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The framers, The Bill of Rights, and the Ninth Amendment

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THE FRAMERS, THE BILL OF RIGHTS,
AND THE NINTH AMENDMENT

by

Kara Sue Rickey

A thesis submitted in partial fulfillment
of the requirements for the degree of

Master of Arts

in

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Department of Political Science
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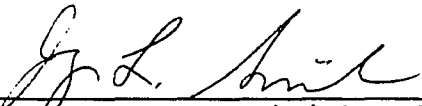
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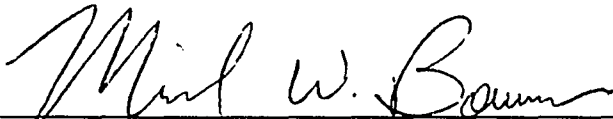
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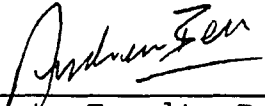
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ABSTRACT

The Bill of Rights, The Framers, and the Ninth Amendment is an examination of current arguments for and against expanded recognition of the Ninth Amendment and unenumerated rights by the judiciary. A brief history of the Ninth Amendment is included. Also explored are the debates between the Federalists and Anti-Federalists on the need for a bill of rights, and how the Ninth Amendment could resolve this conflict.

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CHAPTER 1

THE FEDERALISTS AND ANTI-FEDERALISTS

Introduction

Over two hundred years after the adoption of the Constitution of the United States, the necessity, or even usefulness of the Bill of Rights appears to be a settled question. Debate currently centers on the particulars: the refining of exactly what each guarantee provided in the first ten amendments to the Constitution really means. The need for or desirability of a bill of rights in the first place is today an uncontested issue; yet the dispute was not so uniformly decided when the Constitution was crafted and set before the citizenry for ratification in the late 1780s.

The Debate Over a Bill of Rights

When the 1787 Convention convened and the proposed Constitution was turned over to the states for ratification, the lack of a bill of rights became the major point of dissatisfaction with the people (Van Loan III 1989). As Irving Brant noted, "No sooner had the Continental Congress laid the proposed Constitution before the people for

ratification than a great cry went up: it contained no bill of rights" (Storing 1985, 15). Public opinion was firmly in favor of a bill of rights (Rutland 1985, 2). In defense of the Constitution without a bill of rights, the Federalists argued that a bill of rights would be unnecessary. The proposed government would have the power to act only in the areas in which it had expressly delegated powers (Levy 1987, 266). As James Wilson said, "everything which is not given, is reserved" to the people or the states (Levy 1987, 266). The second argument the Federalists employed was that a bill of rights would not only be unnecessary, but dangerous (Rossiter 1961, 513). James Wilson, among others, believed that listing rights would imply government power over any unlisted rights (Levy 1987, 267). Wilson argued,

If we attempt an enumeration [of rights], every thing that is not enumerated is presumed to be given. The consequence is that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete (Cooper 1991, 423).

But as Randy Barnett wrote in his article "A Ninth Amendment for Today's Constitution," the Anti-Federalists effectively turned this argument against the Federalists, observing that there were several rights listed in the body of the Constitution, such as a prohibition on ex post facto laws or bills of attainder, yet other rights considered fundamental were not listed (Barnett 1993, 178). The Anti-Federalists, on the other hand, believed the Constitution should not be

ratified since it left so many basic rights unprotected. The Anti-Federalist argument was ultimately persuasive to the people, thus the Federalists conceded the point, and promised that a bill of rights would be proposed after ratification of the Constitution (Barnett 1993, 178).

Of course, the Constitution was ratified, but the intended bill of rights was not immediately forthcoming. James Madison repeatedly attempted to put the matter before the House of Representatives, but it was often swept aside in favor of discussing a tax bill or other matters. Eventually, Madison got a Select Committee of the House to consider proposed amendments to the Constitution. Ten of these were eventually modified and adopted as the Bill of Rights (Barnett 1993).¹

Who Was Right?

In retrospect it appears that the Anti-Federalists were correct when they reasoned that a bill of rights was necessary to ensure the rights of the people; the fact that it was ever a question at all is something of a historical footnote. Yet the arguments on both sides are still compelling and may offer insight as to how the Bill of

¹One of these proposed amendments was finally ratified on May 7, 1992, as the Twenty-seventh amendment to the Constitution. It reads, "No law, varying the compensation for the services of the Senators and Representatives shall take effect, until an election of representatives shall have intervened" (DeBenedictis 1992).

Rights can best be utilized currently. The Bill of Rights itself contains the tool necessary to quell the fears and provide the advantages of both sides of the debate two centuries ago. That device is the Ninth Amendment. The Ninth Amendment to the U.S. Constitution reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. Constitution, Amendment IX). Hidden within this often ignored clause is the key to reconciling the Federalist and Anti-Federalist positions, for it can serve each of these masters ably, if only given the power and recognition to do so.

In order to make the potential role of the Ninth Amendment clear, I will analyze the arguments of the Federalists and the Anti-Federalists, and the debate concerning the need for a bill of rights. By examining arguments from both sides, I will show that the Ninth Amendment can help to resolve the difficulties pointed out by either position. The history of the Ninth Amendment is also explored, along with contemporary debates about the problems associated with determining the meaning and applicability of the Ninth Amendment, as well as the conflict over judicial review. Finally, I argue that the Ninth Amendment can effectively secure unenumerated rights through the interpretive theory of the presumption of liberty.

The Federalists

The Federalists attempted to defend the proposed Constitution absent a bill of rights with several arguments. First they claimed that a bill of rights under the new system would be unnecessary, second that words were not capable of protecting rights completely, and finally that a bill of rights would be dangerous.

A Bill of Rights is Unnecessary

The Federalists initially argued that the Constitution needed no bill of rights because it would be a government that would be concerned with "general interests of the nation," not the private rights of individual citizens (Rossiter 1961, 513). The proposed government was one of limited powers that could act only in proscribed areas. As James Wilson argued, the government is one of specific enumerated powers, unlike the state governments whose broad grants of power made bills of rights desirable (Storing 1985, 23). A limited government constrained by its enumerated powers is not in need of a bill of rights to protect citizens' private rights. This argument is weak considering that governments, and according to Madison and others, the legislatures in particular, were known to attempt to assume and amass powers well beyond any proscribed limits. Considering post-adoption judicial decisions such as *McCulloch v. Maryland* (17 U.S. 316),

governmental powers have grown to be near limitless, especially as to implied powers. For example, the Commerce Clause has been interpreted to allow legislation on anything from civil rights, kidnapping, and pollution, to wages and prices throughout the several states (Rossum and Tarr 1991, 230-1).

The Limiting Nature of Lists and Language

The Federalists also argued that an incomplete list of rights could imply governmental power over any rights not listed. They coupled this with the argument that language and practicality make enumerating every right of human beings impossible. As Justice James Iredell said, "it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty rights not contained in it" (Barnett 1993, 2:7). And James Wilson noted, "Enumerate all the rights of men? I am sure, sir, that no gentleman in the late Convention would have attempted such a thing" (Shaw 1990, 52). He also argued that "an omission in the enumeration of the powers of the government is neither so dangerous nor important as an omission in the enumeration of the rights of the people" (Cooper 1991, 423). Alexander Hamilton not only recognized the futility of trying to list all rights, but indicated that language itself was imperfect to the task when he wrote, "But no language is so copious as

to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas" (Rossiter 1961, 229). And "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" (Rossiter 1961, 524). This is persuasive reasoning by the Federalists, for as Thomas Hobbes wrote in the *Leviathan*,

. . . there is no Commonwealth in the world wherein there be rules enough set down for the regulating of all the actions and words of men (as being a thing impossible): it followeth necessarily that in all kinds of actions, by the laws pretermitted, men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves (Olafson 1961, 104).

The Constitution, not just the Bill of Rights, uses broad, vague language, such as the necessary and proper clause, to allow adaptation, and to avoid the limiting nature of more precise words.

A Bill of Rights is Dangerous

The Federalists bolstered these arguments with the claim that a bill of rights could be dangerous. Alexander Hamilton wrote of the treacherous nature of a bill of rights:

They would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? (Rossiter 1961, 513-4).

James Wilson concurred, stating that,

In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous. Whence comes this notion, that in the United States there is no security without a bill of rights? Have the citizens of South Carolina no security for their liberties? They have no bill of rights The state of New Jersey has no bill of rights. The state of New York has not [sic] bill of rights In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given (Shaw 1990, 46).

As Justice James Iredell said at the time,

[I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by government without usurpation (Barnett 1993, 2:7).

James Madison, in a letter penned in 1788 to Thomas Jefferson, wrote that he viewed a bill of rights as unimportant,

because experience proves the inefficacy of a bill of rights on those occasions when its controul [sic] is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State (Mason and Baker 1985, 287).

