What Are the Rights Guaranteed by the Ninth Amendment?

This is the essay that won the 1967 Ross Essay Prize of $4,500. The essay contest, conducted annually by the Association on a subject chosen by the Board of Governors, is open to all members of the Association. The subject this year was "Under the Ninth Amendment, What Rights Are the 'Others Retained by the People'?"

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THE CONSTITUTIONAL history of the United States is replete with instances of little litigated constitutional prohibitions on federal or state action suddenly achieving newfound notoriety as a result of a Supreme Court opinion applying or seeking to apply the prohibition to a case at bar. Such has been the history of the constitutional bars against bills of attainder,[1] the imposition of cruel and unusual punishment,[2] and the deprivation by a state of the privileges and immunities of citizens of the United States.[3] Such now, as a result of the recent decision of the Supreme Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), is the story of the Ninth Amendment.

With the single exception of the terse prohibitions of the Eighth Amendment to the Constitution, no Amendment contains fewer words than the declaration of the Ninth Amendment that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." While fewer cases have dealt with the virtually unlitigated Third Amendment, no other of the first ten amendments adopted together in 1791, two years after the Constitution itself was ratified, has provoked as little judicial examination as the Ninth Amendment. Nor has any other amendment been viewed with the same sense of intellectual disquiet that has recently led one scholar to characterize the Ninth Amendment as "almost unfathomable"[4] and Justice Jackson to write that "[T]he Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me."[5]

The Griswold *Opinions*

While the opinions of the Supreme Court in *Griswold* do not provide a solution to Justice Jackson's mystery they do heighten the significance of determining precisely what manner of amendment the Ninth Amendment is and what future it is likely to have. *Griswold* has been much and well discussed in scholarly journals[6] and the space limitations of this essay preclude extensive analysis of certain aspects of the case. However, since *Griswold* is plainly the single most important Supreme Court offering dealing with the Ninth Amendment, it may be useful at this point briefly to summarize the positions taken in the opinions of the Court with respect to the amendment.

Griswold was a seven-to-two decision that a Connecticut statute broadly prohibiting the use of contraceptives was unconstitutional. Justice Douglas's majority opinion, for himself and Justices Clark, Goldberg, Brennan and Chief Justice Warren, held the statute unconstitutional on the basis of "penumbras, formed by emanations"[7] from a number of constitutional amendments which, together, had formed a "zone of privacy"[8] into which Connecticut was not permitted to trespass. The amendments cited in Justice Douglas's opinion were the First, Third, Fourth, Fifth and Ninth. Justice Douglas did not state the relevance of the Ninth Amendment to his conclusion and

1. Art. I, § 9, cl. 3; see *United States* v. *Lovett*, 328 U.S. 303 (1946).
2. Amend. VIII; see *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Robinson* v. *California*, 370 U.S. 660 (1962).
3. Amend. XIV; see *Edwards* v. *California*, 314 U.S. 160 (1941) (concurring opinions of Justices Douglas and Jackson).
4. Dixon, *The Griswold Penumbra*, 64 MICH. L. REV. 197, 205 (1965).
5. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 74-75 (1955).
6. The reader is particularly referred to five comments on *Griswold* published in the December, 1965, issue of the MICHIGAN LAW REVIEW at pages 197-288; see also the entire Spring, 1966, issue of LAW AND CONTEMPORARY PROBLEMS which is devoted to the subject of privacy.
7. 381 U.S. at 484.
8. *Id.* at 485.

merely quoted its text in support of the proposition that "[v]arious guarantees create zones of privacy".[9]

Justice Goldberg concurred in a separate opinion joined in by Chief Justice Warren and Justice Brennan. Dealing solely with the relevance of the Ninth Amendment to the case, the opinion traced the history of adoption of the Ninth Amendment, concluding that "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments".[10] The amendment, Justice Goldberg conceded, was not "an independent source of rights protected from infringement by either the States or the Federal Government";[11] rather, it simply lent "strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments".[12] In Justice Goldberg's opinion "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment".[13] Justice Goldberg thereupon concurred with the majority opinion that Connecticut was barred by the Fourteenth Amendment from infringing the Ninth Amendment right of Mr. Griswold.[14]

