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THE NINTH AMENDMENT

Raoul Berger†

The Forgotten Ninth Amendment Bennett Patterson entitled his little book in 1955,¹ hardly anticipating that the amendment would be invoked in more than a thousand cases² after Justice Goldberg rescued it from obscurity³ in his concurring opinion in *Griswold v. Connecticut*,⁴ the 1965 contraceptive case. Justice Goldberg was not alone, being joined by Chief Justice Warren and Justice Brennan;⁵ in the opinion of the Court, Justice Douglas included the ninth amendment among the provisions in the Bill of Rights that have “penumbras formed by emanations from [those] guarantees.”⁶ Thus inspired, litigants have invoked the ninth to assert the inherent rights of schoolboys to wear long hair,⁷ challenge school textbooks,⁸ prevent imprisonment in a

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¹ B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955). One hundred thirty-two pages are devoted to appendices and a reprint of the legislative history. Most of the 85-page discussion is a hymn to “individual inherent rights,” that are unenumerated and independent of constitutional grant.

² A LEXIS computer search in September, 1980 located 1,296 cases after 1965 from the “General Federal” and “States” libraries. LEXIS is a registered trademark of Mead Data Central, Inc.

³ Prior to *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court had few occasions to probe the meaning of the ninth amendment. In *United Public Workers v. Mitchell*, 330 U.S. 75, 95 (1947), a case challenging the Hatch Act prohibition against political activities by federal employees, the Court fleetingly referred to “the freedom of the civil servant under the First, Ninth and Tenth Amendments,” but held that they interposed no obstacle to federal regulation where constitutional power is granted. Earlier, the Court had rejected an appeal to the ninth amendment as a restraint on government action because it “does not withdraw the rights which are expressly granted to the Federal Government.” *Ashwander v. TVA*, 297 U.S. 288, 330-31 (1936).

⁴ 381 U.S. 479, 486 (1965).

⁵ Justices Harlan and White separately concurred in the judgment. *Id.* at 499, 502. Justices Black and Stewart dissented. *Id.* at 507, 527.

⁶ 381 U.S. at 484. Justice Douglas did not win a plurality for his interpretation. And he has since wavered. In *Olliv v. East Side Union High School Dist.*, 404 U.S. 1042, 1044 (1972), he dissented from a denial of certiorari in a case involving regulation of schoolboy hairstyle, saying “[t]he word ‘liberty’ [in the fourteenth amendment] . . . includes at least the fundamental rights ‘retained by the people’ under the Ninth Amendment.” On the other hand, concurring in *Doe v. Bolton*, 410 U.S. 179, 210 (1973), in which the Court found Georgia’s abortion law unconstitutional, he declared that “[t]he Ninth Amendment obviously does not create federally enforceable rights.”

⁷ *Freeman v. Flake*, 405 U.S. 1032 (1972) (denial of certiorari) (although four circuits upheld and four struck down regulations of schoolboy hair style).

⁸ *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D.W. Va. 1975).

maximum security section,⁹ protect against conscription,¹⁰ immunize the transportation of lewd materials in interstate commerce,¹¹ and claim a right to a healthful environment.¹²

Justice Goldberg declared that "[t]he language and history of the Ninth Amendment reveal 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."¹³ Who is to protect undescribed rights? Justice Goldberg would transform the ninth amendment into a bottomless well in which the judiciary can dip for the formation of undreamed of "rights" in their limitless discretion, a possibility the Founders would have rejected out of hand.¹⁴ And, as Professor Robert Bork points out, an imputed authorization judicially "to develop new individual rights . . . correspondingly create[s] new disabilities for democratic government;"¹⁵ it disables the states from governing in those areas. Whatever the meaning of the ninth amendment, one thing it clearly did not contemplate—encroachment on state control of local matters except as the constitution otherwise authorized. It is undisputed that such a claim had not been made by the Court in the more than 150 years since the adoption of the Bill of Rights.¹⁶ Justice Stewart remarked in his dissent that "to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."¹⁷

The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁸ Paired with it is the tenth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁹ The two are complemen-

⁹ *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

¹⁰ *United States v. Uhl*, 436 F.2d 773 (9th Cir. 1970).

¹¹ *United States v. Orito*, 413 U.S. 139 (1973).

¹² *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

¹³ 381 U.S. at 488 (emphasis added).

¹⁴ See text accompanying notes 122, 125 *infra*.

¹⁵ Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697.

¹⁶ *Griswold v. Connecticut*, 381 U.S. at 491 n.6 (Goldberg, J., concurring); *id.* at 520 (Black, J., dissenting); *id.* at 529-30 (Stewart, J., dissenting).

¹⁷ *Id.* at 529.

¹⁸ U.S. CONST. amend. IX.

¹⁹ U.S. CONST. amend. X.

tary: the ninth deals with *rights* "retained by the people," the tenth with *powers* "reserved" to the states or the people. As Madison perceived, they are two sides of the same coin. During the debates on ratification of the Bill of Rights in Virginia, he wrote to Washington:

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.²⁰

Understanding of the ninth amendment is aided by appreciation of the background from which it emerged. The Founders were deeply attached to their local governments: these were the tried and true whereby they had resisted the impositions of royal governors and judges.²¹ That attachment constituted a formidable obstacle to the adoption of the Constitution;²² there was widespread distrust of the remote newcomer, a federal government

²⁰ Letter from James Madison to George Washington (Dec. 5, 1789) *reprinted in* 5 THE WRITINGS OF JAMES MADISON 432 (G. Hunt ed. 1904).

²¹ In his 1791 Philadelphia lectures, Justice James Wilson, who had been a leading architect of the Constitution, explained that before the Revolution the executive and the judicial powers of government . . . were derived from . . . a foreign source . . . [and] were directed to foreign purposes. Need we be surprised, that they were objects of aversion and distrust? . . . On the other hand, our assemblies were chosen by ourselves: they were the guardians of our rights, the objects of our confidence, and the anchor of our political hopes. . . .

Even at this time [1791], people can scarcely divest themselves of those opposite prepossessions. . . .

But it is high time that we should chastise our prejudices.

J. WILSON, *Of Government*, in 1 WORKS OF JAMES WILSON 292-93 (R. McCloskey ed. 1967).

²² Madison acknowledged this "babitual attachment of the people." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 284 (1911). It was condemned by Gouverneur Morris: "State attachments, and State importance have been the bane of this Country," *id.* at 530, but the current ran strongly the other way. See R. BERGER, CONGRESS v. THE SUPREME COURT 260-64 (1969). It was to "state Governments", Oliver Ellsworth said at the Convention, that he "turned his eyes . . . for the preservation of his rights." 1 M. FARRAND, *supra*, at 492. There, Elbridge Gerry asked, "[w]ill any man say that liberty will be as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State?" 2 *id.* at 386. James Wilson told the Pennsylvania Ratification Convention that "the framers of [the Constitution] were particularly anxious . . . to preserve the state governments unimpaired." 3 *id.* at 144. Madison assured the Ratifiers that the jurisdiction of the proposed government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." THE FEDERALIST No. 39 (J. Madison) 249 (Mod. Lib. ed. 1937).

removed by vast distances from the governed, wherein large states might outvote the small, and in which there would be clashing sectional interests.²³ The measure of that distrust may be gathered from the fact that after providing for "inferior" federal courts, the First Congress committed the initial enforcement of constitutional issues to the state courts,²⁴ where it remained for the next seventy-seven to eighty-six years.²⁵ Allied to this was insistence on a government of limited powers arising from a pervasive fear of "despotic government";²⁶ hence the outcries against unlimited power. As Jefferson said, "[i]t is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power."²⁷

The drive for the Bill of Rights was fed by such distrust. At the outset of the deliberations in the First Congress, Madison, who drafted the proposed Bill of Rights, averred that "the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done."²⁸ Elbridge Gerry alluded to the "great body of our constituents opposed to the Constitution as it now stands, who are apprehensive of the enormous powers of Government," and added, "[t]he ratification of the Constitution in several States would never have taken place, had they not been assured that the objections would have been duly attended to by Congress."²⁹ Madison recalled to the House that the proposed amendments were "most strenuously required by the opponents to the constitution" in the state ratification conventions.³⁰ A number of states accompanied their ratifications

²³ R. BERGER, *supra* note 22, at 31-33.

