interpretation' was widespread in late eighteenth century America." [FN52] As late as 1791, Justice James Wilson urged his compatriots to "chastise" their "aversion and distrust" of judicial power. [FN53] This was allied to a "profound fear" of judicial discretion, [FN54] so that Hamilton felt constrained to assure the Ratifiers that of the three branches the judiciary is "next to nothing." [FN55] Barnett argues that ***1516** on the skeptic's reading of the Ninth Amendment it is " superfluous," "functionless." [FN56] Minimally, its function is to demark the "enumerated" rights from those "retained." It is Barnett who would render the demarcation meaningless. Above all, Madison warned against a construction that would "enlarge the powers delegated by the Constitution," [FN57] i.e., to intrude into an area that was not delegated but "retained." Roscoe Pound long ago observed that 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." [FN58]

In exalting the claims of the individual over the state's right to regulate individual conduct, Barnett overlooks that for the Founders, "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." [FN59] Alpheus Thomas Mason correctly noted, "In the Convention and later, states' rights--not individual rights--was the real worry." [FN60] It was the collective rather than the individual will that was paramount. Louis Henkin noted that the original "Constitution said remarkably little about rights" because the federal government "was not to be the primary government, . . . governance was left principally to the states." [FN61] Justly, therefore, did Zechariah Chafee write that the "original Constitution did very little to protect human rights against the States." [FN62] So sparse were the protections that Hamilton was hard put to assemble a list: the impeachment provision, the writ of habeas corpus, trial by jury, the definition of treason, and the prohibition against titles of nobility, [FN63] none of which, parenthetically, were natural rights. When the Bill of Rights followed, it largely responded to British excesses in the prewar period--quartering of soldiers, suppression of free speech, seizures, and unfair criminal proceedings.

***1517** C. Judicial Enforceability

The claim that the federal courts may enforce the Ninth Amendment encounters some formidable

obstacles. The progenitor of the Amendment provided that the "exceptions from federal powers made in favor of particular rights, shall not be so construed as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution." [FN64] Madison noted that opponents of the Constitution "disliked it because it did not contain effectual provisions against encroachments on particular rights," [FN65] which the Ratifiers had subjoined in various Bills of Rights. Hence, he explained, upon adoption of the Bill of Rights the courts would consider themselves "the guardians of those rights" and resist "every encroachment upon rights expressly stipulated" in the Bill of Rights. [FN66] Thus, judicial protection was limited to "particular rights," rights "expressly stipulated," i.e., specified, as unenumerated rights are not. Barnett disputes that " 'only the "particular," "stipulated" rights had judicial protection.' . . . Of course, Madison said no such thing." [FN67] Compare, however, Madison's statement in The Federalist No. 39: federal "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." [FN68] And in No. 83 of The Federalist, Hamilton wrote that the objects "being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority." [FN69]

So too, Barnett spins strange theory out of Madison's statement that the " 'exceptions . . . in favor of particular rights' " expressed in the Bill of Rights " 'shall not be so construed as to diminish' " the " '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.' " [FN70] From "greater caution" Barnett deduces that some rights "would have been equally enforceable" had they not been " 'inserted for greater caution.' " [FN71] The antecedent of "greater caution" is "actual limitations of the delegated powers," not an enlargement *1518 of power to enforce "retained" rights. The greater caution indicates that the " exceptions" are at worst declaratory of existing limitations. To extend enforceability to the retained rights is to enlarge judicial power in the teeth of the command not to construe those rights as "to enlarge the powers delegated by the constitution." [FN72]

We must not lose sight of the very real concerns that led to the adoption of the Bill of Rights. Patrick Henry asked in the Virginia Convention, "What do they tell us? That our rights are reserved. Why not say so?" [FN73] George Mason asked, "If they are not given up, where are they secured? " [FN74] The Ratifiers were not satisfied with oral assurances; they insisted on nailing down their security in writing. Charles Jarvis assured the Massachusetts Convention that "by 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." [FN75] Little is gained by peering into Madison's reference to "greater caution." First, although he said in discussing the Tenth Amendment that the words " 'may be unnecessary; but there can be no harm in making such a declaration,' " he nevertheless, as Barnett recounts, did not feel prevented "from appealing to the tenth amendment as authority for his argument against the national bank." [FN76] Second, speaking of the Necessary and Proper Clause, Madison said, " 'Whatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress.' " [FN77] Still less were the Founders minded to confer unlimited discretion on the courts, for they had a "profound fear" of judicial discretion and "twisted construction." [FN78]

The federal jurisdiction is limited to "stipulated," "particular" rights. Article III, Section 2, Clause 1 confers the relevant jurisdiction of "all Cases . . . arising under this Constitution." Rights "retained" by the people are not embodied in the Constitution, and a claim of such a right does not "arise" thereunder. Hamilton assured the Ratifiers in The Federalist No. 83 that "the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction." [FN79]

*1519 D. Privileges or Immunities

"Originally," Barnett states, the federal courts "lacked jurisdiction to protect the retained 'privileges or immunities' of citizens from abuses by their states." [FN80] This arrangement, he asserts, "Was fundamentally changed by the enactment of the fourteenth amendment." [FN81] Now "privileges and immunities" were not among the "retained" privileges which federal courts were powerless to protect, for they were enumerated in Article IV, Section 2, Clause 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Its precursor, Article IV of the Articles of Confederation, provided that the inhabitants of each State "shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state." Chief Justice White stated that " 'the privileges and immunities intended are the same in each.' " [FN82] Thus, the Privileges and Immunities Clause of Article IV conferred privileges on a visitor from another state, not on a resident of the visited state, so it did not protect citizens from "abuses by their own states." Barnett therefore errs on two counts: (1) "privileges and immunities" were not retained by the people but were enumerated in the Constitution; and (2) they were not intended to protect a citizen from abuse by his state, but to confer certain privileges on a visitor to that state, which the antecedent Article IV specified were "all the privileges of trade and commerce." For the Founders, the enumerated "trade and commerce" limited the general terms "privileges and immunities." [FN83] From the beginning, the Maryland and Massachusetts courts construed Article IV, Section 2 in terms of "trade and commerce." [FN84] Chief Justice White stated that Article IV, Section 2 "was intended to perpetuate the limitations" of the earlier Articles of Confederation. [FN85]

*1520 After the Civil War, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, explained that "the great fundamental rights set forth" in the Civil Rights Bill of 1866 were the "right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." [FN86] A telling illustration of the limited scope of privileges or immunities was furnished by John Bingham, an activist mainstay. He strenuously protested against the " oppressive" scope of the Bill:

Civil rights . . . embrace every right that pertains to the citizen. . . . It would strike down . . . every State Constitution which makes a discrimination on account of race or color in any of the civil rights of the citizen. . . . It would reform the whole civil and criminal code of every State government. [FN87] To placate Bingham, "civil rights and immunities" was deleted. James Wilson, Chairman of the House Judiciary Committee, explained that in order to avoid "the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section." [FN88] The deletion was made, he said, because "some gentlemen were apprehensive that the words we propose to strike out might give warrant for a latitudinarian construction not intended." [FN89] After alluding to this incident, the Supreme Court stated, "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights." [FN90]

No activist, to my knowledge, has attempted to explain why Bingham, after strenuously protesting against the "oppressive" invasion of the states' domain by "civil rights," embraced in the lesser " privileges" the very breadth he had excoriated in the Bill. Even Justice Field, who dissented from the Court's overly narrow interpretation of "privileges and immunities" in the Slaughter House Cases, stated, "In the . . . Civil Rights Act Congress has given its interpretation to these terms." [FN91] The fact is that the Framers regarded "privileges and immunities" as words of art having a special meaning. [FN92] And Bingham submitted an 1871 *1521 House Judiciary Committee Report stating that the "fourteenth amendment . . . did not add to the privileges or immunities" of Article IV, Section 2. [FN93] Such was later the judgment of the Supreme Court. [FN94] In sum, the "limited category of rights" enumerated in the Civil Rights Act and incorporated in the Fourteenth

Amendment does not advance the case for judicial enforcement of the "unenumerable" rights " retained" by the people.