Justices Black and Stewart filed separate dissenting opinions each of which maintained that the right of privacy referred to in the opinions of the Justices constituting the majority in *Griswold* was not referred to as such in the Constitution and was therefore unprotected except insofar as the alleged interference therewith violated one of the first eight amendments—a conclusion neither Justice was prepared to reach under the due process clause of the Fourteenth Amendment. Justice Black also stated that "as every student of history knows" the Ninth Amendment was adopted as a limitation of the Federal Government to the powers "granted expressly or by necessary implication".[15] The amendment was thus irrelevant to a case involving a state statute and no more than the due process clause could authorize the Court to "invalidate any legislative act which the judges find irrational, unreasonable or offensive".[16] Justice Stewart argued similarly, stating that the amendment, "like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' *United States* v. *Darby*, 312 U.S. 100, 124"[17] simply makes clear that all rights and powers not delegated to the Federal Government were retained by the people and the states.

Griswold is the focal point of this essay since it is at the same time the most recent Supreme Court case dealing with the Ninth Amendment, the most detailed consideration of the amendment and the most useful framework within which to examine the amendment. As will be seen, it is this author's conclusion that the text and history of adoption of the Ninth Amendment lend general support to the conclusions reached by Justice Goldberg.

Adoption of the Amendment

One of the objections strenuously made by opponents of the newly drafted Constitution being debated in state ratifying conventions in 1787 and 1788 was the absence of a bill of rights such as was contained in the constitutions of several of the states including Virginia, New York, South Carolina and Rhode Island. While the Constitution was ratified without amendments, it was done "only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union"[18] suitable amendments would be introduced and adopted.

Perhaps the leading advocate of the Constitution, as well as its primary draftsman, was James Madison. Shortly after ratification of the Constitution, Madison in 1789 introduced before the House of Representatives twelve proposed amendments drafted to set forth as broadly as was possible the "plain, simple and important"[19] rights retained by the people against any possible claim of Congressional power.

Madison had previously voiced his personal opposition in the Virginia ratifying convention to the addition of a bill of rights to the Federal Constitution.[20] One of the major problems Madison had then noted in the introduction of a bill of rights was the possibility that by its very adoption it might "be implied that everything omitted is given to the general government".[21] Alexander Hamilton, the co-draftsman with Madison and John Jay of the *Federalist Papers*, had made a more refined statement of this argument against the adoption of a bill of rights in the *Federalist* No. 84; James Wilson had stated a variation of this same argument before the Pennsylvania ratifying convention;[22] and in the House of Representatives James Jackson of Georgia, an opponent of the adoption of a bill of rights, stated the argument as follows:

> There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government.[23]

Speaking to the House of Representatives with respect to the objections of individuals such as Hamilton, Wilson and Jackson, Madison answered the charge as follows:

> It has been objected also against a bill of rights, that, by enumerating

9. *Id.* at 484.
10. *Id.* at 488.
11. *Id.* at 492.
12. *Id.* at 493.
13. *Id.* at 499. Mr. Griswold was Executive Director of the Planned Parenthood League of Connecticut, an organization which gave medical advice to married persons as to the prevention of conception; hence the reference to "marital" privacy.
14. Separate concurring opinions of Justices Harlan and White were both framed in more traditional reliance upon the due process clause of the Fourteenth Amendment without reference to or reliance on the Ninth Amendment. See Justice Harlan's extended statement of his views with respect to the due process clauses in *Poe* v. *Ullman*, 367 U.S. 497, 539-555 (1961).
15. 381 U.S. at 520.
16. *Id.* at 511.
17. *Id.* at 529.
18. *O'Neil* v. *Vermont*, 144 U.S. 323, 370 (1892) (dissenting opinion of Mr. Justice Harlan); see ROSSITER, 1787: THE GRAND CONVENTION 302-305 (1966).
19. 1 ANNALS OF CONGRESS 747 (1834) [hereinafter "ANNALS"].
20. See *id.* at 436.
21. 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 626 (1836) [hereinafter "ELLIOT"].
22. 2 ELLIOT 436.
23. 1 ANNALS 442.

particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.[24]

The last clause of the fourth resolution proposed by Madison is now the Ninth Amendment. As drafted and introduced by Madison it read:

> 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.[25]

The proposed language was then amended by the Select Committee appointed to draft the amendments, of which Madison was a member, to read as follows:

> The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.[26]

The words "this Constitution" were then changed to "the Constitution", a comma added after the word "Constitution" and the Ninth Amendment was adopted in its final form. The text of the amendment provoked virtually no debate on the floor of the House, the only recorded suggestion being that of Elbridge Gerry of Massachusetts who moved to substitute the word "impair" for "disparage" on the ground that the latter term was not of "plain import". Mr. Gerry's motion was not seconded and the amendment was therefore adopted as submitted on the floor of the House.[27]

The only other arguably relevant legislative history with respect to the Ninth Amendment occurred eight months before Madison's comment on the floor of the House with respect to the "plausible argument" the Ninth Amendment was designed to meet. In a letter to Jefferson written in October, 1788, Madison had stated that he had never viewed the absence of a bill of rights a material one because, to an extent, the rights in question were reserved by the manner in which federal power was granted and because

> . . . there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience, in particular, if submitted to public definition would be narrowed much more than they are likely to be by an assumed power.[28]

While Madison's second stated reason could be interpreted as an indication that the Ninth Amendment was intended by Madison to encompass rights Madison wished to include but lacked sufficient support to have separately enumerated, later statements by Madison indicate no such intent and the historical record on the whole[29] is clear that the Ninth Amendment was adopted simply to insure, in the felicitous phrase of Professor Dunbar, "that by enumeration of rights in the Constitution *nothing has been lost*; that the rights of the people would have rested on as firm ground without enumeration, because they do not lie within the purview of powers granted to Congress".[30]

Neither the text of the Ninth Amendment, therefore, nor the history of its passage contains any solution to the question of what rights, if any, are retained by the people. Taken together, however, Madison's statements on the floor of the House and the text of the amendment do convincingly demonstrate that Justice Black's conclusion in *Griswold* that "I like my privacy as well as the next one, but I am nonetheless compelled to admit that government has a right to invade it, *unless prohibited by some specific constitutional provision*",[31] cannot be sustained. This is not to say that the Ninth Amendment compels the opposite of the result Justice Black felt "compelled" to accept. It is only to say that the absence of a specific constitutional provision dealing with privacy should not, of itself, have compelled Justice Black to have voted to sustain Connecticut's challenged statute.[32]

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The Ninth and Tenth Amendments

The text and history of the Ninth Amendment also lead to a second conclusion contrary to that of the dissenting Justices in *Griswold*. If accepted, the characterization by Justice Stewart of the Ninth Amendment as "companion" to the Tenth and with it merely declarative of the fact that "all is retained which has not been surrendered"[33] would make the Ninth Amend-

24. *Id.* at 439.
25. *Id.* at 435.
26. *Id.* at 754.
27. *Id.* No records were kept of the Senate debates over adoption of the Bill of Rights.
28. 14 PAPERS OF THOMAS JEFFERSON 18 (Boyd ed. 1958).
29. See Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 823-825 (1966).
30. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 643 (1956). Professor Dunbar's article also makes abundantly clear that the legislative history of the Ninth Amendment is neither more nor less than Madison's views with respect to the problem of enumeration of rights.
31. 381 U.S. at 510 (emphasis added).
32. See, *e.g.*, BICKEL, THE LEAST DANGEROUS BRANCH 99-104 (1962).
33. *United States* v. *Darby*, 312 U.S. 100, 124 (1941).

ment, like the Tenth, merely a truism to be granted no independent weight in the constitutional battles over the exercise of governmental powers. Justice Stewart's argument is, it must be conceded, supported to an extent by prior case law and certain legal authorities. In *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), for example, the Supreme Court in affirming the constitutionality of the Tennessee Valley Authority against contentions based, in part, on the Ninth and Tenth Amendments, first held that the authority to dispose of property constitutionally acquired by the United States had been expressly granted to Congress in Article IV, Section 3 of the Constitution. So holding, the Court then concluded without argument that "the Ninth Amendment . . . in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal government".[34]