²⁴ *Id.* at 263, 273.

²⁵ C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 3-4 (3d ed. 1976). Appeals to the Supreme Court were not defended on the ground that the Court must be enabled to rewrite state legislation, but because, in Hamilton's words, "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." *THE FEDERALIST* No. 80 (A. Hamilton) 516 (Mod. Lib. ed. 1937). The password was "uniformity." R. BERGER, *supra* note 22, at 272. Even so, there were those like Gerry who feared that "the judicial department will be oppressive." 3 M. FARRAND, *supra* note 22, at 128.

²⁶ H. ADAMS, *JOHN RANDOLPH* 38 (1882).

²⁷ C. WARREN, *CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT* 153 (1925). See R. BERGER, *supra* note 22, at 13. See also H. ADAMS, *supra* note 26, at 8-14.

²⁸ 1 *ANNALS OF CONG.* 432 (Gales & Seaton eds. 1836) (printing bearing running title "History of Congress").

²⁹ *Id.* at 446-47.

³⁰ *Id.* at 746. See also *id.* at 661 (remarks of Rep. Page).

with proposed amendments.³¹ Toward the close of the First Congress Gerry said, "This declaration of rights, I take it, is intended to secure the people against the mal-administration of the [federal] Government."³²

Even stronger evidence that the Bill of Rights was to have no application to the states is furnished by the fate of the first sentence of Madison's fifth resolution: "*No State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."³³ Madison explained that "every Government should be disarmed of powers which trench upon *those particular rights*. . . . [T]he State Governments are as liable to attack *these* invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against."³⁴ When the clause came before the Committee of the Whole, Madison urged that this provision was "the most valuable amendment in the whole list," and that it was "equally necessary" that "*these essential rights*" should be "secured against the State Governments."³⁵ As Professor Norman Redlich observed, "When Madison intended an amendment to restrict the states in his proposal to prevent the states from abridging free speech or press, he was quite specific."³⁶ The clause was adopted by the House but rejected by the Senate,³⁷ underscoring that the Founders well knew how to limit state authority, as is again evidenced by their reference in the tenth amendment to power not "prohibited by [the Constitution] to the States."

The words "rights retained by the people" in the ninth amendment expressed a political postulate explained by Jefferson: "the purposes of society do not require a surrender of all our rights to our ordinary governors," and it followed that there re-

³¹ See, e.g., 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657-63 (2d ed. 1876) (Virginia); cf. 2 *id.* at 542-46 (Pennsylvania); 2 *id.* at 177 (Massachusetts); 2 *id.* at 413-14 (New York).

³² 1 ANNALS OF CONG., *supra* note 28, at 749.

³³ *Id.* at 435 (emphasis added).

³⁴ *Id.* at 441 (emphasis added).

³⁵ *Id.* at 755 (emphasis added).

³⁶ Redlich, *Are There "Certain Rights" . . . Retained by the People?*, 37 N.Y.U. L. REV. 787, 805 n.87 (1962).

³⁷ See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433-35 (1926). Redlich concluded, "It would be unrealistic to attribute to the Senate an intent to impose ill-defined legally enforceable restraints on the states in light of this rejection." Redlich, *supra* note 36, at 806. Thus, the records of the First Congress confirm Chief Justice Marshall's holding in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights did not apply to the states.

mained reserved to the people an area of unsundered rights.³⁸ Opponents of a Bill of Rights had urged that it was unnecessary because, as Washington wrote Lafayette, "the people evidently retained every thing which they did not in express terms give up."³⁹ In the words of Hamilton, quoted by Justice Goldberg, "why declare that things shall not be done which there is no power to do?" instancing "no power is given by which restrictions [on "liberty of the press"] may be imposed."⁴⁰ Madison admitted that the amendments "may be deemed unnecessary; but there can be no harm in making such a declaration."⁴¹ Thus viewed, the Bill of Rights added nothing,⁴² but was merely declaratory.

³⁸ E. DUMBAULD, *THE BILL OF RIGHTS* 145 (1957). See also G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 293-94 (1969). For Thomas Cooley, the ninth amendment affirmed "the principle that constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them." T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 31-35 (2d ed. 1891). The ninth amendment "was an affirmation of the principle that, as rights in the United States are not created by government, so they are not to be diminished by government, unless by the appropriate exercise of an express power." Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 638 (1956).

³⁹ 29 *THE WRITINGS OF GEORGE WASHINGTON* 478 (Fitzpatrick ed. 1939). In his letter to LaFayette, Washington referred to James Wilson's assurance to the Pennsylvania Ratification Convention that by the Constitution the citizens dispense "a part of their original power in what manner and what proportion they think fit. They never part with the whole; and they retain the right of recalling what they part with. . . . To every suggestion concerning a bill of rights, the citizens of the United States may always say, We reserve the right to do what we please." 2 J. ELLIOT, *supra* note 31, at 437.

C. C. Pinckney told the South Carolina House of Representatives that "by delegating express powers, we certainly reserve to ourselves every power and right not mentioned." 3 M. FARRAND, *supra* note 22, at 256. In the First Congress, Rep. Hartley observed that "it had been asserted in the convention of Pennsylvania, by the friends of the Constitution, that all the rights and power that were not given to the Government were retained by the States and the people thereof. This was also his own opinion." 1 *ANNALS OF CONG.*, *supra* note 28, at 732.

⁴⁰ 381 U.S. at 489 n.4 (quoting *THE FEDERALIST* No. 84 (A. Hamilton) 558-59 (Mod. Lib. ed. 1937)).

⁴¹ 1 *ANNALS OF CONG.*, *supra* note 28, at 441.

⁴² Dumbauld justly sums up: "The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. . . . [It] was designed to obviate the possibility of applying the maxim *expressio unius exclusio alterius* in interpreting the Constitution. It was adopted in order to eliminate the grant of powers by implication." E. DUMBAULD, *supra* note 38, at 63. Earlier, 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." J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1905 (5th ed. 1891). See also note 43 *infra*.

Parenthetically, this confutes those who argue that the rules of statutory construction should not apply to interpretation of the Constitution, and those like Professor Dean Alfange, who ridicule the application of a canon of construction as an authoritative guide to

Others, however, were deeply concerned by the effect of the maxim *expressio unius est exclusio alterius*: what is expressed excludes what is not.⁴³ They feared that an enumeration of some rights might deliver those not enumerated into the hands of the federal government. Madison's response to such fears is quoted by Justice Goldberg:

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

As Justice Black pointed out, "th[is] very material . . . shows that the Ninth 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.'"⁴⁵ Madison, in short, meant to bar the implication that unenumerated rights were "assigned" to the federal government, for enforcement or otherwise, returning to the theme he had sounded at the outset: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the *Government ought not to act*, or to act only in a particular mode."⁴⁶

constitutional interpretation. See Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 618-19 (1978). See also Berger, "Government by Judiciary": Judge Gibbons Argument *Ad Hominem*, 59 B.U. L. REV. 783, 805 (1977).