E. Natural Rights and Natural Law

The "problem" in effectuating the Ninth Amendment, Barnett opines, is that "many no longer appreciate the natural rights." [FN95] He identifies "natural rights" with "rights retained *1522 by the people." [FN96] And he equates " the boundaries defined by natural rights" with "the rights retained by the people . . . limited only by their imagination." [FN97] These assertions are erroneous. Unlike the unenumerable retained rights, natural rights had come to have a quite restricted compass in English law at the adoption of the Constitution. Alfred Kelly, a historian and member of the team that prepared the desegregation brief for the NAACP, [FN98] wrote:

Revolutionary natural-rights theorists insisted, liberty was derived from a state of nature . . . . It had long since been given a very positive and specific content. . . . The "rights of Englishmen" were not vacuous; instead they were quite well defined and specific. The notion of pulling new natural rights from the air to allow for an indefinite expansion can hardly be considered to be within the original spirit of the fourteenth amendment. [FN99]

Levinson refers to "William Blackstone's powerful evocation of the English tradition of natural rights." [FN100] Blackstone listed the "Absolute Rights of Individuals" as the rights (1) to life, (2) to personal liberty, and (3) to ownership of property. [FN101] Such were the "rights of Englishmen" to which the colonists laid claim at the outset of the Revolution. And they were echoed in the list compiled by James Wilson, a leading Framer. [FN102] In the debates on the Fourteenth Amendment, the Chairman of the House Judiciary Committee, James Wilson, read Blackstone's definition to the House and commented, "Thus sir, we have the English and American doctrine harmonizing." [FN103] These rights were not "retained by the people" but were incorporated in the Fifth Amendment: no person shall "be deprived of life, liberty, or property, without due process of law." Patently these rights were not "limited only by the people's imagination." [FN104] It remains to be said that activist appeals to natural rights find no counterpart in the Founders' preoccupations. Benjamin Wright observed that "there were few appeals to the law of nature. . . . With a few exceptions, they simply found it unnecessary to their immediate purpose." [FN105]

In an earlier article, Barnett cited thirteen "examples of unenumerated rights that have been acknowledged by the courts over the past 200 *1523 years." [FN106] I demonstrated that in a number of important instances they were rooted in the Constitution itself. Without commenting on my criticism, Barnett reprints the list of thirteen "examples." [FN107] This is only one of a number of instances where Barnett disregards a telling criticism, and I therefore take leave to recount some of my earlier analysis.

To begin with number two, the "right to receive equal protection not only from the states but also from the federal government," Barnett cites Bolling v. Sharpe. [FN108] "Equal protection" from the states first appeared in the Fourteenth Amendment. Chief Justice Warren, however, held that it must apply to the federal government as well, "notwithstanding," Barnett wrote, "the fact that the Equal Protection Clause of the Fourteenth Amendment applies only to the states," [FN109] and is absent from the Fifth. Thereby the Court wrote equal protection into the Fifth Amendment. Thus, Bolling represents arrant judicial rewriting of the Constitution, and it should serve as a warning against--rather than encouragement of--judicial creation of unenumerated rights. In this I am not alone. John Hart Ely, a devoted former clerk of Chief Justice Warren, stamped the Bolling decision as "gibberish both syntactically and historically." [FN110] Other commentators are of like mind. [FN111]

*1524 Consider Barnett's third example, the right to vote; that right was granted by and subjected to regulation by the state. [FN112] It took the Fifteenth, Nineteenth, and Twenty-Sixth Amendments to confer this right on citizens of the United States. So too, the eighth example, "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." This was a response to the fact that each state was sovereign within its own borders and could exclude visitors or migrants from another state. The grant of the privileges of a sister state contemplated travel from one state to another, the right of "ingress and regress," as the Articles of Confederation put it. [FN113]

Nor is the fourth example, a "presumption of innocence," a fundamental right. It was not a component of trials in England, and "occurs first in the modern cases," explained by Max Radin as "little more than an assertion" that "much stronger evidence is needed to find a man guilty of a crime than to find that he owes a sum of money." [FN114] This is a bow to common sense administration rather than a right that had not even been one of the "rights of Englishmen." Against this background, Barnett sums up, "The right to travel . . . and the right to equal protection of the laws from the federal government . . . provide paradigm examples or 'easy cases' from which theories of unenumerated rights can be developed." [FN115] His "easy cases" make sad reading for one schooled in the rigorous analysis of the common law.

Lurking behind activist appeals to natural law is the notion that it may supersede the Constitution. That notion is at war with the principles enunciated in Marbury v. Madison by Chief Justice Marshall: "The powers of the legislature are defined and limited . . . . To what purpose *1525 are powers limited . . . if these limits may, at any time, be passed by those intended to be restrained?" [FN116] Unless the Constitution is "a superior paramount law, unchangeable by ordinary means . . . then written constitutions are absurd attempts . . . to limit a power in its own nature illimitable." [FN117] The Framers, he added, "contemplated that instrument, as a rule for the government of courts, as well as of the legislature." [FN118]

Notwithstanding, Justice Chase in a seriatim opinion invoked supraconstitutional principles in Calder v. Bull. [FN119] He was immediately rebutted by Justice James Iredell, who stated that "the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject." [FN120] Moreover, Chase stated in United States v. Worrall [FN121] that "the constitution of the Union is the source of all the jurisdiction of the national government; so that the departments of the government can never assume any power that is not expressly granted by that instrument." [FN122] Even as respects equity, Justice Story wrote that if an English court possessed the "unbounded jurisdiction . . . arising from natural law and justice" ascribed to it, "it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised." [FN123] In place of a "higher law" the Constitution itself became, as Hamilton said, the "fundamental law," [FN124] in Marshall's words, "the superior paramount law." "Law," [FN125] wrote Robert Cover, "as a sovereign act clearly mandates the subordination of natural law to constitutions." [FN126] By expressly providing in Article IV that the Constitution "shall be the supreme Law of the Land," the Framers left no room for judges to supersede the instrument in the name of natural law. [FN127]

*1526 III. Individual Interests and the Police Power

A. The Presumption of Liberty

To meet the challenge that "has proved too much for most judges and constitutional scholars," Barnett proffers his "presumption of liberty":

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. 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. [FN128] A presumption of liberty, Barnett submits, "would shift the burden of proof from the citizen to the government" to "show that interference with liberty is 'necessary' and motives are 'proper.' " [FN129] However, he too easily glides from "liberties" to "rightful liberties." [FN130] More than a claim to "liberty" is required to make it "rightful."