Eleven years later in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947), the single most significant pre-*Griswold* case decided by the Supreme Court with respect to the Ninth Amendment, the Court, in a four-to-three decision, upheld the Hatch Act against the argument that it was unconstitutional. After first conceding that the act did constitute "a measure of interference" with the freedom of civil servants under the First, Ninth and Tenth Amendments to act as party officials or workers for the purpose of furthering their own political views, the Court then upheld the act as a reasonable and therefore constitutional restriction. Speaking of the argument made with respect to the Ninth and Tenth Amendments, the Court stated:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. *If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.*[35]

Analogous decisions of lower courts have also explicitly held that if the Federal Government has been granted a power under the Constitution, the Ninth Amendment, no more than the Tenth, can act as a restriction on the power,[36] and the same view has been taken in leading articles regarding the Ninth Amendment.[37]

While Justice Stewart's contention, therefore, is not lacking in support, it appears to confuse the very purposes for which the Ninth and Tenth Amendments were adopted and the subjects with which they deal. The Constitution enumerates no retained state powers. States, pursuant to the Tenth Amendment, retain the residue of powers ungranted to the Federal Government. Nothing in the history of the adoption of the Tenth Amendment, the Supreme Court has said, "suggest[s] that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment. . . . [T]he amendment [does] not depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, 312 U.S. 100, 124 (1941). The conclusion of the Court in *United Public Workers* v. *Mitchell* that if "a granted power is found" in the Federal Government a Tenth Amendment claim of the states or the people must fall would thus appear unexceptionable.

The Ninth Amendment is different. While no retained states' rights are enumerated in the Constitution, many rights retained by the people are enumerated throughout Article I, Section 9 and the first eight amendments. Insofar as the Ninth Amendment was designed to protect against the possibility that the retained rights of the people were insufficiently specified, the amendment suggests—as the Tenth does not—that certain reserved rights may override certain broadly granted federal powers.

On some occasions, there can be no quarrel with Justice Stewart's argument that federal power should be deemed to overcome retained rights under the Ninth Amendment. Surely, for example, if the Constitution explicitly empowered Congress to prohibit the use of contraceptives, the Ninth Amendment would be of little avail to the litigant maintaining that his right of marital privacy had been invaded by such a statute. Where such explicit power has not been granted, however, the Ninth Amendment—like the first eight amendments—has a positive role to play and may lead to the conclusion that Congress's powers are not as broad as are claimed.

In this respect, consideration of Congress's power "to lay and collect" taxes[38] together with its concomitant power "to make all laws which shall be necessary and proper"[39] to effectuate the taxing power is instructive. Toward the outset of the debates in the House with respect to the adoption of a bill of rights, Madison, a staunch opponent of efforts to limit the powers of the Federal Government to those "expressly" stated in the Constitution,[40] made perfectly clear his view that the power to tax should be subject to what ultimately was adopted as a portion of the Fourth Amendment.

"The General Government," Madison stated:

> . . . has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[41]

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34. 297 U.S. at 330-331.
35. 330 U.S. at 95-96 (emphasis added).
36. *Commonwealth and Southern Corporation* v. *Securities and Exchange Commission*, 134 F. 2d 747 (3d Cir. 1943); *United States* v. *Painters' Local Union No. 481*, 79 F. Supp. 516 (D. Conn. 1948), *rev'd on other grounds*, 172 F. 2d 854 (2d Cir. 1949).
37. Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 790-792 (1959); Dunbar, *supra* note 30 at 637.
38. Art. I, § 8, cl. 1.
39. Art. I, § 8, cl. 17.
40. See 1 ANNALS 761 (Madison opposing proposed revision of Tenth Amendment limiting Federal Government to powers "expressly delegated").
41. *Id.* at 438.