⁴³ James Wilson assured the Pennsylvania Convention that "everything not expressly mentioned will be presumed to be purposely omitted." 3 M. FARRAND, *supra* note 22, at 144. Chief Justice Thomas McKean also assured that Convention that congressional power, being enumerated in the Constitution "and *positively* granted, can be no other than what this positive grant conveys." 2 J. ELLIOT, *supra* note 31, at 540. For a similar expression in South Carolina by C. C. Pinckney, see 3 M. Farrand, *supra* note 22, at 256. Rep. Jackson of Georgia alluded to the maxim in the First Congress. 1 ANNALS OF CONG., *supra* note 28, at 442.

⁴⁴ 381 U.S. at 489-90 (quoting 1 ANNALS OF CONG., *supra* note 28, at 439 (emphasis added)).

⁴⁵ *Id.* at 519 (Black, J., dissenting). See note 42 *supra*.

⁴⁶ 1 ANNALS OF CONG., *supra* note 28, at 437 (emphasis added). Leslie Dunbar observes that Madison "seems to have thought of rights under two main headings. One, as stipulat-

Justice Goldberg neglected to turn "to the last clause of the fourth resolution" in order to learn how Madison proposed that the undesirable implication "may be guarded against." That last clause, the progenitor of the ninth amendment, provided:

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.⁴⁷

Madison's disclaimer of intention "to enlarge the powers delegated by the constitution" by non-enumeration of "other rights" and his emphasis upon enumeration as "actual limitations" on such powers bars a construction which would endow the federal government with the very powers that were denied. It is incongruous, moreover, to read the text of the ninth amendment as expanding *federal* powers at the very moment that the tenth was reserving to the states or the people all "powers not delegated."⁴⁸ Then too, because the federal government may not "*deny*" unenumerated rights, it does not follow that it may *enforce* them against the states.

In fact, enforcement was to be confined to expressly "stipulated rights." "[T]he great mass of the people who opposed [the Constitution]," said Madison, "disliked it because it did not contain effectual provisions against encroachments *on particular rights*."⁴⁹ Hence, Madison explained, if the Bill of Rights were

ing agreed upon methods by which in particular cases the government shall exercise its powers. . . . Secondly, he thought of another class of rights as declarations of areas *totally outside the province of government*." Dunbar, *supra* note 38, at 635 (emphasis added). Madison's intention was "to define those fields into which *powers do not extend at all*." *Id.* at 636 (emphasis added). Even prior to *Griswold*, Justice Black concluded that the ninth amendment merely "emphasize[d] the limited nature of the Federal Government." Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 871 (1960).

⁴⁷ 1 ANNALS OF CONG., *supra* note 28, at 435 (emphasis added). On October 17, 1788, Madison wrote to Jefferson that he favored a Bill of Rights "provided it be so formed as *not to imply powers not to be included in the enumeration*." 5 THE WRITINGS OF JAMES MADISON, *supra* note 20, at 271.

⁴⁸ As the Court held in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 587 (1840): "so far from the states which insisted upon these amendments contemplating any restraint or limitation by them on their own powers; the very cause which gave rise to them, was a strong jealousy on their part of the power which they had granted in the Constitution."

⁴⁹ 1 ANNALS OF CONG., *supra* note 28, at 433 (emphasis added).

incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of *those rights*; they will be an impenetrable bulwark against every assumption of power in the legislative or executive [not the states]; they will be naturally led to resist every encroachment upon rights *expressly stipulated* for in the constitution by the declaration of rights.⁵⁰

For present purposes, the relevant provision of article III, section two, clause one, which enumerates the various categories of federal court jurisdiction, is "all cases . . . arising under this Constitution."⁵¹ A right "retained" by the people is not embodied in the Constitution, and a suit brought on such a right does not "arise" thereunder, as Madison made plain in stressing judicial protection for "particular" rights "expressly stipulated." It does violence to the historical record to construe the ninth amendment to give the courts a roving commission to enforce a catalog of unenumerated rights against the will of the states.⁵² What the Constitution expressed was the will of the people to reserve unto themselves all powers not delegated and all unenumerated rights,⁵³ a will likewise articulated in the article V provision for amendment. With Leslie Dunbar, I would hold that the ninth amendment "is an affirmation that rights exist independently of government, that they constitute an area of no-power."⁵⁴

How does Justice Goldberg meet these materials? On the one hand he states, "I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government."⁵⁵ On the other hand, he ar-

⁵⁰ *Id.* at 440 (emphasis added). Leslie Dunbar comments, "[T]he practical effect of enumeration is the enlistment of the protection of positive law, spoken through the courts, for rights which otherwise could be defended only through political action." Dunbar, *supra* note 38, at 643.

⁵¹ U.S. CONST. art III, sec. 2.

⁵² "Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language." *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). See text accompanying notes 117-18 *infra*.

⁵³ See note 39 *supra*.

⁵⁴ See Dunbar, *supra* note 38, at 641. See also Redlich, *supra* note 36, at 807 (quoted at text accompanying note 103 *infra*); note 46 *supra*.

⁵⁵ 381 U.S. at 492 (concurring opinion).

gues that "the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from infringing fundamental personal liberties."⁵⁶ Justice Goldberg goes on to explain that

the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the *existence* of other fundamental personal rights, now *protected* from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends 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.⁵⁷

Justice Goldberg leaps too lightly from the "existence of rights" retained by the people to a federal power to *protect* them. That no such power was conferred is disclosed by Madison's disavowal of any implication that the enumerated rights were "assigned into the hands of the General Government," least of all for diminution of States' rights, his affirmation that there was no intention to enlarge but rather to limit the delegated powers, and his demarcation of "cases in which the Government ought not to act."⁵⁸

Goldberg's appeal to the "liberty" of the fifth amendment's due process clause for authority to "protect" the unspecified rights retained by the people under the ninth amendment implies that what the ninth plainly withheld was conferred under the rose by the fifth. But why should the Founders take pains to exclude federal power with regard to the unenumerated right of the ninth if they were simultaneously conferring it *sub silentio* by the fifth? That is inexplicable. In fact, the Founders fenced off "cases in which the Government ought not to act," and it requires evidence that those fences were torn down by the fifth. Then too, the "liberty" of the fifth amendment on which Goldberg relies referred

⁵⁶ *Id.* at 493.

⁵⁷ *Id.* (emphasis added).