In the same missive, Madison argued that essential rights, and "the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power" (Mason and Baker 1985, 287).

James Wilson, in a speech advocating the adoption of the Constitution in 1787 paired the two Federalist arguments against a bill of rights when he stated,

In truth, then, the proposed system possesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject - nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent (Ketcham 1986, 184-5).

As Madison himself stated when he presented the Ninth Amendment for ratification, this was the most persuasive argument against adoption of a bill of rights. The listing of certain rights, to the exclusion of others, can imply that those enumerated are the only rights protected. Madison hoped to solve this problem with the addition of the Ninth Amendment.

The Anti-Federalists

The Anti-Federalists, on the other hand, argued that the want of a bill of rights was grounds for rejecting the proposed constitution. Jefferson, in a letter to James Madison in 1787, wrote that "a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference" (Peterson 1975, 285).

A Legal Check

The Anti-Federalists furnished several arguments as to why a bill of rights was essential. First, a bill of rights provides the judiciary a legal check on the other branches. In a letter to Madison dated March 15, 1787, Jefferson wrote, "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary" (Peterson 1975, 438). Alluding to judicial review, Jefferson urged Madison to recognize that the people will have recourse to challenge abuses of their rights by appealing to the courts, and citing the Bill of Rights for their legal claims for relief.

Educating the People

A bill of rights could provide people with information and the idea and sentiment that they have these rights. Knowing these rights, the people would want them protected, and take their causes to court (Barnett 1989, 23). Changing from his original view of a bill of rights as dangerous, Madison urged that a bill of rights would give the people something to point to, to educate them, and to "impress some degree of respect for them, to establish public opinion in their favor, and rouse the attention of the whole community" (Barnett 1989, 58). Again, in a letter to Jefferson, Madison sustained that,

The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Governments, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion (Mason and Baker 1985, 288).

As Edmund Randolph stated, "a perpetual standard should be erected around which the people might rally, and by a notorious record be forever admonished to be watchful, firm, and virtuous" (Storing 1985, 31).

A Written Document

A bill of rights, like a written constitution, becomes a uniform, written document to which all may appeal, and which endures through time. The Pennsylvania Minority's² first objection to the Constitution was its lack of a bill of rights (Ketcham 1986, 247). A bill of rights, laying down firmly the rights of human beings, and supporting the states' bills of rights, was an unacceptable omission for these dissenting members of the Pennsylvania Convention (Ketcham 1986, 247). Anti-Federalist John Dewitt, in his essay of October 27, 1787, also complained of the want of a bill of rights (Ketcham 1986, 195). He argued that a society can never be too explicit in their terms when forfeiting rights to the government, or the liberties of the

²"After the Pennsylvania Convention ratified the new constitution on December 12, 1787, by a vote of 46 to 23, twenty-one members of the minority signed a dissenting address that appeared in the *Pennsylvania Packet and Daily Advertiser* on December 18, 1787" (Ketcham 1986, 237).

people are likely to be trampled upon. "The line," he wrote, "cannot be drawn with too much precision and accuracy" (Ketcham 1986, 195). Governmental abuse over the rights of citizens is what led to the first bill of rights being adopted, Dewitt reasoned, and the principle should not be forgotten. Citizens must be careful and specific to make clear what powers are granted, implied, or reserved to the people (Ketcham 1986, 196). Jefferson, in a letter to Madison dated March 15, 1789, agreed when he wrote, "The declaration of rights will be the text whereby [states] will try all the acts of the federal government" (Peterson 1975, 439).

A Protection Against Future Abuses

The written character of the Constitution and the Bill of Rights also lends itself as a protection against future abuses. John Dewitt, in an essay written in 1787, argued that a bill of rights is an important guard against future tyranny. He stated that while the people who originally formed the new government may understand that they have retained certain rights, they should attempt to deter any future claims by tyrants that rights were surrendered by "tacit implication" since they were not set aside and protected (Ketcham 1986, 197). Silence by the people on certain vital points may invite claims to dominion and the surrender of the rights of the people.

A Rebuttal to the Federalists

Thomas Jefferson attempted to counter Federalist arguments that by listing a few rights, you may omit others. As he wrote to James Madison in 1789, "Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can" (Mason and Baker 1985, 289). Jefferson continued by noting that,

The inconveniences of the Declaration [of rights] are that it may cramp government in its useful exertions. But the evil of this is shortlived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse (Mason and Baker 1985, 290).

Even if all of the rights of human beings cannot be secured, protection of a few rights is preferable to not having a shield for any rights.

CHAPTER 2

BOTH SIDES REEXAMINED

Both sides of the debate make valid arguments, so who was right? Public opinion, time, and history seem to have validated the Anti-Federalist position. The Bill of Rights has worked. The people have embraced it and the courts have protected it. The cases in which citizens have claimed their rights have been infringed, and have appealed to the first ten amendments is legion, especially with the extension of these prohibitions to the state governments via the Due Process Clause of the Fourteenth Amendment.

Anti-Federalist Victories

As the Anti-Federalists hoped, the Bill of Rights can be a check on the other branches of the government in advance of the passage of an oppressive measure. Alexander Hamilton, though an opponent to a bill of rights, recognized the power of judicial review in *Federalist* 78:

It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a

manner compelled, by the very motives of the injustice they meditate, to qualify their attempts (Rossiter 1961, 470).

Madison was also quite prophetic in his speech before the House when he stated,

. . . independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights (Barnett 1989, 60-1).

Claims for free speech, free press, free religion, search and seizure protection, and virtually all the other guarantees have found their way to the courts, and the judiciary has utilized the Bill of Rights to protect the liberties of the citizenry. The Bill of Rights has thus provided the judicial check, the explicit text to which to appeal, and has educated the people and roused their support.

Fears of the Federalists Realized

Unfortunately, that is only half the story. The Federalists' prediction of the loss of unlisted rights has come to pass. Supreme Court justices, as well as legal and political theorists, have declared that there are no rights beyond those specifically listed in the Bill of Rights. For example, in *Griswold v. Connecticut* (381 U.S. 479), Justice Hugo Black's dissenting opinion rested on the claim that the

law challenged in this case was " . . . not forbidden by any provision of the Federal Constitution as that Constitution is written . . . " (*Griswold* 527). In the same case, in which he also dissented, Justice Potter Stewart restated all of the amendments to which the majority referred in the decision and declared that not only did the Connecticut law not violate any of these, but that the Ninth Amendment is nothing more than a constitutional truism, even narrowing it to nothing more than a restatement of the Tenth Amendment.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law . . . (*Griswold* 527-8).

While the majority opinion supported the expansion of individual rights, the opinion has been severely criticized as an illegitimate use of judicial power to create rights out of thin air. *Doe v. Bolton* (410 U.S. 179) provided similar dissenting comments in regard to the "new" right of privacy. Justice Byron White in his dissent wrote that there is nothing in the Constitution to support the right to privacy. As he commented, "The Court simply fashions and announces a new Constitutional right . . . with scarcely any reason or authority for its actions . . . " (*Doe* 221-2). In *Bowers v. Hardwick* (478 U.S. 186), the majority decided that the Court should not expand clauses such as the Due

Process Clause - and, we may assume, the Ninth Amendment - to protect "new" rights.

Robert Bork, unsuccessful Supreme Court nominee, often stated in his nomination hearings that if there is no specific provision in the Constitution, the judge should not act (Barnett 1993, 2:428). He does not consider the Ninth Amendment a specific provision. As he stated, his concern with rights such as the privacy right as fashioned by Justice William O. Douglas in *Griswold* is that it "simply comes out of nowhere, that it does not have any rooting in the Constitution, it is also that he does not give it any contours, so you do not know what it is going to mean from case to case" (Barnett 1993, 2:432). Bork went on to state that "What we are talking about here was a generalized, undefined right of privacy which is not in the Bill of Rights" (Barnett 1993, 2:434). Bork denied that the Ninth Amendment is a repository for rights, such as the privacy right, claiming that to his knowledge, no one ever "knew what the Ninth Amendment did mean and what it was intended to do" (Barnett 1993, 2:433). Political and legal commentators have also denied the existence of unenumerated rights. Walter Berns, in his article "The Constitution as a Bill of Rights," complained of "judicially created rights," and declared that the courts invent rights without any regard to the text of the Constitution (Berns 1985, 67, 69). Berns argues that there is no such thing as the right to

self expression, or abortion, or to be a conscientious objector. Gary McDonnell, in his essay "The Politics of Original Intention" wrote, "The Constitution does not speak of a right to privacy; the Court simply created one" (McDonnell 1989, 9). L. B. Boudin, quoting Justice Black, attempts to make this point:

In determining whether an act of the legislature is constitutional or not, we must look to the body of the Constitution itself for reasons. The general principles of justice, liberty, and right, not contained or expressed in that instrument are no proper elements of a judicial decision upon it (Boudin 1988, 134).