Blackstone defined liberty as the right of moving about without restraint. [FN131] In 1866, James Wilson read Blackstone's definition to the House, [FN132] restraints by the Black Codes on the freedmen's liberty to come and go at pleasure being at the forefront of the movement for amelioratory measures. To be sure, "liberty" has since been blown up by the Court, notoriously in the shape of "liberty of contract," early exemplified in Lochner v. New York. [FN133] But it has yet to be regarded as a bottomless well from which judges may draw unidentified "liberties" at will. To the contrary, the Court declared per Justice Scalia in 1989 that an "interest denominated as a 'liberty' " for purposes of the Due Process Clause had to be not only " 'fundamental' . . . but also . . . an interest traditionally protected by our society." [FN134] Before burdening the government with the onerous task of responding to claims of "imaginary" rights, we do well to ***1527** recall that the government represents the collective will, which for the Founders, was superior to that of the individual. "It was conceivable," wrote Gordon Wood, "to protect the common law liberties of the people against their rulers e.g., the king, but hardly against the people themselves." [FN135] Put differently by Forrest McDonald, "The liberty of the individual was subsumed in the freedom or independence of his political community." [FN136]

"If granted power is found," the Court declared in United Public Workers v. Mitchell, "necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." [FN137] To my mind, that is an inescapable inference. Barnett maintains, however, that "Madison's bank speech statement directly contradicts the the Mitchell theory." [FN138] I find no evidence of such contradiction in Madison's statement. [FN139] To the contrary, Madison stated, "If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." [FN140] If a congressional statute may interfere with a state's constitution, surely a state may, by an authorized law, override an individual's claim to an unidentified right "retained by the people." For as Kent observed, "The private interests must be made subservient to the general interests of the community." [FN141]

B. The Burden of Proof

Barnett's facile shift of the burden of proof to the government's shoulders--"to show that interference with a claimed liberty is 'necessary' " [FN142]--stands long established doctrine on its head. Generally speaking, the burden of proof lies upon the plaintiff to establish the facts alleged in the cause of action. Barnett would have the defendant negate the claim before the plaintiff has shown the affirmative. He recognizes that his presumption of liberty is "precisely the reverse" of the "presumption of constitutionality," [FN143] but that is merely another settled rule ***1528** that must be toppled for the erection of his "presumption of liberty." Then too, to plead a cause of action properly, a claimant must set forth a recognized "rightful liberty." Barnett would legitimize the filing of fanciful claims, which will burden the already overloaded courts. [FN144]

Barnett compounds his difficulties by urging that "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'--the state's power to protect the rights of its citizens." [FN145] The Founders clearly left protection of citizens to the states. [FN146] Chief Justice Marshall rejected the application of the

Bill of Rights to the states in the absence of language clearly showing an intention to protect the people against their own states' "exercise of power . . . in matters which concerned themselves alone." [FN147] The reservation of "retained" rights exhibits a contrary intention. As Judge Richard Posner emphasized, to extend application of the Bill of Rights to the states is to "weaken the states tremendously by handing over control of large areas of public policy to the federal judges." [FN148]

C. The Police Power

Particularly wide of the mark is Barnett's insistence that the state carry the burden of showing that its action "is within its proper powers" and that the exercise of its police powers is "necessary." [FN149]

First, as to the scope of the police power, the Court early stated that "the authority of a State is complete, unqualified and exclusive." [FN150] ***1529** Chief Justice Taney considered that the power is "absolute . . . except in so far as it has been restricted by the constitution." [FN151] Quoting Kent, the Slaughter-House Cases state that " 'private interests must be made subservient to the general interests of the community.' This is called the police power." [FN152] In the face of an "absolute," "unqualified" power, Barnett insists on "a workable definition of the unenumerated 'police powers' of states." [FN153] There is a fine irony in this insistence by one whose own "workable definition" of the rights "retained by the people" is limited only by the imagination. Speaking by Justice Field, the Court stated that " neither the fourteenth amendment . . . nor any other amendment . . . was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, . . . education, . . . and good order of the people." [FN154] What no amendment did, Barnett would achieve by his theorizing: he would endow federal judges with power to interfere with a state's exercise of its police power. Not long since the Court declared that "states are accorded wide latitude in the regulation of their local economies under their police powers." [FN155]

Herbert Wechsler concluded that there is "a burden of persuasion on those favoring national intervention" in state matters; he observed, "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity." [FN156] The exceptional nature of federal intervention was underlined by Justice Brandeis: the Constitution "preserves the autonomy and independence of the States"; federal supervision of their actions "is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is ***1530** an invasion of the authority of the State." [FN157]

The distinction drawn in the Ninth Amendment between "enumerated" rights and "others retained" by the people tells us that the latter are not "matters specifically delegated to the United States." If, finally, a state has an unqualified police power, the question whether its exercise is necessary lies within its sole discretion. [FN158]

IV. Understanding Madison's Words

A. The Meaning of "Assigned"

Barnett acknowledges, "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 rights were, in Madison's words, 'assigned into the hands of the General Government, and were consequently insecure.' " [FN159] But he puts his own spin on these words: "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." [FN160] To put it baldly, to

prevent assignment of the unenumerated rights to the general government, they must be assigned to its courts. The courts, however, are part of the general government; what was withheld from that government was not given to its courts, particularly at a time when the courts were distrusted, when there was "profound fear" of judicial discretion and "twisted construction." [FN161] With his penchant for treating things that are entirely different as the same, Barnett asserts that judicial review can no more be denied to unenumerated than to enumerated rights. [FN162] Manifestly, they are poles apart; enumerated rights are identified and described, unenumerated rights are not. Barnett argues that there is "scant support for the view that unenumerated rights were to be treated differently than enumerated rights." [FN163] The obvious requires no proof. Being expressed in the Constitution, enumerated rights fall within its judicial protection; unenumerated, "retained" rights constitute an area, Madison said, in which the government is "not to act at all." [FN164] Barnett's belief ***1531** that federal courts are the best guardians of the rights "retained by the people" runs counter to the Founders' belief that the states were best trusted with protection of the rights of their people. [FN165]

B. Madison's Bank Speech

For his interpretation of the Ninth Amendment, Barnett relies heavily on a speech by Madison [FN166] during the debate on establishment of a national bank, which Barnett regards as "perhaps the most telling evidence" that "unenumerated rights could be identified and protected." [FN167] I can find no such evidence. Proponents of the bank sought to derive power to create it from implications of several enumerated powers. Madison rejected remote implications, opposed "latitude" of construction, and cited various sources as "guarding against a latitude of interpretation." [FN168] Thus, as Barnett notes, Madison "used the ninth amendment precisely and explicitly as authority for more strictly construing enumerated powers." [FN169] Barnett would extract from Madison's rejection of "latitude" in construing enumerated powers even greater latitude in locating "unenumerated" powers. Certainly Madison's remarks do not constitute evidence that "unenumerated rights could be identified and protected," [FN170] and they do not suggest that those rights could be enforced by federal judges.

Indeed, a number of remarks in his speech point the other way. He rejected a reading of the Constitution that would grant to "Congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the State Governments." [FN171] He condemned the establishment of a "precedent of interpretation levelling all the barriers which limit the powers of the General Government, and protect those of the State Governments." [FN172] Madison's remarks truly are "telling," but they tell against Barnett's theory and in favor of my objections to it.

V. Legitimacy Superimposed on Constitutionality

For most Americans the Constitution is what Article VI declares it to be, the "supreme Law," what Paul Brest described as our "civil religion." [FN173] ***1532** Most would not think of looking behind it for its "legitimacy;" it is "paramount." Barnett argues, however, that before any law binds our conscience we should ask whether it is "just"; and he questions whether the Constitution "imparts legitimacy on federal legislation." [FN174] For this he summons Thomas Aquinas, although he recognizes that "it is a bit unusual to begin any contemporary legal analysis . . . with the ideas of . . . Aquinas," and that the questions he puts "are not often asked in contemporary discussions of constitutional theory." [FN175] His springboard is Aquinas's statement that "only" a just law "creates an obligation that is binding in conscience on the individual." [FN176] Of course, Barnett does not expect the individual to decide for himself whether a given law is to be obeyed, for that way lies anarchy. True to his faith in judicial wisdom, he anticipates that what is "just" will be filtered through the mind of a judge. [FN177] But as John Hart Ely noted, at the end of every search for the

values of the community--still more for a universal criterion--what the judge is "really . . . 'discovering' . . . are his own values." [FN178] If, moreover, an unjust but constitutional law is not binding on the individual, it is not binding on a judge, thus absolving him from his oath to "support" the Constitution when he finds it incompatible with his conscience.

