The Ninth Amendment: Inkblot or Another Hard Nut to Crack

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INTRODUCTION

The times are right for remembering the ninth amendment, for we need reminding of it. The ninth amendment expresses and symbolizes a constitutionalism premised on the belief that the political aspirations of humanity are defined by transcultural or real standards of political morality, like simple justice as opposed to particular or popular historical understandings of justice. Yet powerful forces in twentieth-century American thought are at odds with this belief in simple justice. And this means that the time may not be so good for American constitutionalism as a whole.

This article singles out one element of modernist thought for comment: the New Right constitutionalism of which Robert Bork is considered the leading theorist. New Right constitutionalism is the only modernist teaching that rejects the essential tenets of American constitutionalism while packaging itself in its colors. For this and other reasons—like the public psychology of an acquisitive culture and the firm grip of modernist thought in American higher and professional education—New Right constitutionalism is the most serious near-term threat to American constitutionalism.

Part I of this article presents the nerve of the conflict between New Right constitutionalism and the constitutionalism embodied in the ninth amendment. Part II discusses how we should interpret the Senate's rejection of Robert Bork. Part III submits an affirmative case for a broad liberal reading of the ninth amendment. Part IV concludes the article by considering objections to this liberal reading.

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I. THE NINTH AMENDMENT AS A REMINDER OF REAL RIGHTS

Our era with regard to the ninth amendment parallels Lincoln's era with regard to the proposition of the Declaration of Independence that all men are created equal. To those politicians and judges of his day who measured the intentions of the framers by their worse selves, Lincoln responded by citing the high-flown language of the framers' better selves, the language by which the framers would have been known to their posterity. In this language Stephen Douglas and Roger Taney found an intent to assert merely the equal rights of Englishmen in America and Great Britain. Lincoln found much more. "I had thought the Declaration contemplated the progressive improvement in the condition of all men everywhere," said Lincoln.3

Lincoln held it morally impossible to read the Declaration in the fashion of Douglas and Taney. Commenting specifically on Douglas, Lincoln remarked that should the Declaration be read Douglas' way, the French and Germans among us "are all gone to pot along with the Judge's inferior races." Read Douglas' way, the Declaration covers only those Englishmen here and in Great Britain in 1776. "[W]hat a mere wreck—mangled ruin—[this reading] makes of our once glorious Declaration," Lincoln said. Are we "really willing that the Declaration shall be thus frittered away . . . thus shorn of its vitality, and practical value; and left without the germ or even the suggestion of the individual rights of man in it?"4

Lincoln knew that the authors of the Declaration had not intended to declare equality "in all respects." Nor had they intended the "obvious untruth, that all [men] were then actually enjoying that equality" or were soon to enjoy the rights they did intend. These were "'certain inalienable rights [to]. . . . life, liberty, and the pursuit of happiness.'" "This they said"—i.e., that all were equal in these rights—"and this they meant . . . . They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit." In asserting that "'all men are created equal,'" they meant not to describe existing practices and thus to limit the future extension of the maxim to whatever classes of persons and relationships it could fairly have described when written. They meant instead, said Lincoln, "to set up a standard maxim for free society . . . familiar to . . . and revered by all; constantly looked to . . . labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading . . . its influence, and

4. Id. at 362-63 (emphasis in original).
augmenting the happiness and value of life to all people of all colors everywhere.”

Lincoln opposed a view that would have degraded the maxim to mere rhetoric for rationalizing the Revolution—"old wadding left to rot on the battle-field." Its authors meant it "for future use," said Lincoln. They "meant it to be" what, "thank God, it is now proving itself, a stumbling block to those who in after times might seek to turn a free people back [to] the hateful paths of despotism." The authors "knew the prone-ness of prosperity to breed tyrants," said Lincoln, "and they meant when such should re-appear . . . and commence their vocation they should find left for them at least one hard nut to crack.”

When the Senate turned back the Bork nomination in October, 1987, one need not have stretched matters much to see a parallel between the ninth amendment and the Declaration's maxim. As the maxim had stood to those who defended slavery or the right of the community's majorities to adopt slavery on a theory Lincoln described as "no right principle of action but self-interest," so the ninth amendment stood to Bork and others who believe that constitutional rights owe their existence and status solely to majoritarian recognition.