Theorists and Supreme Court justices (and a nominee) demonstrate that the Federalist fears of a loss of unlisted rights were well founded.

The Constitutionality of Unenumerated Rights

Detractors of unenumerated rights fail to recognize that there is supporting text in the Constitution for unenumerated rights, and that is the Ninth Amendment. They also fail to see the innate danger hidden within their argument. If the rights specifically enumerated in the first several amendments are the only rights Americans can claim, all power is left to the government, consistent with majority rule, only forbidding precisely what is in the Bill of Rights (Dworkin 1992, 384). If this is the case, then the very people who decry these unenumerated rights may find themselves on the other end of a majority which, as Justice

Arthur Goldberg stated in his concurring opinion in *Griswold*, could make laws mandating birth control. After all, there is no specific constitutional provision against it. At Robert Bork's confirmation hearings, Senator Edward M. Kennedy pointed out to him that in Bork's system, majorities would be able to do anything they please short of violating enumerated rights. This would allow nearly any legislation, including compulsory abortion, if a legislative majority so desired. Kennedy stated that this is precisely what the Bill of Rights was meant to guard against: "There are some things in America which no majority can do to the minority or to the individuals" (Barnett 1993, 2:433).

Even the sweeping changes of time and society stymied the emergence of newly recognized rights, or even expanded views of enumerated rights, as the case of *Olmstead v. U.S.* (48 S.Ct. 564) demonstrates. In *Olmstead*, the Supreme Court decided that wiretapping was not illegal because it did not fit a strict interpretation of the Fourth Amendment. The majority held that there was not a search and not a seizure. In his dissent, Justice Louis D. Brandeis argued that wiretapping was something the framers couldn't have dreamed of. The founders had no conception of wiretapping, and Brandeis cautioned that technology could allow government to invade our rights in ways never imagined by the framers, or anyone else. *Olmstead* was subsequently overturned by *Berger v. New York* (388 U.S. 41) and *Katz v. U.S.* (389 U.S. 342) in

the 1960s. In both cases, wiretapping and electronic eavesdropping were considered violations of the Constitution. Justice William O. Douglas, in his concurring opinion in *Berger*, breathed a sigh of relief: "at long last it [this case] overrules *sub silentio Olmstead v. U.S.*" (*Berger* 64). Although it was finally overturned after forty years, *Olmstead* illustrates the difficulty with which new rights and protections are faced.

The benefit of the Anti-Federalists' wisdom has indeed acquired Thomas Jefferson's "half a loaf." But as the Federalists feared, the Bill of Rights - so far - has obtained only the half loaf. The quest now lies in how to get a "full loaf." The task is easy, because the framers have provided us the ingredients: the Ninth Amendment.

Answering the Federalists

Within the Bill of Rights itself lies the answer to the Federalists' objections. The Federalists, as already noted, did not want any bill of rights at all. This means, of course, that all rights under the Constitution would have been unenumerated rights (Barnett 1989, 20). Surely it cannot be debated that the framers would have denied protection for rights such as free speech, press, or any of the rights of conscience. Had the authors and ratifiers of the Bill of Rights known that the rights in those first ten amendments would be considered the only rights of the

people, they certainly would not have settled for so paltry a list. In fact, it is only common sense that a clause such as the Ninth Amendment should be inserted into the Constitution. No text alone is so comprehensive that it can cover everything (Grey 1993, 2:202). Norman Redlich commented on this point in "Are There 'Certain Rights . . . Retained by the People'?" words are inadequate to define all the rights in a free society (Redlich, 1989, 1:145). As Congressman Theodore Sedgwick of Massachusetts argued at the time of ratification, the Constitution need not "descend to such minutiae" as specifying a right to peaceably assemble (Cooper 1991, 424). He stated that such an enumeration would have entailed going "into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper . . . " (Cooper 1991, 424-5). Rights are limitless because rights are whatever anyone can think of, so long as they do not infringe on the rights of others. Charles Black, Jr., in his article "On Reading and Using the Ninth Amendment," argued that vague wording in the Constitution is a good thing, for by listing rights, we necessarily limit them (Black, Jr. 1989). Using the example of cruel and unusual punishments, he remarked that if a few punishments were prohibited, certainly equally cruel punishments could be thought up. Dworkin effectively illustrates why more

precise language would be contrary to the purpose of the Constitution. As he argues in *Taking Rights Seriously*, the Constitution lays down certain principles and concepts concerning liberty and justice. Dworkin compares these concepts to instructions to his children. He writes,

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind (Dworkin 1978, 134).

Dworkin argues that it is the misunderstanding of the difference between conceptions and concepts which has confused our ideas about interpreting the Constitution's vague clauses. Dworkin asserts that the broad constitutional clauses represent "appeals to the concepts they employ, like legality, equality, and cruelty" (Dworkin 1978, 135). He provides the example of the cruel and unusual punishment provision. He writes that it should not matter that the death penalty was not considered cruel and unusual punishment when the amendment was adopted, because the framers provided us with a concept of cruel and unusual

punishment, which we must reexamine ourselves, and make up our own minds about what is cruel (Dworkin 1978, 135).

The Ninth Amendment steps in where the other amendments leave off. It traverses those gray areas where specificity and restrictive words seem to work against the purposes of justice and liberty, rather than for them. The Ninth Amendment responds to the fears of the Federalists that not all rights can be listed, and guards against the notion that by listing certain rights, all others are forfeited. Allowing active interpretation of the Ninth Amendment also permits the growth and change of our conceptions of liberty, and for future generations to be able to respond to the crises of their times, addressing John Dewitt's concerns about future misunderstandings of what the written Constitution actually secured. The human experience is marked by change, change in notions, traditions, and in what is fundamentally important. Bennett P. Patterson, in "The Forgotten Ninth Amendment," wrote that as we become more "civilized" we learn and change our views on things, such as the women's movement and slavery (Patterson, 1989, 1:124). Our rights are evolving, both enumerated and unenumerated. The definition of cruel and unusual punishment is different today than in the 1800s, as it will be in the future. The same will hold true to our definitions of unenumerated rights (Black, Jr. 1989, 341). Patterson furnished the example of debtors' prison which was common at the time of

the adoption of the Constitution. There is no provision in the Constitution to protect us from this, but debtors' prison no longer fits our conception of justice. He provided the example of witchcraft, which was punishable in the 1800s but would not be punished today. Our ideas of what is right and wrong, of justice, and even of the Constitution itself, change with time.

The Supreme Court recognized the need for flexibility in *U.S. v. Classic* (313 U.S. 299):

In determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar, and hence, the Supreme Court reads its words not as legislative codes . . . but as the revelation of the purposes which are intended to be achieved by the Constitution as a continuing instrument of government (1031).

Answering the Anti-Federalists

The Ninth Amendment not only responds to Federalist fears, but it serves the Anti-Federalists' hopes as well. The Amendment provides a clear textual basis for all claims, and it serves as a legal check for the judiciary to employ. As Calvin Massey wrote in his article, "Antifederalism and the Ninth Amendment," unenumerated rights have a textual basis so it seems inconceivable that they are somehow not protected by judicial review (Massey, 1993, 2:275). Given time and usage, the clause may eventually garner the public love and respect that will further protect the citizens from

government intrusions, as people cherish the sentiment that they have many rights to freely exercise. Hamilton, in *Federalist* 84, noted the importance of public support when he wrote that security of rights depends on "public opinion, and on the general spirit of the people and of the government" (Rossiter 1961, 514). Energizing the citizenry with the notion of liberty through the Ninth Amendment helps to ensure the future security of individual rights. The clause is also useful to future generations, allowing the Constitution to be shaped to fit their crises. "Whatever the thoughtfulness of a past generation, the one thing that we can be sure of is that its members did not discern our particular world and apply their formidable intelligence to solving its conundrums," and "even the most well-drafted of statutes can become irrelevant or, what is worse, actively counter-productive to the very concerns that gave them life in the first place" (Levinson 1993, 2:143). Giving the Ninth Amendment its true meaning is necessary, because, "The rights retained by the people are limited only by their imagination and could never be completely specified or enumerated" (Barnett 1993, 2:8). As Immanuel Kant wrote,

No one has a right to compel me to be happy in the peculiar way in which he may think of the well-being of other men; but everyone is entitled to seek his own happiness in the way that seems to him best, if it does not infringe the liberty of others in striving after a similar end for themselves . . . (Olafson 1961, 161).