The "modern conception of legal legitimacy," Barnett indicates, is illustrated by the debate between H.L.A. Hart and Lon Fuller, who "operate ***1533** within Aquinas's framework, though they tend to emphasize one or two of his criteria and to deny or disparage the pertinence of those that are omitted." [FN179] This debate shows that like lawyers, philosophers are divided over fundamentals. [FN180] To add the task of resolving competing philosophical differences to the labors of constitutional construction is to compound confusion. Lawyers, as Bacon counselled, are better employed with existing law. [FN181] The Founders were aware that there could be a disparity between what was just and what was constitutional. Thus, James Wilson, second only to Madison as architect of the Constitution, arguing that Justices should be associated with the President in exercise of the veto, urged in the Convention, "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." [FN182] Nevertheless judges were excluded. [FN183] Subsequently, Chief Justice Marshall cautioned, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." [FN184]

Ours, the Declaration of Independence declared, is a government that derives its powers from "the consent of the governed." That consent was given by the Ratification Conventions. James Iredell emphasized, "The people have chosen to be governed under such and such principles. They have not chosen to be governed, or promised to submit upon any other," [FN185] certainly not those of Aquinas. [FN186] Believing with Justice Iredell ***1534** that "the ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject," [FN187] and with Bacon that lawyers are better employed with existing law than with philosophers' "imaginary laws," [FN188] I am not disposed to follow Barnett's labyrinthine philo-jural justification for testing the Constitution and the laws enacted thereunder by Aquinas's criteria.

VI. Conclusion

The second half of the twentieth century has seen judges act as the instrument of massive social change, e.g., the desegregation and reapportionment decisions. Pressing onward, Charles Black perceives the Ninth Amendment as a means of making welfare an "entitlement"--be the strain on the finite resources of a state what they may. [FN189] In the same generous spirit, Barnett would have judges determine whether it is "really necessary" to limit the number of taxicabs in a municipality, or to condition practice as a beautician on examinations of chemistry, or to criminalize the sale of intoxicating substances, postulating that the privileges of driving a taxicab or selling intoxicating substances are "rightful liberties." [FN190] These are matters of policy, traditionally the legislative province. The Framers excluded judges from determinations of policy, [FN191] and even more plainly reserved to the states control over local matters, reflecting the general belief that the states are better fitted to deal with internal matters, and that the interests of the community rise above those of the individual.

***1535** Activating the Ninth Amendment, Levinson observes, implicates "a radical revisioning of our constitutional history" [FN192] and, I would add, of our Constitution. Barnett's arguments in that behalf seem to me arcane, overlooking Story's caution:

Constitutions are not designed for metaphysical or logical subtleties . . . or for elaborate shades of meaning. . . . The people make them . . . and must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or extraordinary

gloss. [FN193] So read, we may not ignore the difference on the face of the Amendment between rights that are "enumerated" and thereby incorporated in the Constitution with its machinery for judicial enforcement, and the "other rights" retained by the people. To retain is to keep; hence the retained unenumerated rights were not embodied in the Constitution and are therefore outside the federal jurisdiction altogether. That reading is confirmed by the legislative history, and it is commended by Occam's razor: the simpler explanation is to be preferred to the more complex.

Addendum

Barnett overlooks the impact of recent Supreme Court comments on his "presumption of liberty." First, the Court reminded us that the core of "liberty" is freedom from bodily restraint. [FN194] And Justice Scalia stressed, "Without that core textual meaning as a limitation , defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.' " [FN195] Second, when rights have been claimed as "fundamental," the Court has insisted that they "be an interest traditionally protected by our society." [FN196] If the claim is novel, its "mere novelty . . . is reason enough to doubt that 'substantive due process' sustains it." [FN197] Third, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible ***1536** decisionmaking in this uncharted area are scarce and open-ended." [FN198] These considerations are even more compelling when claimants invoke the amorphous "rights retained by the people" under the Ninth Amendment.

FNa. B.A. University of Cincinnati, 1932; J.D. Northwestern University, 1935; LL.M. Harvard University, 1938; LL.D. University of Cincinnati, 1975; LL.D. University of Michigan, 1978; LL.D. Northwestern University, 1988.

FN1. Randy E. Barnett, Introduction to 2 The Rights Retained by the People 1, 44 (Randy E. Barnett ed., 1993) hereinafter Rights Retained . The "challenge" of the Ninth Amendment "has proved too much for most judges and constitutional scholars." Id. at 10.

Additional facets of the Ninth Amendment debate not discussed here can be found in Raoul Berger, The Ninth Amendment: The Beckoning Mirage, 42 Rutgers L. Rev. 951 (1990), reprinted in 2 Rights Retained , supra, at 297.

FN2. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). In the legislative chaplain case, Marsh v. Chambers, 463 U.S. 783 (1983) (upholding constitutionality of commencing state legislature sessions with prayer), the Court stated that a practice that "has continued without interruption ever since the earliest session of Congress" does not violate the First Amendment. Id. at 788.

FN3. Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi.-Kent L. Rev. 131 (1988), reprinted in 2 Rights Retained , supra note 1, at 115, 146.

FN4. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

FN5. Id. at 492. The activist constitutional historian Alfred H. Kelly said at the time that Justice Goldberg's concurrence with its " 'astonishing resuscitation of the Ninth Amendment' was a 'curious mixture of law-office history and vaulting legal logic.... It assumes that history can be written to serve the interests of libertarian idealism.' " Gary McDowell, The Politics of Original Intention, in The Constitution, the Courts, and the Quest for Justice 1, 11 (Robert A. Goldwin & William A. Schambra eds., 1989) (quoting Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 150, 157). Levinson wrote that "Goldberg's reference to the ninth amendment for many, I suspect, simply corroborated the suspicion that he was basically a liberal ideologue and certainly not the very model of a careful lawyer." Levinson, supra note 3, at 117-18.

FN6. Levinson, supra note 3, at 128.

FN7. Andrzej Rapaczynski, The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation, 64 Chi.-Kent L. Rev. 177 (1988), reprinted in 2 Rights Retained , supra note 1, at 163, 172 n.20.

FN8. Barnett, supra note 1, at 4.

FN9. "This philosophic enterprise has acquired very great prestige in the law schools. Those who pursue it discourse learnedly, or appear to do so for all the rest of us can tell, about utilitarianism, contractarianism, hermeneutics, Mill, Marx, Derrida, Habermas, positivism, Rawls, Nozick, and so on until working lawyers and judges can only despair in the knowledge that they will never have time to master the materials of the argument." Robert Bork, Foreword to Gary L. McDowell, The Constitution and Contemporary Constitutional Theory at v, vi (1985).

FN10. Rapaczynski, supra note 7, at 176.

FN11. Randy E. Barnett, The Ninth Amendment and Constitutional Legitimacy, 64 Chi.-Kent L. Rev. 37, reprinted in 2 Rights Retained , supra note 1, at 391, 405.

FN12. Bork, supra note 9, at vi.

FN13. 1 Ephraim London, The World of Law at xvi (1960) (quoting Francis Bacon).

FN14. Levinson, supra note 3, at 146.

FN15. Barnett, supra note 1, at 10, 12.

FN16. Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting); see id. at 527 (Stewart, J., dissenting).

FN17. U.S. Const. amend. IX (emphasis added). Thomas Hartley referred in the Pennsylvania Ratification Convention, November 30, 1787, to the maxim that whatever "rights we did not transfer to the government were still reserved and retained by the people." Pennsylvania and the Federal Constitution 1787-1788, at 290-91 (John Bach McMaster & Frederick D. Stone eds.) (Lancaster, Pa., Inquirer Printing & Publishing 1888). In a letter to Jefferson, Madison favored a Bill of Rights "so framed as not to imply powers not meant to be included in the enumeration." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 The Bill of Rights: A Documentary History 614, 615 (Bernard Schwartz ed., 1971).

It has been urged that the injunction not to "deny or disparage" contemplates judicial enforcement. Stephen Macedo, Originalism and the Inescapability of Politics, 84 Nw. U. L. Rev. 1203, 1208 (1990) ("To treat ninth amendment constitutional rights as uniquely unenforceable by judges is precisely to 'disparage' these rights in violation of the amendment itself."). However, one who may not deny or disparage is not thereby empowered to enforce. In DeShaney v. Winnebago County, 489 U.S. 189 (1989), Chief Justice Rehnquist stated that the prohibition against deprivation of life, liberty, and property without due process does not "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id. at 195.