⁵⁸ See text accompanying notes 44, 46, & 47.

to freedom from imprisonment and freedom of locomotion,⁵⁹ which with fine casuistry the Court, overturning a maximum hours law in *Lochner v. New York*,⁶⁰ perverted into "liberty of contract"—the "liberty" of a bakery worker to contract for sixty hours of labor a week. Notwithstanding his caustic dissent in *Lochner*, Justice Holmes later drew on this "liberty" for a better cause: free speech "must be taken to be included in the Fourteenth Amendment, *in view of* the scope that has been given to the word 'liberty.'" ⁶¹ Thus "liberty" has been expanded in our own time from a shrivelled root. Then too, the due process clause of the fifth amendment was meant only to protect against deprivation of "liberty" without judicial proceedings, not to endow the courts with visitorial powers over legislation.⁶² Not a glimmer of intention exists in the history of the fourteenth amendment to alter that meaning and deliver the last word on state legislation to federal judges.⁶³ James Wilson, chairman of the House Judiciary Committee during the fourteenth amendment debates, indicated that the due process clause furnished a "remedy" to secure the "fundamental rights" enumerated in the Civil Rights Act of 1866⁶⁴—a law considered by the framers to be "exactly" like the fourteenth amendment.⁶⁵ Those "fundamental rights" are far

⁵⁹ See Shattuck, *The True Meaning of the Term "Liberty" in those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 442-45 (1926). See generally R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 270 (1977).

Blackstone defined "the personal liberty of individuals" as consisting "in the power of locomotion . . . or moving one's person to whatsoever place one's own inclination may direct, without imprisonment of restraint, unless by due course of law." 2 W. BLACKSTONE, COMMENTARIES *134. During the debates about the fourteenth amendment, James Wilson read Blackstone to the House. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

⁶⁰ 198 U.S. 45 (1905).

⁶¹ *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J. dissenting) (emphasis added).

⁶² On the eve of the Federal Convention, Hamilton stated in the New York assembly: "The words '*due process*' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature." 4 PAPERS OF ALEXANDER HAMILTON 35 (Syrett and Cooke eds. 1962). He summarized 400 years of history. See Berger, "*Law of the Land*" Reconsidered, 74 Nw. U. L. REV. 1 (1979).

⁶³ See BERGER, *supra* note 59, at 201-06. See also Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 416 (1978).

⁶⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1294-95 (1866).

⁶⁵ See R. BERGER, *supra* note 59, at 22-23. Justice Bradley declared: "[T]he civil rights bill was enacted at the same session, and but shortly before the presentation of the fourteenth amendment; . . . [it] was *in pari materia*; and was probably intended to reach the same object . . . [T]he first section of the bill covers the same ground as the fourteenth amendment." *Live-Stock Dealers' & Butchers Ass'n v. Crescent City Live-stock Landing & Slaughterhouse Co.*, 15 F. Cas. 649, 655 (C.C. La. 1870) (No. 8,408).

removed from Goldberg's ambitious catalog. In the words of the draftsman of the Act, Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, they were "the right to acquire property, the rights to go and come at pleasure [freedom of locomotion], the right to enforce rights in the courts, [and] to make contracts . . ." ⁶⁶ It took the wonder-working Warren Court to transform the fourteenth amendment into a cornucopia of "rights" *excluded* by the framers.⁶⁷

Possibly I do not appreciate the subtle differentiation between "incorporation" of the ninth amendment in the fourteenth and enforcement of the unspecified rights "retained" under the ninth by resort to the "liberty" of the fourteenth, but to my mind the distinction is purely semantic. Let me therefore reiterate that the argument that the Bill of Rights was incorporated in the fourteenth amendment is without historical warrant, as Charles Fairman demonstrated, and as is widely acknowledged.⁶⁸ Since it

⁶⁶ CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). This was a paraphrase of the terms of the Civil Rights Bill. See R. BERGER, *supra* note 59, at 24.

⁶⁷ See R. BERGER, *supra* note 59, at 52-68, 117-33. See also, Berger, *supra* note 42, at 793-94. Senator William Fessenden, Chairman of the Joint Committee on Reconstruction of both Houses, stated, "[w]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions. . . ." CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866). Time and again attempts to ban *all* discriminations were defeated. See R. BERGER, *supra* note 59, at 163-64.

⁶⁸ See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 140 (1949). See also R. BERGER, *supra* note 59, at 137; A. BICKEL, *THE LEAST DANGEROUS BRANCH* 102 (1962).

Professor Dean Alfange, an activist, wrote, "it is all but certain that the Fourteenth Amendment was not intended to incorporate the Bill of Rights and thus to revolutionize the administration of criminal justice in the states." Alfange, *supra* note 42, at 607. Professor Charles E. Merriam noted that the Founders believed government must be limited in many ways:

it must be checked at every possible point; it must be at all times under suspicion. . . . Too much emphasis cannot well be laid upon the fear which the 'Fathers' had of government. To them the great lesson of history was, that government always tends to become oppressive, and it was the greatest foe of individual liberty.

C. MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 76-77 (1903). Let one bit of contemporary evidence suffice. The Kentucky Resolutions of 1798, drafted by Jefferson, stated that "limited constitutions [are designed] to bind down those whom we are obliged to trust with power," to bind them "down from mischief by the chains of the Constitution." 4 J. ELLIOT, *supra* note 31, at 543.

Professor Philip Kurland wrote of the Court's decisions that the due process clause of the fourteenth amendment made the religion clauses of the first amendment applicable to the states: "Of course, nothing in the history of the fourteenth amendment suggests that this was among its purposes or goals. The transmogrification occurred solely at the whim of the Court. An attempt to pass a constitutional amendment providing for the application

must draw upon the due process clause,⁶⁹ and since "due process" in the fifth and fourteenth amendments is identical, the argument makes nonsense of the Bill of Rights. For incorporation of the "first eight" amendments into the "due process" of the fifth renders all the rest superfluous. The framers' attachment to state sovereignty⁷⁰ led the 39th Congress to limit federal intrusion to the ban on discrimination with respect to the "fundamental rights" enumerated by Trumbull.⁷¹ In particular, Chairman Wilson emphasized, "[w]e are not making a general criminal code for the States."⁷² The last thing the framers had in mind was to vest the distrusted judiciary⁷³ with the power of controlling state administration of local matters. Thus, the Court's long journey from the fifth amendment through the fourteenth to the ninth amendment exemplifies the unremitting expansion of judicial usurpation, from what is first disputed to what becomes Holy Writ and is then further dilated.⁷⁴ In a crowning irony, Justice Black, who fathered the "incorporation" doctrine, at last cried "halt":

[F]or a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.⁷⁵

This is not, as Justice Goldberg argued, "to give . . . [the ninth amendment] no effect whatsoever."⁷⁶ Ample effect, over-

of the religion clauses to the states, the Blaine amendment, failed in 1876, eight years after effectuation of the fourteenth amendment." Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 9-10 (1978) (citations omitted).

⁶⁹ R. BERGER, *supra* note 59, at 139-41.

⁷⁰ See CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866) (remarks of Rep. Conkling); *id.* at 1292-93 (remarks of Rep. Bingham). See generally, R. BERGER, *supra* note 59, at 60-64.

⁷¹ See note 66 and accompanying text *supra*.

⁷² CONG. GLOBE, 39th Cong., 1st Sess. 1120 (1866).

⁷³ See R. BERGER, *supra* note 59, at 222-23; Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW.U. L. REV. 311, 350-51 (1979).

⁷⁴ Thus the Court has fulfilled the colonists' fear of power's "endlessly propulsive tendency to expand itself beyond legitimate boundaries." B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56 (1967).

⁷⁵ 381 U.S. at 520 (Black, J., dissenting). See also note 52 *supra*.