The History of the Ninth Amendment

As has previously been discussed, the controversy over a lack of a bill of rights in the new Constitution threatened its ratification. The Federalists finally conceded the point, promising to propose a bill of rights after the ratification of the proposed Constitution (Barnett 1993, 2:178). Of course, the Constitution was ratified, but the intended bill of rights was not immediately forthcoming. James Madison, though known as the author of the Bill of Rights, was not originally in favor of a bill of rights (Morgan 1988, 131). In his book *James Madison on the Constitution and the Bill of Rights*, Robert J. Morgan attempts to explain Madison's switch from an opponent of a declaration of rights to the author and proponent of the Bill of Rights. First, Morgan notes that a response to a call for the crafting of a bill of rights might open the door to tampering with the proposed Constitution, and would complicate the process of ratification (Morgan 1988, 132). Madison also concluded that the call for a bill of rights was mostly a ploy by Anti-Federalists to defeat ratification of the Constitution. In defense of the proposed Constitution, Madison promised rights-securing amendments after ratification (Morgan 1988, 135). Although the Constitution was ratified, and the first elections brought in a Congress and President friendly to the new Constitution, Madison was still concerned about the Anti-

Federalist threat. In May 1787 Madison presented his proposed amendments to the House. On June 8, 1789, Madison urged the House to consider the proposed amendments, warning that "Any further delay . . . would create suspicions, at least, and might even inflame public opinion among the warm supporters of a bill of rights" (Morgan 1988, 137).

Although he recognized the need for other pressing business of the new government, Madison hinted that the new government may face sharp criticism if a bill of rights was not passed. However, he also wanted to ensure that the call for amendments did not open the door to tinkering with the Constitution, but should be limited to securing rights that everyone supported (Morgan 1988, 138). Eventually, Madison persuaded a Select Committee of the House to consider proposed amendments to add to the Constitution (Barnett 1993, 2:4). In an attempt to assuage the fears of the Federalists, he proposed what would become the Ninth Amendment:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution (Barnett 1993, 179).

During this speech, Madison clearly explained the true purpose behind the Ninth Amendment. He said,

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 (Barnett 1989, 60).

This clause was to become the Ninth Amendment.

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people . . . (Barnett 1989, 55).

As Joseph Story noted in his *Commentaries on the Constitution*,

This clause 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; and *e converso*, that a negation in particular cases implies an affirmation in all others (Story 1987, 711).

The Ninth Amendment received little to no attention from courts and commentators up to 1965 (Caplan 1989, 243). When it was referred to in early cases, it was often lumped in with other amendments, and said to refer only to the national government. Bennett B. Patterson, in "The Forgotten Ninth Amendment," explains one theory of why the amendment has remained on a dusty shelf for so many years. According to Patterson, in the case of *Fox v. State of Ohio* (46 U.S. 410), the Court failed to distinguish between the first eight amendments and the Ninth when it stated that "those amendments" applied only to the national government

(Patterson 1989, 110). Also, in *Lessee of Livingston v. Moore* (32 U.S. 469), the Court stated that "those amendments do not extend to the states" (Patterson 1989, 111). Patterson argues that the Court was referring only to the Seventh Amendment, though both the Seventh and Ninth amendments were discussed in the case. Patterson believes that these confused references to the Ninth Amendment as applying only to the national government influenced people to ignore it for many years. Patterson does note, however, that in *Eilenbecker v. District Court of Plymouth County, Iowa* (134 U.S. 31), the Court ruled that the first eight amendments apply to the federal government, leaving the implication that the Ninth Amendment applied to the states (Patterson 1989, 114).

In 1965, the heretofore uninspired life of the Ninth Amendment would be forever changed. The U.S. Supreme Court was confronted with the case of *Griswold v. Connecticut* (381 U.S. 479) in which the executive director of the Planned Parenthood League of Connecticut and a physician associated with the League were convicted as accessories to a crime for giving information and advice on birth control to a married couple. Charged under an aiding and abetting law, they supposedly violated a Connecticut statute that made it illegal to use any drug or article to prevent conception. The case was ultimately appealed to the Supreme Court, where it became one of the most controversial cases of the

century, and one which laid the foundation for the popularity of Ninth Amendment and unenumerated rights claims.

Justice Douglas delivered the opinion of the Court which declared that there are certain rights that, while not mentioned specifically in the Constitution, have been construed to exist under other rights, without which "the specific rights would be less secure" (*Griswold* 482). "In other words, the First Amendment, and other amendments, have a penumbra where privacy is protected from governmental intrusion" (*Griswold* 483). The Court stated that the enumerated rights listed in the Bill of Rights have "penumbras, formed by emanations from those guarantees that help give them life and substance" (*Griswold* 484). The Court listed the First, Third, Fourth, Fifth, and Ninth amendments as the rights that form zones of privacy. *Griswold* marked the beginning of the right to privacy, followed by such cases as *Roe v. Wade* (410 U.S. 113), *Doe v. Bolton* (410 U.S. 479), and *Eisenstadt v. Baird* (405 U.S. 438), which built on the foundation laid in *Griswold*.

But perhaps more important to the life of the Ninth Amendment was Justice Arthur Goldberg's now famous (or, to his critics, infamous) concurring opinion. Justice Goldberg argued that there are several rights that have long since been recognized by the Court despite the fact that they are not specifically mentioned in the Constitution. Goldberg

went on to say that these rights exist because they are so deeply ingrained in the traditions and consciousness of the people that they are fundamental. Goldberg directly seized upon the Ninth Amendment and used it to underpin his opinion. Referring to the Ninth Amendment, Goldberg mentioned the fact that the framers thought there were additional fundamental rights protected from governmental intrusion other than those listed in the first eight amendments. "Liberty" protected by the Fifth and Fourteenth Amendments, he asserted, protects unenumerated rights via the Ninth Amendment with the same constitutional force and authority as enumerated rights. The unenumerated right that was deserving of protection in the *Griswold* case was the right of privacy in marriages, which comes from the collective conscience of the people, and "from the totality of the constitutional scheme under which we live" (*Griswold* 493-5).

But not all of the justices on the Supreme Court thought the decision was a proper one, and many critics after the decision have thought the same. Justices Black and Stewart joined in dissent in this case, stating that while the law was frivolous and "uncommonly silly," it was not unconstitutional. While several amendments such as the Fourth and Fifth protect a right to privacy at certain times, places, and under certain circumstances, there is no general right to privacy in the Constitution. Stewart

argued that if the people wanted to be rid of this law, they needed to persuade their representatives to repeal it. According to Stewart, "That is the constitutional way to take this law off the books" (*Griswold* 531).

Justice Hugo Black, also dissenting, attempted to refute Goldberg's reading of the Ninth and Tenth amendments. He claimed that these amendments were meant to limit government to those powers expressly granted in the Constitution, not to open the door to numerous rights, or for the Court to invalidate the laws of the legislatures. According to Black, the role of the Court is not to keep the Constitution up to date, or in tune with the social atmosphere of the times; that is the purpose of the representative branches of government. Black also warned that use of the Ninth Amendment is a thinly disguised bid for judicial power, allowing judges to invalidate any legislative acts they do not like. He claimed that with constant use of judicial review, and by loosening the rules of the Constitution, there would be a great shift of power to the courts in violation of the separation of powers.

The complaint of the justices, and of other critics, is the same. The legitimate role of the Court is not to strike down laws simply because the judges do not like the law. If the law is a bad one, there are plenty of remedies for the people through their duly elected legislatures.

Another case in which the Ninth Amendment was appealed to is *Bowers v. Hardwick* (478 U.S. 186). Hardwick was challenging an anti-sodomy law, claiming that the statute violated his privacy rights under the Ninth Amendment, a "specific constitutional provision giving 'life and substance' to our understanding of privacy" (*Bowers* 201). Justice Byron White delivered the opinion of the Court. White claimed that the precedents in this area, *Meyer v. Nebraska* (43 S.Ct. 625), *Griswold*, and *Roe* all dealt with family, marriage, or procreative rights, not just any sexual activity between two consenting adults. In order to support this right according to *Griswold*, it must be "deeply rooted" in the national conscience, or must be implicit in the concept of liberty. White wrote that to even suggest that homosexual sex is either of these things is "at best, facetious" (*Bowers* 194). White argued that homosexual activity has always been against the law: through common law, at the time when the Constitution was ratified, and throughout the states.

Dissenting in this case, Justice Harry Blackmun asserted that simply because a law has been around a long time does not make it right. Blackmun quoted Holmes' observation that

[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since,

and the rule simply persists from blind imitation of the past³ (*Bowers* 199).

Blackmun argued that we protect marriage and procreation not because of some social value placed on these things, but because they are central to individuals in defining themselves and their lives. He wrote,

The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others (*Bowers* 206).

Blackmun contended that the real danger to this country is neither usurpation by the judiciary nor the recognition of a nontraditional lifestyle, but rather the refusal to uphold minority rights against the prejudices of the majority. He wrote,

. . . depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do (*Bowers* 214).