FN18. 1 Annals of Cong. 454 (Gales & Seaton eds., 1834) (emphasis added).

FN19. Id. at 456 (emphasis added). Justice Story wrote that the Ninth Amendment "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." Joseph Story, Commentaries on the Constitution of the United States s 1007 (photo. reprint 1987) (1833).

FN20. Griswold, 381 U.S. at 519 (Black, J., dissenting) (quoting 1 Annals of Cong. , supra note 18, at 456).

FN21. "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," that is, as declaratory of existing limitations. 1 Annals of Cong. supra note 18, at 452.

FN22. Even Laurence Tribe, whose fertile imagination enables him to toss off novel theories for libertarian goals, "points out the impossibility of viewing the Ninth Amendment as the source of rights." Levinson, supra note 3, at 126 (citing Laurence Tribe, Contrasting Constitutional Visions: Of Real and Unreal Differences, 25 Harv. C.R.-C.L. L. Rev. 95, 107 (1987)).

FN23. Barnett, supra note 1, at 4.

FN24. Funk & Wagnall's Desk Standard Dictionary (rev. ed. 1946).

FN25. Barnett, supra note 1, at 4 (emphasis added). Levinson goes further: "For a constitutional interpreter to say, as both Justice Black and Judge Bork have done, that the set of enforceable constitutional rights is limited to those specified in the text is ... precisely to defy the Ninth Amendment by denying that there are other rights retained by the people." Levinson, supra note 3, at 127. Undeniably the people have retained "unenumerated" rights; that is not the question. The issue is whether the Ninth Amendment confided enforcement of the retained rights to the judiciary. The claim that it did cannot rest on bare assertion.

FN26. Barnett has some odd notions about the relation of people to their states: the fact that "most state constitutions contain provisions identical to the Ninth Amendment" belies the "thought that the people have surrendered all their rights to State governments." Barnett, supra note 1, at 12. Unlike the federal government, which possesses only delegated powers, the state governments were given "plenary powers," which "required the prohibitions of bills of rights and the like to withhold certain powers from the states." Levinson, supra note 3, at 125. To surrender is to relinquish, whereas even plenary powers are subject to revocation by the principal. No delegation to an agent, unless expressly irrevocable, deprives the principal of power to terminate the agency and take back the delegated power. It needed no exception from the plenary power to rebut an implication of surrender; what was excepted simply was withdrawn.

FN27. Barnett, supra note 1, at 8, 9.

FN28. Id. at 7.

FN29. Id. at 9 n.31.

FN30. Oxford Universal Dictionary (3d ed. 1947).

FN31. Id.

FN32. Barnett, supra note 11, at 412. "Absent a cognizable body of rights, the justification for judicial review is all but conclusively dissipated." Lawrence G. Sager, Rights Skepticism and Process-Based Responses, 56 N.Y.U. L. Rev. 417, 420 (1981). Sir William Holdsworth "continually insisted ... that when people in the seventeenth century talked about fundamental rights or laws they meant the rights which the existing law gave them." J. W. Gough , Fundamental Law in English Constitutional History 39 n.3 (1955). The Founders looked to seventeenth-century England for guidance.

FN33. Creating the Bill of Rights: The Documentary Record from the First Federal Congress 152 (Helen E. Veit et al. eds., 1991) hereinafter Documentary Record (statement of James Madison during Aug. 15, 1789 House of

Representatives committee session, reported in The Daily Advertiser , Aug. 17, 1789).

FN34. Barnett, supra note 1, at 10 n.32.

FN35. Charles A. Keigwin, Cases in Common Law Pleading 6, 11 (2d ed. 1934).

FN36. Id. at 26, 159.

FN37. Lord Ellsmere declared in the Earl of Oxford's Case that "our Books are, That the Acts and Statutes of Parliament ought to be revers'd by Parliament (only), and not otherwise." 21 Eng. Rep. 485, 488 (1615). Chief Justice Thomas Cooley stated that "there can be no such steady and imperceptible change in their constitution's rules as inheres in the principles of the common law." Thomas Cooley, Constitutional Limitations 88 (Victor H. Lane ed., 7th ed. 1903).

FN38. John Marshall's Defense of McCulloch v. Maryland 209 (Gerald Gunther ed., 1969).

FN39. 5 U.S. (1 Cranch) 137, 177 (1803).

FN40. 1 William Blackstone, Commentaries *45. For Blackstone, "law" is "a rule of civil conduct" couched in terms of "thou shalt, or shall not," wherefore "law is defined to be 'a rule.' " Id. at *44-45. "Law" is defined as "rules or injunctions that must be obeyed." Oxford Universal Dictionary (3d ed. 1947). Oxford defines "rule" as "a regulation or maxim governing conduct," id., Bouvier's Law Dictionary as "a regulation or formula to which conduct must be conformed," Bouvier's Law Dictionary 1078 (William E. Baldwin ed., 1946).

FN41. Barnett, supra note 1, at 19.

FN42. Id. at 22 (second emphasis added) (footnote omitted).

FN43. Id.

FN44. 3 The Records of the Federal Convention of 1787 , at 51 (Max Farrand ed., rev. ed. 1966) hereinafter Records of the Federal Convention . Madison wrote in 1788 that " 'a spirit of locality' permeates American politics." Gordon S. Wood, The Creation of the American Republic 1776-1787 , at 195 (1969). For additional citations, see Raoul Berger, Federalism: The Founders' Design 50 n.8 (1987).

FN45. William P. Murphy, The Triumph of Nationalism: State Sovereignty, the Founding Fathers and the Making of the Constitution 359 (1967).

In the Convention Oliver Ellsworth said, "What he wanted was domestic happiness. The Natl. Govt. could not descend to the local objects on which this depended .... He turned his eyes therefore for the preservation of his rights to the State Govts." 1 Records of the Federal Convention , supra note 44, at 492. Madison recognized the "great objection" that "the Genl. Govt. could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions." Id. at 357.

Hamilton pointed out that the Constitution was "merely intended to regulate the general political interests of the nation," rather than "every species of personal and private concerns." The Federalist No. 84, at 559 (Alexander Hamilton) (Modern Library ed., 1937) hereinafter all citations to The Federalist are to this edition.

In a letter to Elbridge Gerry, August 22, 1789, Samuel Adams referred to "the distinct Sovereignty of the several States upon which the private and personal Rights of the Citizens depend." Documentary Record , supra note 33, at 285.

FN46. Joseph Story , Commentaries on the Constitution of the United States s 957 (Melville E. Bigelow ed., 5th ed., Boston, Little, Brown & Co. 1891).

FN47. Richard Posner, The Federal Courts: Crisis and Reform 194-95 (1985).

FN48. Supra text accompanying notes 44-46.

FN49. Felix Frankfurter, John Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 226 (1955).

FN50. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

FN51. The Federalist No. 40, at 255 (James Madison).

FN52. H. Jefferson Powell, The Modern Misunderstanding of Original Intent, 54 U. Chi. L. Rev. 1511, 1537 (1987) (book review).

FN53. 1 James Wilson , Works of James Wilson 292-93 (Robert G. McCloskey ed., 1967) (1804).

FN54. Wood , supra note 44, at 298.

FN55. The Federalist No. 78, at 504 n.* (Alexander Hamilton) (quoting Montesquieu , 1 Spirit of Laws 186).

FN56. Randy E. Barnett, Reconceiving the Ninth Amendment, 74 Cornell L. Rev. 1, 2, 6-8 (1988).

FN57. 1 Annals of Cong. . supra note 21.

FN58. Roscoe Pound, Introduction to Bennett B. Patterson, The Forgotten Ninth Amendment at iii, iv (1955).