⁷⁶ 381 U.S. at 491 (Goldberg, J., concurring). In this error Goldberg had been anticipated by Patterson. See B. PATTERSON, *supra* note 1, at 24.

looked by Goldberg, was commonsensically furnished by Dean Roscoe Pound: "Those [rights] not expressly set forth are not forever excluded but are, if the Ninth Amendment is read with the Tenth, left to be secured by the states or by the people of the whole land by constitutional change, as was done, for example, by the Fourteenth Amendment."⁷⁷ In "retaining" the unenumerated rights, the people reserved to themselves power to add to or subtract from the rights enumerated in the Constitution by the process of amendment exclusively confided to them by article V. If this be deemed supererogatory, be it remembered that according to Madison the ninth amendment itself was "inserted merely for greater caution."

Bennett Patterson

It is tempting to dismiss Patterson's *The Forgotten Ninth Amendment* out of hand.⁷⁸ But the fact that it has Roscoe Pound's encomium⁷⁹—although his own conclusions were diametrically opposed to those of Patterson—and that it has been cited by others⁸⁰ calls for more considered judgment.⁸¹ Although more than half of Patterson's 217 pages are devoted to a reprint of the debates in the First Congress on the Bill of Rights, he gleans little therefrom. He mentions Gerry's unsuccessful proposal to change the word "disparage" in the ninth to "impair";⁸² and sets out the "last clause of Madison's fourth resolution,"

⁷⁷ Pound, *Foreword to B. PATTERSON, supra note 1*, at iv. Pound reiterated: "[T]hese reserved rights may be defined and enforcement of them may be provided by the states, except as may be precluded by the Fourteenth Amendment, or may be defined and acquire secured enforcement by the people of the United States by constitutional amendment." *Id.* at vi.

⁷⁸ Patterson's unreliability may be quickly illustrated. He states:

"We believe that the law should grow and our Constitution should be interpreted in the light of current history, as was stated by one of the eminent courts of last resort of one of the States, [quoting] 'The law should be construed in reference to the habits of business prevalent in the country *at the time it was enacted*. The law . . . *as then known* to exist.'"

Id. at 56 (emphasis added). Patently, the case expresses exactly the opposite of Patterson's proposition that "the law should grow."

⁷⁹ Pound, *Foreword to B. PATTERSON, supra note 1*, at vi-vii.

⁸⁰ See, e.g., 381 U.S. at 490 n.9 (Goldberg, J. concurring); E. DUMBAULD, *supra note 38*, at 138; Redlich, *supra note 36*, at 805 n.87.

⁸¹ "The flaccid acceptance of shoddy work ha[s] long been a scandal of scholarly and literary journals." O. HANDLIN, *TRUTH IN HISTORY* 149 (1973).

⁸² B. PATTERSON, *supra note 1*, at 16.

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 power, or as inserted merely for greater caution.⁸³

Instead of noticing this disclaimer of intention "to enlarge," but rather to impose "actual limitations" on the powers "delegated by the Constitution," Patterson seizes on the words "the exceptions *here or elsewhere* in the Constitution."⁸⁴ From this he concludes that the language "definitely demonstrates that the clause was intended as a *general* declaration of human rights . . . a general clause relating to the entire Constitution, and not a specific clause relating only to the proposed amendments."⁸⁵ Without doubt it "related to any other rights *enumerated* . . . in the Constitution,"⁸⁶ but it is a nonsequitur to conclude that these words constitute "a general declaration of human rights." The specific is not the "general."

Patterson also construes a proposed Senate preamble to the Bill of Rights recognizing state desires to "prevent misconstruction or abuse of [the granted] powers" by adding "further *declaratory* and restrictive clauses"⁸⁷ to mean that the ninth and tenth amendments are a "declaration of principles" rather than "restrictive clauses."⁸⁸ The word "declaratory" means to declare the law or rights as they stand, rather than a "declaration" of new law or rights.⁸⁹ Thus, the Framers regarded the proposed amendments as merely declaring what was implicit: unenumerated powers are not granted.⁹⁰

⁸³ See text accompanying note 47 *supra*.

⁸⁴ B. PATTERSON, *supra* note 1, at 13. He also set forth Madison's response to the "assignment" objection to a Bill of Rights, see text accompanying note 44 *supra*, without comment on its significance.

⁸⁵ B. PATTERSON, *supra* note 1, at 13 (emphasis added).

⁸⁶ *Id.* (emphasis added).

⁸⁷ *Id.* at 17.

⁸⁸ *Id.* at 18.

⁸⁹ So far as the amendments were not "actual limitations," said Madison, they were "inserted merely for greater caution." See text accompanying note 47 *supra*. See also text accompanying note 41 *supra*.

⁹⁰ See notes 42, 43 *supra*. Justice Stone stated that the tenth "amendment states but a truism that all is retained which has not been surrendered." It was merely "declaratory" of the existing relationship between state and federal governments; its purpose was to "allay fears that the new federal government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *United States v. Darby*, 312 U.S. 100, 124 (1941).

True it is that the Constitution is not to "be construed as a *grant* to the individual of inherent rights or liberties;"⁹¹ rather, as Hamilton said of a "declaration of rights," it is a "limitation . . . of the power of the government itself."⁹² But it was the federal government, not the states, that was so limited.⁹³ Patterson finds it "impossible to believe that human rights and individual liberties" had been fought for "only to be surrendered up to State governments where they could be destroyed by the sovereign people acting en masse."⁹⁴ He forgets that the Bill of Rights issued out of state distrust of the powers of the general government. "In an age where men looked to the states as the chief guardians of individual rights," Professor Redlich observed, "it was not surprising that the barrier of the Ninth and Tenth Amendments was erected against only the federal government."⁹⁵ Patterson would fetter the "sovereign people" themselves, although the ninth amendment provides that unenumerated rights are "retained by the people," not by some superior body that will protect against them.

The bulk of Patterson's discussion is beside the point—a sustained panegyric to "inherent natural rights of the individual."⁹⁶

⁹¹ B. PATTERSON, *supra* note 1, at 19 (emphasis added).

⁹² THE FEDERALIST No. 84 (A. Hamilton) at 558 (Mod. Lib. ed. 1937).

⁹³ It needs constantly to be remembered that the sovereign powers vested in the State governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

....

The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 325-26 (1816) (Story, J.).

⁹⁴ B. PATTERSON, *supra* note 1, at 36-37.

⁹⁵ Redlich, *supra* note 36, at 808. See note 22 *supra*. Patterson infers from the statement in *Eilenbecker v. District Court of Plymouth County*, 134 U.S. 31, 34 (1890), that "the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States," that the ninth amendment did not contain such limitation. B. PATTERSON, *supra* note 1, at 28 (emphasis added). *Eilenbecker* considered challenges under the fifth, sixth, and eighth amendments, and the Court had no occasion to wander beyond the first eight. In addition, it was the "exercise," not the "reservation" of rights or powers that was at issue. It would take more than *Eilenbecker* to translate the ninth's retention of rights by the states or the people into limits upon the states, let alone that history precludes the Patterson differentiation.

⁹⁶ B. Patterson, *supra* note 1, at 19. Throughout he exalts the status of the individual over the collective. But to the Revolutionists of 1776, "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." G. Wood, *supra* note 38, at 63.