Bork believes, or comes down close to the belief, that our most important right as individuals is the right to join with other individuals to form majorities whose representatives can enact their preferences into law. He seems to believe the Constitution limits the majority's agent-government solely because majorities at the founding and at later moments of constitutional amendment willed it so. In effect, Bork denies that individuals and minorities have rights as persons, rights the community is obligated to honor whether it has recognized them or not. He denies that the Constitution is open to rights against the community and its majorities beyond those rights recognized in the community's positive law.

A liberalized form of Bork's basic view would honor rights embedded deeply in a community's moral tradition, like the right to marital

5. Id. at 360-61 (emphasis in original).
6. Id. at 360-62.
7. Id. at 291, 303-08 (emphasis in original).
9. See Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 2-3 (1971).
privacy protected by a narrow reading of *Griswold v. Connecticut.* Other variations, also usually (but not necessarily) to the left of Bork, yield to judges the power to anticipate changes in community morality. At bottom, these and other variations hold that the community is ultimately responsible to no standards beyond its own making. They therefore share a *conventionalist* view of constitutional rights because they agree that rights have no source or weight beyond social convention, established or emerging.

A few of Bork's critics on the Senate Judiciary Committee and elsewhere insisted that they had rights against the community and its majorities solely by virtue of their natural personhood, and not just because the community had elected to honor those rights. They therefore suggested a broad *moral realist* understanding of rights: rights as in some sense real or natural, not just conventional; rights as connected in some way with what our most reflective and dedicated thinking proposes about the truth concerning simple justice or human nature. These critics cited the ninth amendment as one sign that the Constitution itself honors rights beyond those expressed in the positive law. They might have added that the ninth amendment implies that the community is capable of doing wrong in ways other than contradicting expressed self-limitations on its power. For, as a norm addressed to the community's agent-government, the ninth amendment presupposes the community's capacity for violating rights beyond those expressed, which is tantamount to a

11. 381 U.S. 479 (1965) (Harlan, J., concurring).
13. For a comprehensive and systematic exposition of the moral realist and antirealist (here "conventionalist") positions in moral philosophy, together with a broad defense of moral realism as a family of positions, see Moore, Moral Reality, 1982 WIS. L. REV. 1061. See also Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277, 288-313 (1985) [hereinafter Moore, Natural Law Theory]. For an attempt to derive American constitutional rights from a natural human desire to be and to be known as rational creatures, see S. BARBER, ON WHAT THE CONSTITUTION MEANS 105-68 (1984). For a realist attempt to defend liberal constitutionalism from communitarian critics, see S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987). Some recent attempts at moral realist arguments by constitutional scholars are vitiated when they adopt the philosophic conventionalism of Richard Rorty, Michael Walzer, Alasdair MacIntyre and other philosophers. These constitutional scholars include Michael Perry and Rogers Smith. See R. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985) (compare id. at 202-05, 229-30 with id. at 184, 213); Perry, supra note 12 (compare id. at 1014-23 with id. at 1049-75). For a moral realist argument that the judiciary should severely curtail its protection of rights, see Berns, supra note 2; Berns, Judicial Review and the Rights and Laws of Nature, 1982 SUP. CT. REV. 49. I have argued that Berns' realism projects a public philosophy equivalent to Bork's conventionalism. See Barber, supra note 10, at 266-75.
capacity for injustice beyond inconsistency with past statements. Since the ninth amendment is a precaution against this capacity for injustice beyond self-contradiction, the ninth amendment implies a standard of justice that is primarily substantive.15

Later in this paper I shall add to what others have said for this view of the ninth amendment. I can assume its validity in this comment on the Bork episode, however, because Bork himself has conceded the central part of it. When asked for his view of the ninth amendment during the hearings, Bork said the amendment was like an inkblot covering an enumeration of specific rights. He said he could not decide cases under the amendment without knowing what was under the inkblot.16 By treating the ninth amendment as a mistaken way to secure rights, Bork implied that the amendment was not designed merely to underscore the tenth amendment's reminder that the powers of the national government vis-a-vis the states were limited through enumeration. Bork implicitly rejected a federalism reading of the ninth amendment that would find the amendment's meaning deducible from the powers enumerated in article I, section 8 and elsewhere in the Constitution.17 Bork acknowledged, in other words, that constitutional rights in general, including the inkblotted ones, are or would be exemptions from the powers of government—limitations on the means government may employ in pursuit of its authorized ends. The problem with the inkblotted rights on this account is that we do not know what they are. The ninth amendment is regarded as a mistaken attempt to secure rights, not another way of confining government to enumerated powers.