FN59. Wood , supra note 44, at 63; see also Berger, supra note 1, at 299 n.18.

FN60. Alpheus T. Mason, Victory and Defeat 1787-1790, in The States Rights Debate: Antifederalism and the Constitution 69, 78 (Alpheus T. Mason ed., 2d ed. 1972). For citations to Patrick Henry, see Berger, supra note 1, at 299 n.18.

FN61. Louis Henkin, Human Dignity and Constitutional Rights, in The Constitution of Rights 210, 213 (Michael J. Meyer & William A. Parent eds., 1992). "The underlying assumption" of the Virginia Convention of 1776 "is that the rights of the individual have nothing to fear from majority rule exercised through legislative assemblies...." Edward S. Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 365, 403-04 (1929); see supra text accompanying note 45.

FN62. Zechariah Chafee, Jr., Three Human Rights in the Constitution of 1787 , at 90 (1956).

FN63. The Federalist No. 84, at 556 (Alexander Hamilton).

FN64. 1 Annals of Cong. , supra note 18, at 452 (emphases added).

FN65. Id. at 450 (emphasis added).

FN66. Id. at 457 (emphases added). Barnett concedes, "Although this passage is consistent with Berger's account it hardly compels it." Randy E. Barnett, Introduction to 1 The Rights Retained by the People 1, 23 (Randy E. Barnett ed., 1989). He overlooks Madison's adherence to the maxim that the enumerated excludes the unmentioned. See The Federalist No. 41, at 268-69 (James Madison). Such niceties are not for Barnett, who remarks, "The presumption of

liberty simply extends the protection afforded to the ... enumerated rights, to the unenumerated freedoms retained by the people." Barnett, supra note 1, at 27 (emphasis added).

FN67. Barnett, supra note 1, at 43 n.148 (quoting Berger, supra note 1, at 318).

FN68. The Federalist No. 39, at 249 (James Madison) (emphasis added).

FN69. The Federalist No. 83, at 541 (Alexander Hamilton).

FN70. Barnett, supra note 1, at 4 (quoting 1 Annals of Cong. , supra note 18, at 452).

FN71. Id. at 37.

FN72. Barnett, supra note 1, at 4 (quoting 1 Annals of Cong. , supra note 18, at 452).

FN73. 3 The Debates in the Several State Conventions on the Adoption of the Constitution 448 (Jonathan Elliot ed., B. Franklin 1974) (1836) hereinafter Elliot .

FN74. Id. at 266.

FN75. 2 Elliot , supra note 72, at 153.

FN76. Barnett, supra note 1, at 37 n.127 (quoting 1 Annals of Cong. , supra note 18, at 458-59).

FN77. Id. at 31 (quoting 1 Annals of Cong. , supra note 18, at 1898).

FN78. See text accompanying notes 52 and 55.

FN79. The Federalist No. 83, at 541 (Alexander Hamilton) (emphasis added).

FN80. Barnett, supra note 1, at 12.

FN81. Id.

FN82. United States v. Wheeler, 254 U.S. 281, 296 (1920) (quoting The Slaughter-House Cases, 86 U.S. (16 Wall. 36, 75) (1872)).

FN83. In The Federalist No. 41 , Madison asked, "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general powers?" The Federalist No. 41, at 269 (James Madison). Daniel Webster considered that Article IV put it beyond the power of any state to bar entry "for the purposes of trade, commerce, buying and selling." H.R. Rep. No. 22, 41st Cong., 3d Sess. 2 (1871) (quoting Daniel Webster), reprinted in The Reconstruction Amendments' Debates 466 (Virginia Commission of Constitutional Government, 1967) hereinafter Reconstruction Debates .

FN84. See Campbell v. Morris, 3 H. & McH. 535, 553-54 (Md. 1797) (stating that "one of the great objects" of the Privileges and Immunities Clause was to enable citizens "to acquire and hold real property in any of the states"); Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 91 (1827) (describing the privileges and immunities of citizens as to "take and hold real estate" in any state). For a discussion of Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), a well-known attempt to define privileges and immunities, see Raoul Berger, Bruce Ackerman on Interpretation, 1992 B.Y.U. L. Rev. 1035, 1044-46.

FN85. Wheeler, 254 U.S. at 294 (emphasis added).

FN86. Cong. Globe , 39th Cong., 1st Sess. 475 (1866), reprinted in Reconstruction Debates , supra note 81, at 122.

FN87. Cong. Globe , supra note 84, at 1291, 1293, reprinted in Reconstruction Debates , supra note 81, at 186, 188 (emphases added).

FN88. Cong. Globe , supra note 84, at 1367, reprinted in Reconstruction Debates , supra note 81, at 191.

FN89. Id.

FN90. Georgia v. Rachel, 384 U.S. 780, 791 (1966).

FN91. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96 (1872) (Field, J., dissenting).

FN92. After reading from the cases to the Senate, Trumbull said that "this is the construction as settled by judicial decisions." Cong. Globe , supra note 84, at 475, reprinted in Reconstruction Debates , supra note 81, at 122. Judge William Lawrence acknowledged in the House "that the courts have by construction limited the words 'all privileges' to mean only 'some privileges.' " Cong. Globe , supra note 84, reprinted in Reconstruction Debates , supra note 81, at 207. An activist critic of my view stated that Berger "amply demonstrates" that privileges and immunities were words of art. Walter F. Murphy, Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?, 87 Yale L.J. 1752, 1759 (1978).

FN93. H.R. Rep. No. 22, supra note 81, reprinted in Reconstruction Debates , supra note 81, at 466 (emphasis added). In addition, several years earlier Senator Luke Poland said that the Privileges and Immunities Clause "secures nothing beyond what was intended by the original provision in the Constitution." Cong. Globe , supra note 84, at 2961, reprinted in Reconstruction Debates , supra note 81, at 230.

FN94. Maxwell v. Dow, 176 U.S. 581, 596 (1900). Robert Bork remarked that the Privileges and Immunities Clause "has been a mystery since its adoption." Barnett, supra note 1, at 21 n.56 (quoting Robert H. Bork , The Tempting of America 166 (1990)). Perusal of its history will dispel the mystery.

Sanford Levinson considers that "it is not very difficult to show that the notion 'of privileges or immunities of United States citizenship' could well comprehend the unenumerated rights protected against (at least) national interference by the Ninth Amendment." Levinson, supra note 3, at 130. The history summarized above refutes this assertion. Levinson prefers the authority of Michael Kent Curtis, id. at 131, notwithstanding that my The Fourteenth Amendment and the Bill of Rights (1989) refuted Curtis point by point. Commenting on that refutation, Forrest McDonald wrote, it is "utterly devastating." Forrest McDonald, How the Fourteenth Amendment Repealed the Constitution, Chronicles , Oct. 1989, at 29, 31 (book review). I invite Levinson to plunge his hands into the grubby facts and to frame a similar rebuttal of that history.

FN95. Barnett, supra note 1, at 6.

FN96. Id. at 5. Barnett dwells on Roger Sherman's "significant" statement, "The people have certain natural rights which are retained by them when they enter into society." Id. at 5, 35. This statement is contained in a " draft of a bill of rights," id. at 5 (emphasis added); until the proposed draft was enacted, those rights were of course "retained by the people" as distinguished from those enumerated in the Constitution. As Justice John McClean wrote in Miller v. McQuerry, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (No. 9583), "It is for the people ... in making constitutions, and in the enactment of laws, to consider the laws of nature .... This is a field which judges can not explore."

Sherman's remark should be viewed in light of Randolph's statement in the Convention:

A display of theory, howsoever proper in the first formation of state governments, ... is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and ...

interwoven with what we call ... the rights of the states. 2 Records of the Federal Convention , supra note 44, at 137. "Tacitly," wrote Louis Henkin, "framers of constitutions and bills of rights distinguished between natural rights that preexisted society and civil rights enjoyed in society." Henkin, supra note 61, at 217.