The individual with whom Patterson, a member of a Houston law firm, B. PATTERSON, *supra* note 1, at 99, was concerned is the capitalist, who must be shielded from the "senti-

Be they as wide as all outdoors,⁹⁷ he assumes rather than proves that the enforcement of unenumerated rights "retained by the people" was handed over to the General Government by the ninth amendment. His insistence that "[t]here is no provision in the Constitution which shall prevent the Government of the United States from protecting inherent rights"⁹⁸ overlooks the elementary fact that the federal government has only such powers as are granted.⁹⁹ His is the error in rejecting the proposition that "in order to protect a native human or inherent right, we must find the source of its protection in the Constitution."¹⁰⁰

Professor Norman Redlich

More sophisticated than Patterson, Professor Redlich appreciates the import of the legislative history: "the sketchy legislative history would seem to support the holding in *Barron v. Baltimore* that it was intended to restrict only the federal government."¹⁰¹ He considers that "[i]t would be unrealistic to attribute to the Senate," which had added to the tenth amendment the words "or to the people," and "intent to impose ill-defined legally enforceable restraints on the states."¹⁰² Those

last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were 'retained . . . by the people,' and that because the people

mental over-generosity and assistance that will in short time weaken our people by doing for them the things which they should be able and willing to do for themselves, and thus stifle genius and destroy their stamina."

"[S]ome of us," he counsels, "will have greater material wealth than others and none of our people can permit themselves to rankle and become bitter, because it is a part of our system to believe in private ownership of property." *Id.* at 84.

⁹⁷ The sovereign people's power to create "rights" knows no bounds: "The other rights 'retained by the people' may be, of course, justified by derivation from natural law theory; but they could just as well be ascribed . . . to the consensus of the American people." Dunbar, *supra* note 38, at 640.

⁹⁸ B. PATTERSON, *supra* note 1, at 42.

⁹⁹ See notes 43, 93 *supra*.

¹⁰⁰ B. PATTERSON, *supra* note 1, at 45. Like Patterson, Knowlton Kelsey jumps to his conclusion without prior demonstration that it is compelled by text or history: "[The ninth] must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of 'unenumerated rights.'" Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 323 (1936).

¹⁰¹ Redlich, *supra* note 36, at 805-06 (footnote omitted).

¹⁰² *Id.* at 806.

possessed such rights there were *powers* which *neither* the federal government nor the States *possessed*.¹⁰³

These remarks, plus his observation that the Founders "looked to the states as the chief guardians of individual rights" and consequently that the "barrier of the Ninth and Tenth Amendments was erected against only the federal government,"¹⁰⁴ require the conclusion that the ninth amendment has no application to the states. It is therefore puzzling to read that the ninth and tenth amendments "might be peculiarly suited to meet the unique and important problems suggested by the Connecticut birth control law case."¹⁰⁵

The starting point for Redlich is a "strong historical argument" that the ninth and tenth amendments "were intended to apply in a situation where the asserted right appears to the Court as fundamental to a free society but is, nevertheless, not specified in the Bill of Rights."¹⁰⁶ Apparently Redlich assumes that the Court is to be the enforcer of these "not specified" rights.¹⁰⁷ That role apparently is premised in his statement that the ninth and tenth amendments "appear to have been designed" for "the protection of individual rights not specified in the Constitution."¹⁰⁸ But it is incompatible with his statement that "because the people possessed such [retained] rights, there were *powers* which *neither* the federal government nor the States *possessed*."¹⁰⁹ Among such "no-powers" is the "protection" of those retained rights.

Anticipating Justice Goldberg, Redlich attempts to bridge this chasm by invoking the fourteenth amendment to provide "the framework for applying these restrictions against the states, even though they may have been originally intended to apply only against the United States."¹¹⁰ First, he suggests that those Justices "who consider the Fourteenth Amendment as having embodied either or all the major portions of the Bill of Rights could ap-

¹⁰³ *Id.* at 807 (emphasis added). For present purposes there is no need to inquire whether the reservation of powers not delegated to the federal government also operates against the states. The Founders feared federal, not state power, as Redlich himself recognizes. See text accompanying note 95 *supra*.

¹⁰⁴ Redlich, *supra* note 36, at 808.

¹⁰⁵ *Id.* at 804.

¹⁰⁶ *Id.* at 808.

¹⁰⁷ It is not only such judicially recognized "fundamental" rights, but *all* unenumerated rights which are "retained by the people."

¹⁰⁸ Redlich, *supra* note 36, at 808.

¹⁰⁹ *Id.* at 807 (emphasis added).

¹¹⁰ *Id.* at 806.

propriately consider the Ninth and Tenth Amendments as 'incorporated' or 'absorbed' into the first paragraph of the Fourteenth Amendment."¹¹¹ Thus the discredited "incorporation" doctrine is to serve as the vehicle of yet another arrogation, a result on which even the apostle of "incorporation," Justice Black, gagged. Redlich would have the tenth amendment, which reserves powers not delegated, and against which all "general" delegations are to be read, swallowed up by the fourteenth!¹¹² Next, Redlich turns to "those Justices who have viewed the Fourteenth Amendment as limited only to 'fundamental' rights unrelated to the specific provisions of the Bill of Rights [who] should have no difficulty in adopting a Constitutional provision which appears to have been almost custom-made for this approach."¹¹³ This collides with his conclusion that the retention of rights was accompanied by the withholding of correlative power.

John Hart Ely

Stamping Chief Justice Warren's holding in *Bolling v. Sharpe* "that the Due Process Clause of the Fifth Amendment incorporates the Equal Protection Clause of the Fourteenth Amendment" as "gibberish both syntactically and historically,"¹¹⁴ Professor John Hart Ely turns to the ninth amendment, asserting that "such an open-ended provision is appropriately read to include an 'equal protection' component."¹¹⁵ Indeed, he considers that "the conclusion that the Ninth Amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."¹¹⁶

If I do not mistake his meaning, Ely confines his invocation of the ninth amendment to the federal domain. We are agreed

¹¹¹ *Id.* at 808.

¹¹² Senator Frederick Frelinghuysen, a framer who construed the fourteenth amendment broadly, said in 1871 that "the Fourteenth Amendment must . . . not be used to make the General Government imperial. It must be read . . . together with the Tenth Amendment." CONG. GLOBE, 42nd Cong., 1st Sess. 501 (1871). In a more innocent decade (1957), Professor Dumbauld wrote, "The Ninth and Tenth Amendments, being reservations for the benefit of the states, of course give no occasion for raising the question whether they are made applicable against the states by the Fourteenth Amendment." E. DUMBAULD, *supra* note 38, at 138.

¹¹³ Redlich, *supra* note 36, at 808.

¹¹⁴ J. ELY, DEMOCRACY AND DISTRUST 32 (1980).

¹¹⁵ *Id.* at 33.

¹¹⁶ *Id.* at 38.

that "[i]t is quite clear that the original framers and ratifying conventions intended the Bill of Rights to control only the actions of the federal government."¹¹⁷ It therefore bears emphasis that Ely's "federal constitutional rights" can be asserted only against the federal government and not the states, for he does not here call on incorporation into the fourteenth amendment.

Ely's reference to the "existence of federal constitutional rights" requires explication. Both the rights expressed in the Bill of Rights and the unspecified rights retained by the people "exist," but only the former are "constitutional rights." To my mind, a right "retained" by the people and not described has not been embodied in the Constitution. Madison made clear that the retained rights were not "assigned" to the federal government: to the contrary, he emphasized that they constitute an area in which the "Government ought not to act." This means, in my judgment, that the courts have not been empowered to enforce the retained rights against either the federal government or the states.