The *Griswold* case heralded dozens of cases appealing to the Ninth Amendment as an attempt to justify individual rights (Caplan 1989, 243). The right to smoke marijuana in the home, the right to an abortion, the freedom to conduct one's personal sex life without official intrusion, freedom of movement, the right to wear one's hair any way one wants, the right to a healthful environment, the right to enjoy

³Oliver Wendell Holmes, "The Path of the Law," 10 Harvard Law Review, 457, 469 (1897).

natural resources, the right not to wear a crash helmet, the right to teach in public schools, the right to sue the federal government, freedom from the military draft, the right of access to the courts, and the right to engage in political activity are just some of the cases that have sprung up in the past few decades laying claim to the Ninth Amendment (Shaw 1990, 109-111). Not all of these cases have succeeded in their claims; but they have, for the first time, bolstered their arguments with the "forgotten" Ninth Amendment.

The Ninth Amendment and States' Rights

The Ninth Amendment, however, does fail to address one major complaint of the Anti-Federalists. It does not protect states' rights versus the national government. The Pennsylvania Minority objected to the powers described in the new constitution since the national government "must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several states" A proposed amendment to the Constitution by the Anti-Federalists demonstrates their concerns. The very first amendment desired was "that it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised" (Ketcham 1986, 242).

As indicated by the words of the Ninth Amendment, the clause speaks to rights retained by the "people," not the states. Paradoxically, some current commentators have claimed that the sole original purpose of the Ninth Amendment was to protect states' rights. They assert that the Ninth Amendment was ratified to assure the people that all rights protected under the state constitutions would retain their full effect under the new system. Robert Bork, though not an active proponent of the theory, stated at his confirmation hearings that this explanation was the only one "that has any plausibility to it that I have seen so far" (Barnett 1993, 2:433). The "retained rights" referred to in the Ninth Amendment, this theory asserts, are the rights existing at the time of adoption in the states' constitutions. Raoul Berger supports this opinion in his article, "The Ninth Amendment," indicating that the states wanted the Ninth Amendment to protect them from a strong national government (Berger 1989, 1:208-10). Berger notes that at that time, it was the states that were regarded as the protectors of liberty, not the national government, and the amendment was simply an assurance that these liberties would still be intact under the new regime. Added to this is the idea that the Ninth Amendment cannot be used to invalidate state laws because Madison, the author of the Ninth Amendment, originally wanted to insert the clause in Article I, Section 9 of the Constitution, the area

specifically referring only to the national government (Levinson 1993, 2:129). Also, in *Adamson v. California* (67 S.Ct. 1672), the Supreme Court held that the Fourteenth Amendment does not incorporate all of the amendments in the Bill of Rights and apply them to the states.

Russell Caplan takes up the torch from there with an interesting view of the role of the Ninth Amendment in the constitutional scheme. Caplan also supports the view that the Ninth Amendment was merely a protective clause for the states against the national government, however Caplan takes the argument a little further in his article "The History and Meaning of the Ninth Amendment" (Caplan 1989). He argues that the Ninth Amendment was enacted to protect the states' pre-existing laws and constitutions, thus the amendment is looking back, enforcing things that were in effect before the amendments were ratified. Caplan argues that the Ninth was meant to be paired with the Tenth Amendment, and it is the Tenth Amendment that looks forward, protecting the states' power from future encroachment by the national government. By pairing these two amendments, Caplan limits the meaning of the Ninth Amendment to a one-shot protection clause of those rights that were protected by state constitutions only at the time of ratification of the Bill of Rights. Caplan adds a unique twist to this argument stating that the Ninth Amendment

certainly cannot now be used to invalidate state laws since its very purpose was to protect them.

However, a serious look at history bolsters an expansive reading of the amendment (Macedo 1993, 2:151). The real meaning and intent of the framers is shown by the fact that around the 1800s many state constitutions had clauses similar to the Ninth Amendment, and thus the people back then understood it to mean what it says, and not as some restriction on national power. As John Ely wrote in his article "The Ninth Amendment,"

The fact that the constitution-makers in, say, Maine and Alabama in 1819 saw fit to include in their bills of rights provisions that were essentially identical to the Ninth Amendment is virtually conclusive evidence that they understood it to mean what it said and not simply to relate to the limits of federal power (Ely 1989, 183).

Since the adoption of the Constitution, twenty-nine states have added a clause similar to the Ninth Amendment (Kettleborough 1918). The Constitution of the Confederate States of America also contained a similar provision (Barnett 1989, 29). Article VI, Section 5 of the Confederate Constitution is nearly verbatim of the Ninth Amendment:

The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several States (Kilpatrick 1961, 28).

If the amendment was intended solely to protect states' rights at the time of ratification, there would be no cause

for similar provisions for newly formed states in the Union, or in the Confederate Constitution.

Early Protection for Unenumerated Rights

Several early cases under the new Constitution also show that the founders understood that unenumerated rights were deserving of constitutional protection. In *Calder v. Bull* (3 U.S. 386) and *Savings and Loan Association v. Topeka* (87 U.S. 686), the Supreme Court stated that certain inherent human rights are entitled to protection even though they are not numbered in the Constitution (Patterson 1989, 1:115). In *Calder*, Supreme Court Justice Samuel Chase said in the opinion of the Court that there was some legislation that, although not specifically restricted by the Constitution, could be struck down if it violated certain principles of "free Republican governments" (*Calder* 388).

CHAPTER 3

A WORKING THEORY

The Ninth Amendment has the potential to be a cherished protector of liberty. Yet it has remained dormant until very recently. Only after the landmark case of *Griswold v. Connecticut*, in which the Ninth Amendment was referred to, has the amendment been appealed to with any conviction or frequency. Awakening interest in the Ninth Amendment is most likely the result of the huge interference on the individual of the ever growing bureaucratic state over the past fifty years (Arnold 1993, 2:257).

Defining Unenumerated Rights

But what are the rights protected by the Ninth Amendment? How do we determine what they are? At his confirmation hearings discussing enumerated rights, Justice Anthony M. Kennedy quipped, " . . . 'Come out, come out, wherever you are', looking for the sources and the definitions of unenumerated rights" (Barnett 1993, 2:465). Perhaps to attempt to define and enumerate unenumerated rights would be contrary to the obvious intent and meaning

of the amendment (Patterson 1989, 120). But, in order to protect these rights, there must be some way of determining what they are. There are many theories on the definition of Ninth Amendment rights. Massey claims that the Ninth protects both natural and positive rights just as the first eight amendments do (Massey 1989, 1:310-11). Randy Barnett writes that unenumerated rights should be protected against both illegal means and ends employed by government (Barnett 1993, 591). According to the *Griswold* opinion, the rights under the Ninth come from three sources: the traditions and the conscience of our people, experience with the requirements of a free society, and the fundamental principles of liberty (Caplan 1989, 1:245). Others point to the fact that interpreting the Ninth is the same as with the rest of the Constitution. It could even be done by the "originalist" method of looking at the framers' notes, proposed amendments, speeches of the day, and the like (Barnett 1989, 35). Interpreting the Ninth could be seen the same as giving meaning to the open-ended "necessary and proper" clause (Barnett 1989, 37). Or, one could use enumerated rights as points of departure to find unenumerated rights through "common underlying values" (Black, Jr. 1989, 347).

The problems with the Ninth Amendment are problems with the law in general; in determining means and ends of protection, defining what counts, accepting that it may have

to be redone, and that mistakes are made (Black, Jr. 1989, 340). The core of the dilemma is that the amendment appears to command that we search for unenumerated rights, yet provides no clues as to what these rights are, or how to determine their meaning. Some skeptics of the Ninth Amendment, such as Raoul Berger, have pointed out that if the clause is given a broad interpretation, it gives the judiciary a "bottomless well" to use at their "limitless discretion" (Barnett 1993, 182-3). There are also theorists who believe that the Constitution should be read and interpreted with the intent of the framers in mind (Maltz 1993, 2:261). These "originalists" believe that there is no way to determine what the framers intended unenumerated rights to be, and therefore they are unenforceable. The founders wanted rights to be protected **from** the Constitution, not **by** the Constitution (Maltz 1993, 2:262). That is, rights should be protected from encroachment by the government. If the government is viewed as the protector of rights, it is given a claim to power over the protection and enforcement of rights, and the government's power is enlarged by the Constitution, rather than restrained by it.

However, supporters of a sweeping reading of the Constitution, such as Ronald Dworkin, note that limiting the rights of the people to the few listed in the first eight amendments, and in the body of the Constitution, gives government overwhelming power, and takes the principles of

the Constitution and reduces the text to "a document with the texture and tone of an insurance policy or a standard form commercial lease" (Dworkin 1992, 384).