FN97. Barnett, supra note 1, at 8.

FN98. See Brown v. Board of Educ., 347 U.S. 483 (1954).

FN99. Kelly, supra note 5, at 154-55.

FN100. Levinson, supra note 3, at 125.

FN101. 1 Blackstone , supra note 40, at *117, 125, 130, 134.

FN102. 2 Wilson , supra note 53, at 588, 592, 608. A similar list is contained in the Amendments proposed by the Virginia Convention on June 27, 1788. Documentary Record , supra note 33, at 17.

FN103. Cong. Globe , supra note 84, reprinted in Reconstruction Debates , supra note 81, at 164.

FN104. Barnett, supra note 1, at 8.

FN105. Benjamin F. Wright, Jr., American Interpretations of Natural Law 125 (Russell & Russell, Inc. 1962) (1931).

FN106. Barnett, supra note 56, at 32. The examples are:

1. The right to retain American citizenship, despite even criminal activities, until explicitly and voluntarily renouncing it;

2. The right to receive equal protection not only from the states but also from the federal government;

3. The right to vote, subject only to reasonable restrictions to prevent fraud, and to cast a ballot equal in weight to those of other citizens;

4. The right to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime;

5. The right to use the federal courts and other governmental institutions and to urge others to use these processes to protect their interests;

6. The right to associate with others;

7. The right to enjoy a zone of privacy;

8. The right to travel within the United States;

9. The right to marry or not to marry;

10. The right to make one's own choice about having children;

11. The right to educate one's children as long as one meets certain minimum standards set by the state;

12. The right to choose and follow a profession;

13. The right to attend and report on criminal trials. Id. at 32 n.106.

FN107. Barnett, supra note 11, at 409 (reprinting list and citing allegedly supporting cases).

FN108. 347 U.S. 497 (1954).

FN109. Barnett, supra note 56, at 41.

FN110. John H. Ely, Democracy and Distrust 32 (1980).

FN111. Levinson considers that "there is no satisfactory theory ... that explains the imposition on 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." Thomas C. Grey, The Uses of an Unwritten Constitution, 64 Chi.-Kent L. Rev. 211, 230 (1988), reprinted in 2 Rights Retained , supra note 1, at 199, 220. And Sager is greatly troubled by the "baldly prochonistic doctrine that the due process clause of the fifth amendment incorporates the principles which underlie the equal protection clause (ratified roughly 100 years later)." 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, 262 (1988), reprinted in 2 Rights Retained , supra note 1, at 229, 254.

Grey justly emphasized, "Activist judicial review that proceeds without taking account of the popular view of the importance of writings lacks the consent of the governed." Grey, supra. Nevertheless, Barnett asserts, "Few would contest that such an unenumerated right should be used to prevent the segregation of public schools in the District of Columbia." Barnett, supra note 11, at 410. Bother the Constitution if the result is commendable. Questions of power and jurisdiction are passze.

FN112. Senator Jacob Howard, to whom it fell to explain the Fourteenth Amendment to the Senate in 1866, 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. Cong. Globe , supra note 84, at 3039, reprinted in Reconstruction Debates , supra note 81, at 237.

FN113. Art. of Confederation art. IV, reprinted in 1 Documents of American History 111 (Henry S. Commager ed., 9th ed. 1973).

FN114. Max Radin, Handbook of Anglo-American History 229 (1936).

FN115. Barnett, supra note 56, at 33.

FN116. 5 U.S. (1 Cranch) 137, 176 (1803).

FN117. Id. at 177.

FN118. Id. at 180.

FN119. 3 U.S. (3 Dall.) 386 (1798).

FN120. Id. at 399.

FN121. 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

FN122. Id. at 779 (emphases added).

FN123. Joseph Story , 1 Commentaries on Equity Jurisprudence s 19 (W.H. Lyon, Jr. ed., 14th ed. 1918) (1835).

FN124. The Federalist No. 78, at 506 (Alexander Hamilton).

FN125. See text accompanying note 112.

FN126. Robert M. Cover, Justice Accused 34 (1975).

FN127. No matter; "history may well mark the turning point for popular acceptance of natural rights theory," Barnett tells us, "to be Senator Joseph Biden's opening statement during the Clarence 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." Barnett, supra note 1, at 44. Of "which version" was there popular acceptance? Does a dictum from Senator Biden rise above the supreme law of the land?

FN128. Id. at 10 (emphasis added). "Rightful conduct" needs no presumption; it can rely on the common law, which apparently suffices for "others." Only the common law rights of "others" are to be free of violation by Barnett's claimants, whereas the claimants are "immune" from governmental interference across a much broader, undefined spectrum. Why are their infringements of "others' " rights presumably permissible beyond the common law boundaries, whereas governmental action beyond those boundaries confronts a presumptive immunity of the claimants? Action in the collective interest should have a greater claim to "immunity" than private actions.

FN129. Id. at 13, 24.

FN130. Id. at 17, 27.

FN131. 1 Blackstone , supra note 40, at *130. George Carey points out that the placement of the Due Process Clause "among other provisions relating to trials and prosecutions" would "strongly support the proposition that the 'liberty' protected by the fifth amendment was a personal liberty that conformed with Blackstone's definition." George W. Carey, Liberty and the Fifth Amendment: Original Intent, 4 Benchmark 301, 319 (1990).

FN132. Cong. Globe , supra note 84, reprinted in Reconstruction Debates , supra note 81, at 164.

FN133. 198 U.S. 45 (1905).

FN134. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989).

FN135. Wood , supra note 44, at 63.

FN136. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 71 (1985). John Dickinson said that a " people is travelling fast to destruction, when individuals consider their interests as distinct from those of the public." Wood , supra note 44, at 61 n.30; see Corwin, supra note 61, at 403-04.

FN137. United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947).

FN138. Barnett, supra note 1, at 32 n.108.

FN139. Madison's speech is reprinted in 2 Rights Retained , supra note 1, at app. A hereinafter Bank Speech.

FN140. Id. at 420.

FN141. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (quoting James Kent , Commentaries *340).

FN142. Barnett, supra note 1, at 24. He also requires a showing that the government's motives are "proper." Courts will not inquire into the motives of a legislature. Helvering v. Griffiths, 318 U.S. 371, 401-02 (1943) (refusing to weigh the "political factors which may have motivated" Congress).

FN143. Barnett, supra note 1, at 11.

FN144. For such claims, see Raoul Berger, The Ninth Amendment, 66 Cornell L. Rev. 1, 1-2 (1980).

Barnett furnishes a clue to the sort of claims he favors, claims that would substitute judicial for legislative choice:

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? ... 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? Barnett, supra note 1, at 17. Legislatures, it is generally accepted, are better judges of such matters than courts.

The notion that every person has the "liberty" to sell harmful drugs verges on the absurd. Barnett himself notes that "judicial review is not a panacea for protecting liberty." Id. at 18. Chief Justice Marshall stated that "the constitution ... was not intended to furnish the corrective for every abuse of power which may be committed by the state governments." Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830).

FN145. Barnett, supra note 1, at 10.

FN146. See supra text accompanying notes 45-49.

FN147. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

FN148. Posner , supra note 47, at 194-95.

FN149. Barnett, supra note 1, at 10.

FN150. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 139 (1837). In the Pennsylvania Ratification Convention, John Smilie apparently quoted from the Pennsylvania Constitution: "That the people of this state have the sole, exclusive and inherent right of ... regulating the internal police of the same." Pennsylvania and the Federal Constitution , supra note 17, at 250.

FN151. License Cases, 46 U.S. (5 How.) 504, 573, 583 (1847). Referring to the debates in the first Congress on the First Amendment, Michael McConnell wrote that "the framers of the Constitution and Bill of Rights believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government. It is thus no accident that the 'police power'--the protection of public health, safety and morals--was left to the states." Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1506 (1987).