Madison's example of the relationship of the taxing power of Congress to the Fourth Amendment bar on general warrants was apt and was illustrated with respect to other amendments in later cases holding that a tax law adopted as "a deliberate and calculated device in the guise of a tax to limit the circulation of information" would be held unconstitutional under the First Amendment[42] and that an excise tax would be unconstitutional under the due process clause of the Fifth Amendment if discrimination in classifications and exemptions were gross enough to be equivalent to confiscation.[43] Taken together, the taxing cases well illustrate that the otherwise unencumbered enumerated powers of Congress[44] are simultaneously limited by the first eight amendments to the Constitution and shaped by those amendments.[45] That being true with respect to those amendments, it follows that, to the extent that the Ninth Amendment was designed to protect rights omitted from the enumeration in the first eight amendments, Congress is no more free to limit or destroy those rights than it is to abrogate other rights protected by the Bill of Rights.[46]

The Ninth Amendment and Due Process

In fact, the Connecticut statute held unconstitutional in *Griswold* was so held on the basis of the due process clause of the Fourteenth Amendment. Justice Goldberg's *Griswold* opinion, concurring with the majority opinion of Justice Douglas, takes the position that the Ninth Amendment supports a sufficiently liberal reading of the due process clauses of both the Fifth and Fourteenth Amendments to encompass rights not specifically enumerated in the first eight amendments. "While the Ninth Amendment—and indeed the entire Bill of Rights—", Justice Goldberg argues, "originally concerned restrictions upon *federal* power" the adoption of the Fourteenth Amendment prohibited state abridgment of fundamental personal liberties and the Ninth Amendment "is surely relevant in showing the existence of other fundamental personal rights now protected from state as well as Federal infringement".[47]

With all of the above, there would appear to be little area for dispute. The Supreme Court has frequently read into the word "liberty", as used in the due process clauses of the Fifth and Fourteenth Amendments, a meaning more substantive than a mere guaranty "against unduly vague statutes and against procedural unfairness at trial".[48] Under the due process clauses, without regard to the questions of procedural fairness or statutory vagueness, the United States has been held without the power to operate segregated schools in the District of Columbia;[49] to deprive citizens of the "right to travel" except on compelling proof of the necessity thereof;[50] and to bar members of Communist organizations registered under the Subversive Activities Control Act or under final order to register to apply for or use a passport.[51] Similarly, states have been held without power to deny a petitioner admission to the Bar where the evidence introduced did not justify his exclusion therefrom;[52] to require all children to attend public schools;[53] to prohibit the teaching of German in school;[54] and to make the payment of a poll tax a precondition to voting.[55] In all of these cases, the due process clauses of the Fifth and Fourteenth Amendments were held applicable in spite of the fact that specific constitutional prohibitions against the challenged activities were not found in the first eight amendments of the Constitution. In none of them was the Ninth Amendment cited. While Justice Black's *Griswold* dissent attempts to distinguish these and other due process cases,[56] the prior precedent appears clear, and the Ninth Amendment appears to lend aid to the conclusion, that "liberty" as utilized in the due process clauses means more than the specifically enumerated liberties of the first eight amendments.

As for Justice Goldberg's argument with respect to the application of the Ninth Amendment to the states,[57] again it appears clear that the amendment at least lends support to an interpretation of the due process clause of the Fourteenth Amendment sufficiently broad to encompass the fundamental liberties sought to be protected by the Bill of Rights, whether or not the particular liberty involved was specifically enumerated in the Bill of Rights. This conclusion appears sound whether one accepts Justice Black's theory that the first eight amendments are "incorporated" in the due process clause of the Fourteenth Amendment;[58] Justice Harlan's theory that the due process clause stands "on its own bottom" and is not dependent upon the specific provisions of the Bill of Rights,[59] or the view of Justice Goldberg that certain of the first eight amendments are incorporated in the due process clause of the Fourteenth Amendment together with other rights not necessarily included in the first eight amendments.[60] Whatever one's conceptual analysis of the due process clause of the Fourteenth Amendment, if the Ninth Amendment is accepted as a check against the possibility that the Bill of Rights did not adequately enumerate the fundamental liberties of the people listed in the first

42. *Grosjean* v. *American Press Company Inc.*, 297 U.S. 233, 250 (1936) (applying First Amendment standards to Louisiana tax statute aimed at the press).