The Presumption of Liberty

Resolving the issue of what is an unenumerated right, a right retained by the people, can be accomplished through Randy Barnett's theory of the "presumption of liberty." In his theory, the judiciary would approach any claim to an unenumerated right with the presumption that individuals have the freedom to do whatever it is that they are claiming. This shifts the burden to the government to justify its conduct. If the government cannot defend its actions and show that the objective cannot be achieved without violations to citizens' rights, then the citizen deserves to win and the government deserves to lose (Barnett 1989, 26). As Justice Brandeis wrote, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the [Constitution]" (Schwartz 1968, 171). This method does not mean that the government will always lose. Rather, it implies a burden of justification upon the government to warrant its activities, both in using expressly delegated powers and implied, means-oriented powers.

This method is also similar to the technique judges use in adjudicating cases concerning enumerated rights. For example, there is a presumption of free speech, and any governmental intrusion is closely scrutinized (Barnett 1989, 42). Barnett's approach works to limit government, not expand it. It leaves certain areas that neither state nor national governments have the power to regulate (Kelsey 1989, 93). It creates a "sea of rights surrounding islands of government powers," rather than a "sea of governmental powers surrounding islands of individual rights" (Barnett 1989, 43). This theory was hinted at in *U.S. v. Carolene Products Co.* (304 U.S. 144) in the famous Footnote 4, when Justice Harlan F. Stone wrote,

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ~~ten~~ amendments, which are deemed equally specific when held to be embraced within the Fourteenth {emphasis added} (*Carolene* 152).

The Court signaled that the presumption of the constitutionality of legislation would face a more serious challenge when the legislation in question impinged upon a particular clause of the Constitution. Note that the Court recognized the first ten amendments, which, of course, would include the Ninth Amendment, as specific provisions that could test the presumption of constitutionality of legislation.

**Unenumerated Rights
Are Similar to Listed Rights**

Unenumerated rights under the Ninth Amendment are not so different to interpret as the numbered rights. Despite the fact that rights are listed, judges still must interpret enumerated rights, because they are vague, general declarations of right, just like the Ninth Amendment. As Henry Manne noted in his essay "Reconciling Different Views About Constitutional Interpretation," "The meaning of words are notoriously vague, ambiguous, and volatile . . . " (Manne 1989, 58). The "enumerated" rights are filled with vague and ambiguous terms that must be defined by the judiciary. What is **excessive** bail? What is **cruel and unusual** punishment? What is **unreasonable** search and seizure? The enumerated rights require subjective interpretation just as unenumerated rights do.

The First Amendment right to free speech is a good example of this concept since it is a broad guarantee that has required more narrow definitions of its meaning throughout the years. The Court has been asked to interpret this right. In the case of *Martin v. Struthers* (63 S.Ct. 862) the Court held that freedom of speech and the press includes the right to distribute literature and the right to receive it. There is no textual provision that states this, but the Court has interpreted an enumerated right. The courts have done this continuously, in determining whether free speech is anything from picketing to wearing black

armbands (Black, Jr. 1989, 342). In his essay, "Unenumerated Rights: Whether and How Roe Should be Overturned," Dworkin illustrates this point (Dworkin 1992). He compares the Court's protection of flag burning under the First Amendment right to free speech, and the protection from gender discrimination under the Equal Protection Clause, to the protection of the right to an abortion as an unenumerated right. He notes that neither flag burning nor protection from gender discrimination are specifically mentioned in the document itself, but all are guaranteed by the general principles of the Constitution. The interpretation of the enumerated rights to include flag burning and gender equality are the same thing as the interpretation of unenumerated rights. He claims these things do not flow from the intent of the framers, but from the political principles that guide our country.

Unenumerated rights can also be seen as having the same limits as the listed rights. Richard A. Epstein, in his article, "Property, Speech, and the Politics of Distrust," wrote, "Freedom of speech is not the same as an uninhibited license to speak" (Epstein 1992, 45). Courts have not interpreted the First Amendment to mean that government actions may never in any manner affect speech, but that when they do, the government is under a heavy burden to justify its conduct (Barnett 1993, 2:27). Justice Oliver Wendell Holmes, in the *Schenck v. U.S.* (39 S.Ct. 247) decision,

wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic" (*Schenck* 249). In *Gitlow v. New York* (45 S.Ct. 625), the Court curbed free speech by upholding a New York statute prohibiting speech that threatens overthrow of the government by unlawful means. Chief Justice Fred Vinson, in *Feiner v. New York* (71 S.Ct. 303), wrote that the right to free speech does not include the right to incite a riot. Again, in *Chaplinsky v. State of New Hampshire* (62 S.Ct. 766), the right of speech was not declared an absolute right. Justice Frank Murphy wrote the opinion, stating that Congress can regulate lewd, obscene, libelous speech, and "fighting words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (*Chaplinsky* 766). If the enumerated right of free speech can be limited and defined, then unenumerated rights would surely face similar limitations.

Recognition of Unenumerated Rights

Many unenumerated rights have already been recognized with little controversy about their existence or need to be sheltered. In *Meyer v. Nebraska* (43 S.Ct. 625) the Court stated that certain unenumerated rights were necessary "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (*Meyer* 626). For example, the right to associate was

secured in *NAACP v. Alabama* (357 U.S. 449). The right to be presumed innocent was found to exist in *Estelle v. Williams* (425 U.S. 501) decided in 1975. In 1970, in the case of *In re Winship* (397 U.S. 358), the right to proof beyond a reasonable doubt became a fundamental right in our criminal justice system. The right to bring up children and direct their education was protected in *Pierce v. Society of Sisters* (45 S.Ct. 571). The right to marry, to establish a home, and the right to have offspring have all been shielded as fundamental rights retained by the people in *Skinner v. Oklahoma* (62 S.Ct. 1110). *Lochner v. New York* (25 S.Ct. 539) gave the right to contract, though this case is now widely considered illegitimate. The right to forward one's own political views was protected by the Ninth Amendment in the case of *United Public Workers v. Mitchell* (37 S.Ct. 556). The right to pursue an occupation without state interference was declared in *Schwartz v. Board of Bar Examiners* (77 S.Ct. 752). The right for the media to attend trials is not listed in the Constitution, but became a protected right in *Richmond Newspapers, Inc. v. Virginia* (448 U.S. 555). In this case, the Court admitted that there is no enumeration of this right, but said that traditionally the media and public had been attending trials, and this right is part of the First Amendment.

In *Kent v. Dulles* (78 S.Ct. 1113), the right to travel was declared. Supporting that decision was the case of

Aptheker v. Secretary of State (378 U.S. 500) in which the right to travel at home and abroad was found to be an important aspect of liberty. In *U.S. v. Guest* (383 U.S. 745), the Court again reaffirmed this right by stating that, "The Constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union . . . [F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution" (*Guest* 758). The opinion goes on to recognize that while the right to travel is not specifically listed in the Constitution, it is basic and elementary. Again, in *Shapiro v. Thompson* (394 U.S. 618), the Court found that the Constitution guarantees the right of interstate travel. In dealing with an uncontroversial subject, the Supreme Court "points to the absence of an explicit textual home for the right with pride, as a kind of evidence of the centrality of the right to the constitutional project of which it is indisputably a part" (Sager 1993, 2:255).

All of these unenumerated rights have been relatively supported because of their uncontroversial nature. The criticisms of unenumerated rights arise when controversial subjects, such as abortion, are linked to an unenumerated right, such as the right to privacy. The right to privacy is not so controversial in and of itself, except that the legal right to abortion flows from it (Barnett 1993, 2:413).

The right to privacy has been mentioned by the Court on numerous occasions. Justice Brandeis, in his dissent in *Olmstead* stated, "The right to be let alone [is] the most comprehensive of rights, and the right most valued by civilized men" (*Olmstead* 572). The opinion in *Frank v. Maryland* (79 S.Ct. 804) recognized the "essential right of privacy" that is "protected by the due process clause of the Fourteenth Amendment" (*Frank* 808). Again, in *Stanley v. Georgia* (394 U.S. 557), the Court wrote, "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy" (*Stanley* 564).

When the right of privacy comes under assault, it is generally due to the controversial nature of a particular issue, such as birth control, abortion, or homosexual activity, rather than the broad concept of a right to privacy. In the case of *Poe v. Ullman* (367 U.S. 497), though the case was dismissed due to injusticiability, dissenting justices said that the laws prohibiting use of contraceptives were "an invasion of the privacy that is implicit in a free society" (*Poe* 509, 521). In *Eisenstadt v. Baird* (405 U.S. 438), the opinion read, "If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"

(*Eisenstadt* 453). But the most controversial of the "privacy rights" which has brought ire down upon unenumerated rights, was the decision in *Roe v. Wade* (410 U.S. 113). In this case, the Court declared that the right to privacy encompassed a woman's right to terminate her pregnancy if she chose to. In the opinion of the Supreme Court, "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (*Roe* 153). The emotional debate over abortion and the right to privacy has threatened the recognition of other, less controversial unenumerated rights. Similar cases with equally unpopular issues have made it to the Supreme Court, but not necessarily with the same outcome. The case of *Bowers v. Hardwick* (478 U.S. 186) was an attempt to strike down sodomy laws which were claimed to deny homosexuals their right to privacy and to conduct their sexual lives without interference by the government. The claim was denied, and the anti-sodomy law was upheld.