Ely himself observes, "One thing we know to a certainty from the historical context is that the Ninth Amendment was not designed to grant Congress authority *to create* additional rights, to amend Article I, Section 8 by *adding a general power* to protect rights."¹¹⁸ Without protection, a "right" is empty. And he justly points out that the phrase "'others retained by the people' [is not] an apt way of saying 'others Congress may create.'"¹¹⁹ That power of creation equally was withheld from the courts; the Founders did not regard the courts as "creators", or lawmakers, but as discoverers of law.¹²⁰ For them, the separation of powers, as Madison said in the First Congress, was a "sacred principle"¹²¹ reinforced by a "profound fear" of judicial discretion.¹²² It does not, therefore, advance the case for judicial enforcement of the ninth amendment that "[t]here was at the time of the original Constitution little legislative history indicating that *any* particular

¹¹⁷ *Id.* at 37.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ "[J]udges conceived of their role as merely that of discovering and applying preexisting legal rules." Horwitz, *The Emergence of an Instrumental Conception of American Law 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 297 (1971).

¹²¹ 1 ANNALS OF CONG., *supra* note 28, at 596-97 (Gerry referring to Madison's argument).

¹²² G. WOOD, *supra* note 38, at 298. In 1769 Chief Justice Hutchinson of Massachusetts declared: "*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." Horwitz, *supra* note 120, at 292.

provision was to receive judicial enforcement: the Ninth Amendment was not singled out one way or the other."¹²³ All the presuppositions the Founders brought to the task militate against a blank check to that branch which Hamilton assured them "was next to nothing."¹²⁴ Ely himself remarks that "read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that thought can get pretty scary."¹²⁵ "[T]hat thought," I venture, would have scared the Founders out of their wits. It runs against Madison's explanation that the Bill of Rights would impel the judiciary "to resist encroachments upon rights expressly stipulated for . . . by the declaration of rights,"¹²⁶ and reinforces the conclusion that courts were not empowered to enforce the retained and unenumerated rights.

Ely finds Madison's explanation of the ninth amendment separating "the question of unenumerated powers from the question of unenumerated rights"¹²⁷ confused: "the possibility that unenumerated rights will be disparaged is seemingly made to do service as an intermediate premise in an argument that unenumerated powers will be implied . . ."¹²⁸ This "confusion" he attributes to "what we today would regard as a category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."¹²⁹ But whether the Founders were mistaken in logic is

¹²³ J. ELY, *supra* note 114, at 40.

¹²⁴ THE FEDERALIST No. 78 (A. Hamilton) at n.* (Mod. Lib. ed. 1937) (quoting C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748)). See also J. WILSON, *supra* note 21.

¹²⁵ J. ELY, *supra* note 114, at 34.

¹²⁶ 1 ANNALS OF CONG., *supra* note 28, at 457 (quoted at text accompanying note 50 *supra*).

¹²⁷ J. ELY, *supra* note 114, at 35.

¹²⁸ *Id.* at 36.

¹²⁹ *Id.* Citing Hamilton's reply to the argument that the power of taxation could be used to inhibit freedom of expression, THE FEDERALIST No. 84 (A. Hamilton) 560 n.* (Mod. Lib. ed. 1937), Ely concludes that "the possibility of a governmental act's being supported by one of the enumerated powers and at the same time violating one of the enumerated rights is one our forebears were capable of contemplating." J. ELY, *supra* note 114, at 202 n.86. Hamilton rejected the notion that "the imposition of duties upon publications" would be impeded by express "declarations in the State constitutions, in favor of the freedom of the press." He argued in support of his conclusion "that newspapers are taxed in Great Britain and yet it is notorious that the press nowhere enjoys greater liberty than in that country." THE FEDERALIST No. 84 (A. Hamilton) 560 n.* (Mod. Lib. ed. 1937).

Whether an *enumerated* power might override an "exception" in favor of an *enumerated* right need not presently concern us, although it is worth noting Madison's emphasis that *enumerated* rights were "excepted" "out of the grant of power"—that they were to be regarded "as actual limitations of such powers." Here the issue is whether there is an "unexpressed power" to enforce *unenumerated* rights "retained by the people."

of no moment if they acted on that mistaken view.¹³⁰ That the Framers premised that rights and powers were two sides of the same coin is hardly disputable. The exceptions "made in favor of particular *rights*," Madison stated, were to be regarded as "actual limitations on such *powers*."¹³¹ The "great object" of a Bill of Rights, he said, was to limit . . . the *powers* of Government, by *excepting out* of the grant of power those cases in which the Government ought not to act, or could act only in a particular mode."¹³² As Ely observes, "[w]hat is important" is that Madison "wished to forestall *both* the implication of unexpressed powers *and* the disparagement of unenumerated rights," employing the tenth amendment for the one and the ninth for the other.¹³³ By what logic do we derive "unexpressed powers" to enforce "unenumerated rights" in the teeth of Madison's purpose to "foreclose . . . the implication of unexpressed powers," and his emphasis that the enumeration of "particular rights" was not to be construed to "enlarge the powers delegated by the Constitution," but rather "as actual limitations of such powers"?¹³⁴ Is it conceivable that Madison meant to confer "open-ended" power by "unenumerated rights" while limiting power by the enumeration of "particular rights"? Ely's conclusion also collides with his affirmation that the ninth amendment was not designed to add to article I, section eight "a general power to protect rights."

Finally Ely concludes, "[i]f a principled approach to judicial enforcement of . . . open ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them."¹³⁵ The notion that the Framers, so fearful of the greedy expansiveness of power,¹³⁶ would make an "open-ended," *i.e.* unlimited, grant, which after the lapse of almost two hundred years is so "scary" that Ely would condemn it unless lim-

¹³⁰ C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 186 (1928).

¹³¹ 1 ANNALS OF CONG., *supra* note 28, at 435 (quoted at text accompanying note 47 *supra*) (emphasis added).

¹³² 1 ANNALS OF CONG., *supra* note 28, at 437 (quoted at text accompanying note 46 *supra*) (emphasis added). See also 3 M. FARRAND, *supra* note 22, at 256 (remarks of Rep. Pinckney) (quoted at note 39 *supra*).

¹³³ J. ELY, *supra* note 114, at 36.

¹³⁴ 1 ANNALS OF CONG., *supra* note 28, at 435 (quoted at text accompanying note 47 *supra*).

¹³⁵ J. ELY, *supra* note 114, at 41.

¹³⁶ See note 74 and accompanying text *supra*.

ited by a "principled" approach, verges on the "incredible."¹³⁷ Little less strange is the assumption that a Court which employed the allegedly "open-ended" terms of the fourteenth amendment¹³⁸ in disregard of the framers' unmistakable intention to exclude suffrage from its scope¹³⁹ will show greater respect for the self-denying "principles" which Ely now proffers.

CONCLUSION

The ninth amendment demonstrably was not custom-made to enlarge federal enforcement of "fundamental rights" in spite of state law; it was merely declaratory of a basic presupposition: all powers not "positively" granted are reserved to the people. It added no unspecified rights to the Bill of Rights; instead it demarcated an area in which the "General Government" has no power whatsoever. To transform it into an instrument of control

¹³⁷ I borrow the pejorative from Ely's description of my views. See J. ELY, *supra* note 114 at 198 n.66.

¹³⁸ For a critique of this theory, see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 300-11 (1977). Ely has it that the framers of the fourteenth amendment issued "open and across-the-board invitations to import into the constitutional decision process considerations that will not be found in the amendment nor even . . . elsewhere in the Constitution." Ely, *supra* note 63, at 415 (emphasis added). For a critique of this view, see Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 *IND. L.J.* 277 (1979).