43. *Steward Machine Company* v. *Davis*, 301 U.S. 548, 585 (1937).

44. With respect to the taxing power, see, *e.g.*, *Sonzinsky* v. *United States*, 300 U.S. 506 (1937) (upholding firearms tax on dealers of sawed-off shotguns, machine guns and the like); *United States* v. *Kahriger*, 345 U.S. 22 (1953) (upholding occupational tax on persons engaged in business of accepting wagers); and *United States* v. *Sanchez*, 340 U.S. 42 (1950) (upholding Marihuana Tax Act designed, in good part, to "render extremely difficult the acquisition of Marihuana by persons who desire it for illegal uses"). It is of note that in *California* v. *Glaser*, 48 Cal. Rptr. 427 (Cal. App. 1965), the purported right to possess marihuana was rejected as a Ninth Amendment retained right.

45. See, *e.g.*, *Reid* v. *Covert*, 354 U.S.1 (1957); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

46. After *Griswold*, for example, it is most unlikely that Congress may constitutionally pass a prohibitively high tax on the interstate shipment of contraceptives.

47. 381 U.S. at 493.

48. *Id.* at 503.

49. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

50. *Kent* v. *Dulles*, 357 U.S. 116 (1958).

51. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

52. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

53. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

54. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

55. *United States* v. *Texas*, 252 F. Supp. 234 (W. D. Tex. 1966), *aff'd* 384 U.S. 155 (1966).

56. 381 U.S. at 511, note 4.

57. Justice Goldberg's conclusion that the Ninth Amendment was not drafted as a restriction upon the exercise of state as opposed to federal power has been questioned, PATTERSON, THE FORGOTTEN NINTH AMENDMENT 36-43(1955), but has substantial precedential support. See, *e.g.*, *Barron* v. *Baltimore*, 32? U.S. 242 (1833); *Brown* v. *New Jersey*, 175 U.S. 172 (1899).

58. See *Adamson* v. *California*, 332 U.S. 46, 68 (1947) (dissenting opinion).

59. 381 U.S. at 500.

60. See *Pointer* v. *Texas*, 380 U.S. 400, 410 (1965) (concurring opinion).

eight amendments and a particular liberty is deemed protected by the Ninth Amendment, no valid reason exists to deny protection of the Ninth Amendment right under a Fourteenth Amendment which, by its terms, specifically protects "liberty".

One area of Justice Goldberg's opinion with respect to the due process clause, however, appears unsound. The argument that the Ninth Amendment is not an "independent source" of rights but merely an aid in interpretation of the Fifth and Fourteenth Amendments claims too little for the Ninth Amendment. In one sense, of course, it is accurate to say that the Ninth Amendment is not a "source" of rights. The rights, if any, protected by the amendment were clearly thought by Madison to be retained by the people with or without the addition of the Ninth Amendment; the function of the amendment was to insure that the Constitution would not be read so as to grant "into the hands of the General Government"[61] all rights unspecified in the first eight amendments. In the same fashion, however, the First Amendment was not considered by its drafters to be a "source" of the right of free speech. The right was inalienable; like the Ninth Amendment, the First was adopted so as to prevent a misconstrual of the Constitution which might result in the loss of inherent human rights. The Ninth Amendment is thus neither more nor less a "source" of rights than any of the first eight amendments.

The Unenumerated Rights

What solution, then, to the mystery of unenumerated rights? The principal effect of the Ninth Amendment is to underscore the intention of the framers of the Constitution that essential human rights are to be protected from governmental interference or destruction and to complement the due process clause in providing a flexible instrument for protecting such rights. The constitutional vindication of the basic rights which, as Justice Cardozo classically phrased it, are "implicit in the concept of ordered liberty"[62] will likely continue to be provided principally in the due process clauses of the Fifth and Fourteenth Amendments. Occasionally, albeit less frequently, such a vindication may be based on a sterner judicial examination of governmental powers under Article I, Section 8 or, perhaps, an interpretation of "necessary and proper" sufficiently restrictive to prohibit incursions on individual liberty.[63] Least likely of all, the rights could be protected on the theory that the Ninth Amendment, to the same extent as the first eight amendments, is a "source" of rights and, as such, a basis for holding unconstitutional federal and—through the Fourteenth Amendment—state laws impairing such rights. However couched, the question of *which* rights exist with *what* effect subject to *what* governmental restrictions is the identical question which the extensive body of due process case law has developed and is continuing to develop.