FN152. 83 U.S. (16 Wall.) 36, 62 (1872) (quoting James Kent , 2 Commentaries *340).

FN153. Barnett, supra note 1, at 10 n.33. "Wide latitude," "unqualified authority," dispense with Barnett's call for "a definition of the unenumerated 'police powers.' " Where is his call for a "definition" of the "unenumerated" retained rights, the unenumerated "liberties"? He assumes that his call "is akin to the problem of defining legitimate regulation of liberty," overlooking that the Court has long confirmed the "unqualified" police power, whereas there is no authority

for unqualified liberty. The latter is at war with Blackstone's restricted definition cited to the Reconstruction Congress. See supra text accompanying notes 126-27.

FN154. Barbier v. Connolly, 113 U.S. 27, 31 (1885).

FN155. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

FN156. Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544-45 (1954).

FN157. Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) (emphasis added) (quoting Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

FN158. Control of a branch's discretion lies beyond the judicial function. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803); see also Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840).

FN159. Barnett, supra note 1, at 6 (quoting 1 Annals of Cong. , supra note 21, at 456).

FN160. Id. at 42.

FN161. See text accompanying notes 52 and 55.

FN162. "An analysis that supports judicial review of legislative interference with enumerated rights while denying equal judicial protection to unenumerated rights is inherently suspect." Barnett, supra note 56, at 21.

FN163. Barnett, supra note 1, at 43.

FN164. If the government was "not to act" with regard to the enumerated rights--"exceptions" to the earlier grants of power, supra text accompanying note 18--still less was it to act in the area of "retained" rights.

FN165. See supra text accompanying note 45. Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." Myers v. United States, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting).

FN166. Bank Speech, supra note 134.

FN167. Barnett, supra note 1, at 30.

FN168. Bank Speech, supra note 134, at 422, 424, 425.

FN169. Barnett, supra note 1, at 31 (emphasis added).

FN170. Id. at 30.

FN171. Bank Speech, supra note 134, at 419.

FN172. Id. at 425.

FN173. Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 234 (1980) (quoting Sanford Levinson, "The Constitution" in American Civil Religion, 1979 Sup. Ct. Rev. 123).

FN174. Barnett, supra note 11, at 391.

FN175. Id. at 391, 392.

FN176. Id. at 392. The Ninth Amendment, Barnett opines, is relevant because a process that "also considered unenumerated rights" would be more "likely to result in legislation that satisfies the substantive criteria of legitimacy." Id. at 407.

FN177. Id. at 403. Shortly before he was appointed to the Supreme Court, Solicitor General Robert H. Jackson wrote that "time has proved that the Court's judgment was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches." Robert H. Jackson, The Struggle for Judicial Supremacy at x (1941). His stricture was confirmed by respected scholars. Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 292-93 (1957); James M. Burns, Dictatorship: Could It Happen Here?, in Has the President Too Much Power? 234, 236 (Charles Roberts ed., 1974). For a scathing comment on the pre-1937 Court, see Henry S. Commager, Judicial Review and Democracy, 19 Va. Q. Rev. 417, 428 (1943).

Barnett's rosy reliance on broad judicial discretion was not shared by Lord Camden: "Judicial discretion is 'the law of tyrants.' " McGautha v. California, 402 U.S. 183, 285 (1971) (Brennan, J., dissenting) (quoting Lord Camden). In 1767, Chief Justice Hutchinson of Massachusetts said that " the Judge should never be the Legislator: Because, then the Will of the Judge would be the Law: and this tends to a State of Slavery." Morton J. Horwitz, The Emergence of an Instrumental Conception of American Law, 1780-1820, in 5 Perspectives in American History 287, 292 (Donald Fleming & Bernard Bailyn eds., 1971) (quoting Charge to the Grand Jury, Quincy's Mass. Rep. 234-35 (1767)).

FN178. John H. Ely, The Supreme Court, 1977 Term--Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5, 16 (1978).

FN179. Barnett, supra note 11, at 394-95. This debate took place in the late 1950s.

FN180. The English philosopher G.E. Moore wrote, " 'Philosophical questions are so difficult, the problems they raise so complex, that no one can fairly expect, now, any more than in the past, to win more than a very limited assent.' " Robert Skidelsky , 1 John Maynard Keynes: Hopes Betrayed, 1883-1920 , at 138 (1983) (quoting G.E. Moore, Principia Ethica 76 (1959)). "Good," he considered, "is indefinable because ... it can be shown that any attempt to define it ... breaks down." Id. at 139.

FN181. See supra text accompanying note 13. Barnett notes that under existing law there is a "presumption of constitutionality," Barnett, supra note 1, at 11, and that the "judiciary may nullify legislation only when it concludes that such legislation is unconstitutional." Barnett, supra note 11, at 399.

FN182. 2 Records of the Federal Convention , supra note 44, at 73. Given English antipathy to Catholicism, it should come as no surprise that there is no mention of Aquinas or his views in the records of the Federal Convention, the Ratification Conventions, or The Federalist.

Barnett observes, "A constitution could also incorporate the first of Aquinas's three requirements of legitimacy. A judge would then be authorized to assess whether the substance of a particular legislative act was really 'ordered for the common good.' " Barnett, supra note 11, at 403 (emphases added). His attempt to show that the Constitution "incorporated a substantive dimension of legitimacy," id., is to my mind unconvincing.

FN183. 2 Records of the Federal Convention , supra note 44, at 73-80.

FN184. John Marshall, "A Friend of the Constitution" Essays, in John Marshall's Defense of McCulloch v. Maryland 190-91 (Gerald Gunther ed., 1969).

FN185. 2 Griffith J. McRee, Life and Correspondence of James Iredell 145, 146 (photo. reprint 1949)

(1857).

FN186. Supra note 175.

FN187. Supra text accompanying note 116.

FN188. Supra text accompanying note 13.

FN189. For example, see Raoul Berger, Lawrence Church on the Scope of Judicial Review and Original Intention, 70 N.C. L. Rev. 113, 126-27 (1991).

It comes as no little surprise to learn that Blackstone had stated:

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 and wretched, but he may demand a supply for all the necessities of life, from the more opulent part of the community .... 1 Blackstone , supra note 40, at *127; see also Margaret K. Rosenheim, Shapiro v. Thompson: "The Beggars Are Coming to Town", 1969 Sup. Ct. Rev. 303, 345-46.

FN190. Barnett, supra note 1, at 17.

FN191. 2 Records of the Federal Convention , supra note 44, at 73-80. John Bingham, draftsman of the Fourteenth Amendment, stated that the Court had "dared to descend from its high place in the discussion and decision of purely judicial questions to the settlement of political questions which it has no more right to decide for the American people than has the Court of St. Petersburg." 6 Charles Fairman, History of the Supreme Court of the United States 462 (1971) (quoting Cong. Globe , 40th Cong., 2d Sess. 483 (1868)).

Madison stated that "questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." Veto of Internal Improvement Bill (1817), reprinted in 1 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1789-1897 , at 584, 585 (1899). Dissenting in Hammer v. Dagenhart, 247 U.S. 251, 280 (1918), Justice Holmes stated that "this Court always had disavowed the right to intrude its judgment upon questions of policy or morals."

FN192. Levinson, supra note 3, at 139. Levinson speaks of a "revival" of the Amendment, but furnishes no citation to it prior to that of Justice Goldberg in Griswold. Griswold v. Conneticut, 381 U.S. 479, 486 (1965) (Goldberg, J. concurring). Rapaczynski concludes, "The only (if any) thing the ninth amendment can do ... 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." Rapaczynski, supra note 7, at 164.

FN193. 1 Story , supra note 19, s 451.

FN194. Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992), a belated return to Blackstone's definition. 1 William Blackstone, Commentaries *134.

FN195. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (emphasis added) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

FN196. Id. at 122.

FN197. Reno v. Flores, 113 S. Ct. 1439, 1447 (1993).

FN198. Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992).

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