As a comparison of the right to travel and the *Roe* and *Hardwick* decisions illustrate, the acceptance of the concept of unenumerated rights has more to do with the actual right

claimed, and its controversial nature, than a debate over the existence of unenumerated rights.

**Judicial Review, Judicial Activism,
and the Ninth Amendment**

Expanded use of the Ninth Amendment is open to the problems associated with judicial discretion. It has been argued that the Supreme Court, through extensive use of judicial review, has usurped power from the other two branches, and exercises extraordinary powers (Mace and Melone 1988). Judicial review is the power of the Court to overturn acts of the other two branches of government, or of the state governments, as unconstitutional. Activist decisions are those opinions that do not defer to the legislative or executive branch, that do not adhere closely to only specific textual provisions of the Constitution, or that do not follow original intent. Judicial activism and the Ninth Amendment seem to go hand in hand. Discussing the issue at his confirmation hearings before the Senate, Bork stated,

I do not think you can use the ninth amendment [sic] unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it (Barnett 1993, 2:441).

Of course, the Ninth Amendment is not hidden beneath an ink stain. The words are clear, and we know what it says, but

the problem is that the words do not reveal specific rights and provisions. The criticisms of judicial activism, and hence of the use of the Ninth Amendment, rely on the principles of original intent, majoritarianism, and the danger of the personal preferences of the judge deciding cases.

Originalism and the Constitutionality of Judicial Review

The first claim against the legitimacy of judicial review is that this power is simply unconstitutional. The power of judicial review is nowhere explicitly mentioned in the Constitution. Rather, opponents claim, the Court has usurped this power over the years through a series of cases, starting with *Marbury v. Madison* (5 U.S. 137, Mace and Melone 1988, 19). Many of the advocates of this position adhere to the theory of the intent of the framers, or originalist theory. Originalist doctrine demands that judges look to the intent of the framers of the Constitution to guide them in their decisions. Originalists often claim that if the framers had intended to grant the Supreme Court the power of judicial review, they would have included explicit words in the document to that effect. However, since no such phrasing exists, neither should the power.

This theory has severe problems as a serious guide to constitutional interpretation. First and foremost, it is nearly impossible to discern what the intent of the framers

actually was. The records of the convention are incomplete, and offer conflicting testimony. There was more than one person at the convention, and certainly it cannot be proposed that all of the framers had exactly the same intent on every phrase of the Constitution. Also, the intentions of the state conventions, or even all of the people who eventually ratified the Constitution are impossible to discover (Shaman 1992, 39). There is considerable evidence that the framers were not only aware of the concept of judicial review, but many actively supported the idea (Beard 1988, 42). In fact, Hamilton clearly indicated judicial review would be a factor under the new Constitution in *Federalist* 16, when he wrote,

If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void (Rossiter 1961, 117).

Hamilton also specifically spelled out the powers of the judiciary in *Federalist* 78:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute . . . " (Rossiter 1961, 467).

Even if all this were not true, the theory of originalism is still bankrupt for several reasons. As Jeffrey Shaman

writes in "Interpreting the Constitution: The Supreme Court's Proper and Historic Function," "following the will of the 55 persons who supposedly framed the Constitution or the smaller group of them who actually participated in the framing is hardly an exercise in democracy" (Shaman 1992, 41). Nor does it say anywhere within the Constitution that the rule for interpreting the document is to follow the framers' intent. For all of these reasons, originalism fails to be a decisive indicator in the debate concerning judicial review.

The Undemocratic Nature of Judicial Review

Another argument against judicial review is that it is undemocratic. It is asserted that nine individuals nullifying acts of the popularly elected branches is inherently undemocratic (Mace and Melone 1988, 24). In *Thornburgh v. American College of Obstetricians and Gynecologists* (476 U.S. 747), Justice White explains in his dissenting opinion that certain "issues in our society are best resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted" (*Thornburgh* 796). In a democratic society, the will of the people is expressed through their legislature, and should be given the widest latitude possible. The rights retained by the people can be enacted through

legislatures, through state laws, and through constitutional amendments (Berger 1989, 205). The problem with the Ninth Amendment, according to Bork, is that it provides no text to determine its meaning, and therefore no law for the judge to apply. And when there is no law for a judge to apply, there is no function for the judge to perform. As Bork states it, "[d]emocratic choice must be accepted by the judge where the Constitution itself is silent" (Barnett 1993, 2:21).

But the assertion that judicial review is undemocratic, and hence illegitimate in our system, fails to recognize that the American system of government is a constitutional democracy, meaning it is a democracy with limitations on what the majority may do (Shaman 1992, 41). Justice Robert Jackson, in *West Virginia Board of Education v. Barnette* (319 U.S. 624), described why this concept is vital to the idea of liberty,

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by courts. . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections (*West Virginia* 638).

Perhaps the Court should be thought of as anti-democratic, rather than undemocratic. It can hardly be denied that the Supreme Court has undemocratic characteristics, but it can be considered anti-democratic in that it fosters good democracy. In pursuit of a better democracy, the Court acts as a counter-majoritarian force to

uphold minority rights and facilitate full participation by all groups in society (Mace and Melone 1988, 27).

Removing Issues from Public Debate

Some critics of judicial review argue that by allowing the courts to make final decisions, important issues are removed from public discussion. As Michael W. McConnell states in "A Moral Realist Defense of Constitutional Democracy," republican government is a better way to secure rights than by assigning power to judges, and removing issues from public debate (McConnell 1993, 93). McConnell writes, "We are willing to bear the risk that the community will sometimes be wrong because the risks posed by the alternatives are worse" (McConnell 1993, 73).

However, despite what the opposition to judicial review claims, the Supreme Court is not the final arbiter on issues. Judicial decisions are not the final say on any subject. "Its decisions are reviewable by Congress, which with some frequency overrules them" (Levinson 1993, 144). Several amendments have been adopted in reaction to unpopular Supreme Court decisions. In *Oregon v. Mitchell* (400 U.S. 112), the Supreme Court ruled on the 1970 federal Voting Rights Act which lowered the voting age from twenty-one to eighteen in local, state, and national elections. In that ruling, the voting age was upheld at the national level, but rejected for the state elections because

the justices ruled that the Congress overstepped its bounds of power by making voting requirements for the states (Cultice 1992, 171). Within a year, the Twenty-sixth Amendment giving the vote to every citizen at the age of eighteen, was ratified (Cultice 1992, 214).

Also, the Eleventh Amendment to the Constitution was "adopted to overturn an early Supreme Court decision⁴ that an out-of-state plaintiff could sue a state in federal court to collect a debt" (Orth 1987, 7). One need only examine the abortion issue to realize that a controversy is not finally disposed of by a Supreme Court decision.

Personal Biases of Judges

Another argument against judicial review is that judges will insert their own preferences into their decisions, basing invalidation of laws not on the Constitution, but on their own personal biases. Using such vague provisions as due process, equal protection, or the Ninth Amendment allows judges to nullify virtually anything (Boudin 1988, 137). Judicial review used to be an extraordinary power used in extraordinary circumstances but now, critics claim, it is ordinary and used all the time (Boudin 1988, 137). Analysts complain that judges no longer invalidate legislation based on whether it is a clear violation of the Constitution, as James B. Thayer urges in "The Origin and Scope of the

⁴*Chisholm v. Georgia*, 2 Dall. 419.

American Doctrine of Constitutional Law" (Thayer 1988, 71). Rather, the new standard is not whether Congress has the power to pass such legislation, but whether that power is wisely used (Boudin 1988, 139). It is charged that the judiciary compares contested acts against their own policy predispositions, rather than against the Constitution. Critics fear a powerful judiciary broadly interpreting a vacuous, limitless clause and shaping the Constitution and the law into whatever they wish. For example, Raoul Berger is concerned that the courts will become "Big Brother," and attempt to control the people. He believes the Court will use the Ninth Amendment to "make [the people] free and virtuous if they have to force them to be free and cram virtue down their throats" (Berger 1989, 218). This "bottomless well" for the judiciary takes government out of the hands of the people and into the courts. It leaves the Constitution open to a judge's opinion of what is right (McConnell 1993, 76).

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean (McConnell 1993, 85).