Thus far but two rights have been designated as retained rights under the Ninth Amendment: the right, so easily overcome in *United Public Workers* v. *Mitchell, supra*, of a government employee to engage in political activity;[64] and the right, so carefully delineated in *Griswold*, of marital privacy. Other Ninth Amendment rights, it may confidently be predicted,[65] will be claimed in the years to come.

Any attempt, however, to list the rights likely to be judicially denominated as Ninth Amendment rights is futile. The amendment is, first of all, only of relevance when other amendments do not specifically enumerate the retained rights in controversy.[66] The "penumbra" approach to the first eight amendments exemplified by Justice Douglas's *Griswold* opinion makes it less likely that either the Ninth Amendment or the due process clause, or a combination of the two, will be needed as a constitutional gap filler. It also makes it all the more difficult to predict when a retained right will be held to be protected by one of the more specific constitutional amendments rather than being held protected by the due process clause or the Ninth Amendment alone.

A second reason why it cannot now be predicted which rights will be characterized as Ninth Amendment rights arises out of the inherent nature of the due process clause and the Ninth Amendment. The "right to travel" held by *Kent* v. *Dulles*, 357 U.S. 166 (1958), to be protected by the due process clause is no more specifically enumerated in the text of the Constitution than the *Griswold* right of marital privacy. In *Kent* as much as *Griswold*, the Court could have cited the Ninth Amendment for the proposition that "other rights" exist in addition to those specifically enumerated in the first eight amendments. That the Ninth Amendment was not cited in *Kent* only indicates that the argument provided by the amendment was not considered then necessary. A plethora of due process cases is likely to be decided by the courts in the years to come; the attempt to divine in which of those yet uncommenced cases judges may find it useful to refer to the Ninth Amendment would be fruitless.

Finally, a reference to the Ninth Amendment would be likely to be most useful in a case where it was difficult to characterize the governmental infringement as a deprivation of life, liberty or property. But in most cases which can be conceived of there is sufficient scope in the Fifth and Fourteenth Amendments, language to permit it to be applied comfortably to the complained of abuse. May the Federal Government or the states, for example, enact euthanasia laws? Would a law be constitutional permitting a "conserva-

61. 1 ANNALS 439.

62. *Palko* v. *State of Connecticut*, 302 U.S. 319, 325 (1937).

63. See, *e.g.*, Note, *State Taxation of Multistate Business*, 74 YALE L. J. 1259, 1264-1266 (1965).

64. At this point in this essay the author ventures his tentative view that *Mitchell* would not be decided today as it was in 1947, and that the views of the three dissenting Justices therein would now prevail. But see *Gray* v. *Macy*, 239 F. Supp. 658 (D. Ore. 1965), *rev'd on other grounds* 358 F. 2d 742 (9th Cir. 1966).

65. On two occasions the Ninth Amendment has been of relevance in cases involving state public accommodation laws. In *New Hampshire* v. *Sprague*, 105 N.H. 355, 200 A. 2d 206 (1964) the New Hampshire Supreme Court upheld that state's public accommodations law in face of a challenge based in part upon the Ninth Amendment. In the more interesting case of *Colorado Anti-Discrimination Commission* v. *Case*, 151 Colo. 230, 380 P. 2d 34 (1962), the Colorado Supreme Court upheld portions of a Colorado antidiscrimination statute on the basis, in part, of the recognition granted by the Ninth Amendment and the Colorado counterpart thereof of "inherent rights", 380 P. 2d at 40.