The claim that the 1789 framers issued such an "invitation" through the medium of "open-ended" terms runs counter to Ely's own analysis. He remarks that the founders "certainly didn't have natural law in mind when the Constitution's various open-ended delegations to the future were inserted and approved." J. ELY, *supra* note 114, at 39. He notes that "you can invoke natural law to support anything you want." *Id.* at 50. His "open-ended" theory would permit the imposition of personal, extra-constitutional values that found no favor in the shape of natural law.

The founders, as Professor Philip Kurland observed, and as is well attested, were attached to a "written Constitution"—one of "fixed and unchanging meaning," except as changed by amendment. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978). They conceived the judge's role as *policing* constitutional boundaries, not as taking over legislative functions within those boundaries, and still less as revision of the Constitution. See Berger, *Government by Judiciary: John Hart Ely's "Invitation," supra*, at 287. As Elbridge Gerry stated, "[i]t was quite foreign from the nature of [the] office to make them judges of the policy of public measures." 1 M. FARRAND, *supra* note 22, at 97-98. See 2 M. FARRAND, *supra* note 22, at 75. "Vague and uncertain laws, and more especially Constitutions," wrote Samuel Adams, "are the very instruments of slavery." 3 S. ADAMS, *WRITINGS OF SAMUEL ADAMS* 262 (H. Cushing ed. 1904) (quoted in Berger, *Government by Judiciary: John Hart Ely's "Invitation," supra*, at 288).

Such were the presuppositions that underlie Madison's reference to judicial protection of "stipulated rights." Ely's acknowledgment that the ninth amendment did not empower Congress to "create" additional rights, or add "a general power to protect rights" is at war with his view that the amendment is "open-ended."

¹³⁹ See notes 144, 145, and accompanying text *infra*.

over state government by recourse to the fourteenth amendment blatantly perverts the meaning of the framers, both in 1789 and in 1866.

The newly discovered "meaning" of the ninth amendment is but another facet of the unremitting effort to rationalize the judicial take-over of government in areas which have found favor with activists. It was not ever thus. The shift has been described by an activist, Professor Stanley Kutler: through the late 1930s, academe "criticized vigorously the abusive powers of the federal judiciary" for "frustrating desirable social policies" and "arrogat[ing] a policymaking function not conferred upon them by the Constitution."¹⁴⁰ After 1937, these critics "suddenly found a new faith," a "new libertarianism promoting 'preferred freedoms' " protected by an "activist judiciary."¹⁴¹ Now another activist, Professor Louis Lusky, defends "the Court's new and grander conception of its own place in the governmental scheme"¹⁴² resting on "basic shifts in its approach to constitutional adjudication [including] . . . assertion of the power to *revise* the Constitution, *bypassing* the cumbersome amendment procedure prescribed by article V."¹⁴³ That "new and grander" role—conferred by the Court on the Court—pays little heed to the intention of the Framers. When confronted by Justice Harlan's "irrefutable" demonstration that the fourteenth amendment was not intended to "authorize Congress to set voter qualifications"¹⁴⁴—it is safe to say that suffrage was *unmistakably excluded*¹⁴⁵—Justices Brennan, White and Marshall "could not accept this thesis even if it were supported by historical evidence,"¹⁴⁶ and Justice Douglas dismissed it as "irrelevant."¹⁴⁷ This repudiated the traditional canon

¹⁴⁰ Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511-12 (1979).

¹⁴¹ *Id.* at 513.

¹⁴² Lusky, "Government by Judiciary": *What Price Legitimacy?*, 6 HASTINGS CONST. L.Q. 403, 408 (1979).

¹⁴³ *Id.* at 406 (emphasis added).

¹⁴⁴ *Oregon v. Mitchell*, 400 U.S. 112, 350 (1970).

¹⁴⁵ Looking back in *Griswold*, Justice Harlan justly remarked that the reapportionment interpretations were "made in the face of irrefutable and still unanswered history to the contrary." 381 U.S. at 501 (Harlan, J., concurring). See R. BERGER, *supra* note 59, at 52-98. Lusky considers that Harlan's demonstration is "irrefutable and unrefuted." Lusky, *supra* note 142, at 406. See generally Berger, *supra* note 42, at 794.

¹⁴⁶ *Oregon v. Mitchell*, 400 U.S. 112, 251 (1970).

¹⁴⁷ *Id.* at 140. Little wonder that Professor Paul Brest challenges the assumption "that judges and other public officials were bound by the text or original understanding of the Constitution." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204, 224 (1980).

of construction reiterated by Justice Holmes: when a legislature "has intimated its will, however indirectly, that will should be recognized and obeyed. . . . [I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it."¹⁴⁸ Still less is that will to be disobeyed when the Framers have spoken with unmistakable clarity, any more than the Court may "revise" the express text. Posterity will honor Justice Harlan's comment:

When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.¹⁴⁹

Even the express text is thrust aside by one super-heated activist, Professor Robert Cover:

[A] reading of the Constitution must stand or fall not upon the Constitution's *self-evident meaning*, nor upon the intentions of the 1787 or 1866 framers . . . [I]t is for *us*, not the framers, to decide whether that end of liberty is best served by *entrusting* to judges a major role in defining our governing political ideas and in measuring the activity of the primary actors in majoritarian politics against that ideology.¹⁵⁰

Of course Cover does not—and cannot—point to the source of this decision to "entrust" judges with the ultimate power to frame our "ideology"; he chooses instead to equate the wishes of the academic illuminati with the will of "We, the people." Widespread resistance to busing, as well as dissatisfaction with affirmative action, the Court's restrictions on death penalties, and State criminal law enforcement testify that the identification is imaginary. Were

¹⁴⁸ *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (quoted in *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 391 n.4 (1939)). Judge Learned Hand stated in 1959 that "the purpose may be so manifest as to override even the explicit words used." *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959). "The intention of the lawmaker is the law." *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (quoting *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874)). Those who dismiss out of hand the application of canons of statutory construction to constitutional interpretation are probably unaware that Justice Story, Edward Corwin, Julius Goebel and Harry Jones are to the contrary. See Berger, *supra* note 42, at 805.

¹⁴⁹ *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring).

¹⁵⁰ Cover, Book Review, *NEW REPUBLIC*, Jan. 14, 1978, at 27 (emphasis added). See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224 (1980).

the values of the Justices superior to those of the commonality,¹⁵¹ they would yet represent those of "Big Brother" and recall Robespierre: "If Frenchmen would not be free and virtuous voluntarily, then he would force them to be free and cram virtue down their throats."¹⁵²

It is against this background that the Goldbergian resort to the ninth amendment is to be viewed; another bit of legal legerdemain whose purpose is to take from the people their right to self-government and put it in the hands of the Justices.¹⁵³

¹⁵¹ Professor G. Edward White asks, "[W]hy should [the Court] not openly acknowledge that the source of [newly-invented] rights is not the constitutional text but the enhanced seriousness of certain values in American society?" White, *Reflections on the role of the Supreme Court: the Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 168 (1979). See also Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977).

¹⁵² 2 C. BRINTON, J. CHRISTOPER & R. WOLFF, *A HISTORY OF CIVILIZATION* 115 (1st ed. 1955).

¹⁵³ Alfred Kelly, a devout activist, wrote that the Warren Court was "apparent[ly] determin[ed] to carry through a constitutional . . . revolution." Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 158.