Commentators claim that judicial review destroys the judiciary in the eyes of the public, turning it into a partial, subjective institution, whereas it has always been

thought of as an impartial body relying on objective law to reach its decisions (Massey 1993, 300). Soon the judiciary would be relying on religion and morality rather than political theory and law (Rapaczynski 1993, 196). Critics also claim it causes an imbalance of powers between the branches of government (Massey 1993, 300). McConnell argues that judges are the worst ones we could enlist to interpret the Constitution so broadly for the rest of society. He claims they are totally unrepresentative of the people. Judges are generally older white men, upper class, isolated, and, perhaps most importantly, not accountable in most instances of judgeship. Federal judges, and specifically Supreme Court justices, are appointed for life, and McConnell states, "Power without responsibility is not a happy combination" (McConnell 1993, 89).

The fear of judicial tyranny is a valid concern, but there are other threats that may be worse. The tyranny of the majority is even more dangerous, and it was the one that Madison feared the most in his discussions about factions in *Federalist* 10 (Rossiter 1961). It seems only logical that in order to protect rights of the minority from the majority, or rights of the individual from society, the courts must necessarily be the forum for the preservation of these rights. "Whereas, the enumerated powers of Article I operate against the states and the people, the judicial power of negation operates against the other branches"

(Barnett 1993, 2:42). Individual rights are the rights most likely to be infringed by legislatures, so it is the unique duty of the judiciary to protect them (Massey 1993, 275). Judges are isolated from the whims of the majority, and thus are better equipped to protect the rights of the minority which may be vulnerable to neglect or abuse by the other branches of government (Sager 1993, 244). As McIntosh notes, in "On Reading the Ninth Amendment: A Reply to Raoul Berger," enforcement and encroachment are two different things (McIntosh 1989, 226). Protecting rights and enforcing them against the other two branches is not the same as infringing rights.

Controls on the Judiciary

While the problem of a zealous judiciary exists, it can be guarded against. There are several factors that limit the power of judges. As Hamilton argued in *Federalist* 78,

The judiciary . . . has no influence over either the sword or the purse; no direction of either the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments (Rossiter 1961, 465).

The judiciary must rely on the compliance of the other branches, and of the people.

Judges have to justify their decisions, both to others in the legal profession and to the public (Melone 1988, 263). Judges are constrained by *stare decisis*, statutes,

and the Constitution. Justices are subject to impeachment, and must be appointed by the president and confirmed by the Senate. The judiciary is bound by certain principles of adjudication, such as adhering to precedent, the "case or controversy" limitation of Article III of the Constitution, and certain maxims of self restraint, such as deciding on grounds other than constitutional controversies if possible, and avoiding "political questions" (Carr 1942, 185-197).

Finally, judges can only strike down offending legislation, not enact new laws (Barnett 1993, 2:19). Judicial review does not necessarily expand the power of the courts, rather it can be seen as limiting the power of the other two branches. Judicial review is negative and limiting, indicating that "the brakes of our constitutional machinery are more important than the ignition system" (Mason 1987, 437). Coupled with this idea is that the true value of judicial review is not nullification, but validation of laws. If the Court has the power to overturn a law, yet supports that law, it legitimizes the actions of the other branches of government, or the acts of state governments (Black, Jr. 1989, 11). The Court thereby adds to the legitimacy of the actions of the other two branches, and supports the idea of limited government, by indicating that there are certain boundaries that the legislature may not cross (Black, Jr. 1989, 11).

Judicial Restraint and Activism

Proponents of judicial activism cite that judicial review is necessary for some important reasons. First, as John Marshall asserted in *Marbury v. Madison* (5 U.S. 137), judicial review is a necessary power of the courts. Building on Article III and the Supremacy Clause, Marshall noted that the government that the Constitution set up was meant to be a limited government, and the only way to constrict government is to oblige government to watch itself. In order to accomplish this, the Constitution set up a semi-independent branch to check the other two. If Congress were to pass an ex post facto law or bill of attainder, where else but the courts could injured parties seek relief? Majoritarians claim that is up to the people to fix, but if unpopular minorities' rights are violated, the majority is unlikely to be a fair judge in its own cause (Black, Jr. 1989, 8-10). Minority rights are to be protected, even at the discomfort of the majority. As Black, Jr. argues in "The Building Work of Judicial Review," while not everyone will agree with the decisions of the Supreme Court, we can agree on the process. When the government is obliged to be the judge in its own case, the system must provide for as much of an independent, impartial arbiter as possible. He writes that the judiciary provides the independence and specialized knowledge necessary to make

the system as fair as it can be (Black, Jr. "Building Work," 1989, 9).

The conservatives in contemporary politics argue that the "liberal" Court has twisted the Constitution and rendered it a hollow document into which it can pour its own meaning. However, judicial activism is not limited to one party or ideology. Daniel Novak asserts in his article "Economic Activism and Restraint," that the Marshall and Taney courts were activists in the economic realm supporting business (Novak 1984, 80). Indeed, the *Lochner* era has been criticized for its economic activism. In a study examining the decisions of "restraintist" judges, Anthony Champagne and Stuart S. Nagel found that judicial restraint is actually often used to support certain policy preferences. If judicial restraint is not applied consistently, without regard to what interests may benefit by its use, then it isn't really restraint. Restraint must not be concerned solely with results (Champagne and Nagel 1984, 316).

In a similar study, Harold J. Spaeth and Stuart H. Teger examined levels of judicial deference to legislative acts to determine if judges were really restraintist or activist. They found that judges tended to vote to uphold their personal biases. "The point here is not to argue that the justices are activists, but rather to show that considerations of activism and restraint are absent from their decision making. Considerations of substantive policy

control the justice's voting behavior" (Spaeth and Teger 1984, 295).

Judges' decisions seem primarily rooted in their own prejudices, and so do the criticisms of the use of judicial review. Melone and Mace argue in their article, "Judicial Review: The Usurpation and Democracy Questions," that "positions on judicial activism versus restraint often turn on whose ox is being gored. Yesterday's liberals often criticized the Court for its activism; today it is the conservatives who condemn the Court for the same sin" (Mace and Melone 1988, 78). "Whenever the Supreme Court renders a decision that someone doesn't like, apparently it is not enough to disagree with the decision; there also has to be an accusation that the Court's decision was illegitimate, being based upon the justice's personal views and not the words of the Constitution or the intent of the framers" (Shaman 1992, 37). To disagree with the Court's opinion does not somehow invalidate its role as interpreter of the Constitution. No American agrees with every law ever passed by Congress, yet we abide by the laws because the process has been accepted as legitimate. Let the same now hold true for the judiciary.

The Future of the Ninth Amendment

The Ninth Amendment is in its infancy in constitutional interpretation and adjudication. The future of the clause

is uncertain as commentators debate about its true meaning, and about the role it should play in our system. Is the Ninth Amendment a mere ghost ship, a wayward clause that has no substance? Or is it, as Randy Barnett believes, a lifeboat? Barnett's analogy compares the Constitution to a majestic ship, designed never to sink. The designers expect that it will stay afloat forever, but they add lifeboats anyway, even though the designers hope they will never be needed. After many generations on this ship, the passengers forget what many of the devices on this ship are, including the lifeboats. Suppose, then, that some crisis occurs, and the boat begins to sink. As Barnett asked, "Would it make any sense to argue that passengers should refuse the lifeboats or life preservers because it was 'never intended' that they use them?" (Barnett 1989, 27-8). Of course, it would not. As the Ninth Amendment becomes more recognized, the Amendment, and the rights it protects, should be taken seriously enough to break out the life preservers. The individual rights of Americans need not go down with the ship.

Despite its lack of protection for the states, the Ninth Amendment can still be a powerful tool to secure liberty. The Federalists and Anti-Federalists were both insightful in their arguments concerning a bill of rights. The Bill of Rights has been a great bulwark against government invasion into private rights, and thus the

Anti-Federalists are vindicated. But the Federalists were also proven right, albeit mournfully so, that the listing of certain rights for protection is a dangerous enterprise. The Ninth Amendment is the key to capturing the best of both worlds: a declaration of rights with the guarantee that there are other rights deserving of protection besides the few mentioned. We cannot ignore the obvious text of the Ninth Amendment, for, as Dworkin notes, "The idea that the Constitution cannot mean what it says ends in the unwelcome conclusion that it means nothing at all" (Dworkin 1992, 392). The Supreme Court stated in the *Richmond Newspapers, Inc. v. Virginia* opinion,

The concerns expressed by Madison and others have thus been resolved; the fundamental rights, even though not expressly guaranteed, have been recognized by the court as indispensable to the enjoyment of rights explicitly defined (*Richmond* 580).

Perhaps this declaration was a bit premature, but, except for the states' rights argument, the possibility for reconciling this two hundred year old debate about the best method to protect individual rights lies as near as full recognition of the role of the Ninth Amendment.

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