66. In cases in which a constitutional argument is squarely based on an amendment specifically enumerating rights, courts have been rightly reluctant to consider the Ninth Amendment of substantive relevance. *Cf.*, *Roth* v. *United States*, 354 U.S. 476, 492 (1957); *United States* v. *Kahn*, 251 F. Supp. 702 (S.D. N.Y. 1966), *aff'd* 366 F. 2d 259 (2d Cir. 1966); *cert. den.*, 385 U.S. 948 (1966).

tor" to be appointed to preserve the property of alcoholics and drug addicts who have "suffered substantial impairment of [their] ability to care for [their] property"?[67] Could Congress in time of national food shortage, limit the number of children to two per couple?[68] Or pass a law banning the procreation of any offspring for a two-year period? On a somewhat more prosaic level, could a law constitutionally require persons to wear prescribed clothes, or prohibit the wearing of the color purple?

An endless amount of arguable incursions on "life" or "liberty" can be envisioned. But as to all of these cited the Fifth and Fourteenth Amendments, language seems a broad enough and flexible enough tool since as to each situation, the due process clause allows the courts to adjudge whether, in the circumstances, the right to life, to dissipate one's funds, to marital privacy, to breed children, to dress as one pleases and the like may be invaded by the state.

In short, the Ninth Amendment is of substantive importance as it allows judicial protection to be granted to non-procedural rights not otherwise specified in the Constitution. The Ninth Amendment does not answer the question of which rights will be held protected; it does not suggest answers; it may be a useful tool in enabling answers to be fashioned beyond the answers compelled by what Justice Black referred to as "some specific Constitutional provision".[69]

67. A bill to that effect passed the New York State Assembly in 1967 and, as of the writing of this essay, was before the state senate. See New York Assembly Int. 2034 (1967).

68. A similar hypothetical situation was suggested by Justice Goldberg in *Griswold*. 381 U.S. at 497.

69. 381 U.S. at 510.

Eminent Domain from Grotius to Gettysburg

In this brief survey of the law of eminent domain, Mr. Rice shows how a power that was, in effect, limited to the taking of land for the construction of public roads in colonial days has been expanded as the concept of "public use" has expanded. The key case in the expansion was the litigation that arose over the Federal Government's decision to preserve the battlefield at Gettysburg as a memorial. The litigation ended with a decision by the United States Supreme Court in 1896.

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TO THE HOMEOWNER dispossessed by the condemnation of his property for an unwanted trafficway, the power of eminent domain may appear arbitrary if not despotic. Were the unhappy victim familiar with the writings of the great jurists of the past, he might quote Grotius as having encircled private property with the protection of natural law:

> The law of nature is a dictate of right reason, indicating that moral guilt or rectitude is inherent in any action according to its agreement or disagreement with our rational—and social—nature . . . .
>
> This natural law does not only respect such things as depend not upon human will, but also many things which are consequent to some act of that will. Thus, property, as now in use, was introduced by man's will, and being once admitted, this law of nature informs us that it is a wicked thing to take away from any man against his will what is properly his own.[1]

Grotius, however, did not pretermit the status of the property owner as a member of organized society.

> The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded our society must be supposed to have intended that private ends should give way.[2]

In such wise, in his monumental work, *De Jure Belli et Pacis*, published in 1625, Grotius affirmed the existence of a power transcending all rights of private property. The concept was not new, but here for the first time was employed the descriptive phrase, "eminent domain" (*dominium eminens*). As to whence came this power, subsequent publicists differed and the courts were not always in agreement. Was it a right reserved by the state as the original proprietor of all property or was it an attribute of sovereignty, inherent in every body politic? Ultimately there was a consensus that the power was a sovereign attribute rather than a property right.

In legal terminology, there has been general acceptance of Grotius's designation, although it has been asserted that in England:

> The phrase itself was not known to the common law nor was the doctrine itself in any other application of it than was found in the exercise by the sovereign of the prerogative right to enter upon lands for the defense of the realm. [*Attorney General* v. *Tamlane* —Ch. D. 214 (1878)].[3]

1. GROTIUS, 1 DE JURE BELLI ET PACIS, ch. 1.
2. 3 *Id.*, ch. 20.
3. *George* v. *Consolidated Lighting Company*, 87 Vt. 411 (1916).