II. WHAT MIGHT THE BORK EPISODE MEAN?

Bork's defeat came after his repudiation of the ninth amendment and his related rejection of a general constitutional right to privacy, the most controversial modern expression of the ninth amendment's promise to honor rights beyond the positive law. This juxtaposition of events invites, though hardly compels, an interpretation of the Bork episode as the nation's rejection of Bork's constitutionalism for the constitutionalism of the ninth amendment: that the positive law can fall short of its aspiration to real justice for individuals and minorities, and that judges and others have an affirmative duty to further this aspiration.

Bork and the Administration reject this interpretation of the Senate's action. They believe the Senate and the public were victimized by a campaign of lies and special interest pressure that could corrupt the process of judicial nomination for years to come. Aside from their allegations of malevolence, Bork and the Administration have reason to seek an explanation other than the nation's embrace of the ninth amendment and the constitutionalism it expresses. For Bork's majoritarianism is but a right-wing version of a basic moral conventionalism that most American intellectuals profess. This includes leaders among Bork's critics who cannot fully embrace the traditional constitutionalism of the ninth amendment. So the Administration and its critics are now engaged in what Dworkin calls the "second battle over Bork—the battle over the best explanation of his defeat."

Assuming, then, that the facts of the matter will support either of two conflicting interpretations, how should we view the Bork episode? Should we favor an interpretation that turns away from Bork's constitutionalism and toward the view that our basic law would reconcile majoritarianism to a standard of justice beyond the written law and social convention generally?

We can begin by considering why we are interested in explaining Bork's defeat. Our interpretation of the Bork episode matters because both sides expect a successful interpretation to constitute a reason for how the nation should conduct her affairs—we expect a successful interpretation to have normative force. If the Administration should make the case for its version of what happened, then the Bork episode will suggest no reason to alter the Administration's constitutional philosophy, just its nominating strategy. Should Bork's critics give the most persuasive account, the nation would have an additional reason to reject Bork's constitutionalism as a normative position. The normative stature of Bork's constitutionalism would have been either diminished, enhanced or left unchanged depending on one's interpretation of what the nation's representatives did, because the public's considered opinion, or what represents that opinion, has normative weight with us.

As in the controversy over what the framers intended, a controversy stretching from before Lincoln's time to the present, the meaning of the

Bork episode thus proves to be more than a historical question. We are debating a question of history taken as normative, and that requires us to see the historical material as expressive of something praiseworthy. When we take public opinion as normative, we cannot just take a poll to determine what the public approves. For "the public" of whose judgment we would inform ourselves is an entity of presumed normative authority. We want not just the opinion of the public; we want the opinion of the public as worthy of its normative or conduct-guiding status. And an entity loses its conduct-guiding status—its claim to be worthy of guiding conduct—to the extent that we, upon thorough reflection, believe its judgments flow from indefensible views of what is good or right, or false opinions about what concedes to what is good or right, or irrational processes of testing its premises and reaching its conclusions.

Both Madison and John Marshall recognized the distinction between mere public opinion and the public's considered judgment. When Madison opposed Jefferson's proposal for letting the public settle certain constitutional disputes among the branches of government, he argued that in the heat of political controversy one could expect that "[t]he passions... not the reason, of the public, would sit in judgment. But it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government."21 And John Marshall could attribute the authoritativeness of the act of public opinion that established the Constitution not just to the act's mere occurrence in history, but also to the quality of the act as "a very great exertion" that neither "can... nor ought... to be frequently repeated."22

If we should count as a fully authoritative expression of the public mind anything that some lawful representative of the public might say on any occasion, without considering any question of its quality, then the Senate vote on Bork should have to count as sound in all respects. Bork and the Administration evidently reject such a superficial measure of public opinion, and correctly so. To know what the public really approves we would have to know what it would approve after as full and fair a consideration as circumstances would permit. We would have to settle difficult questions about the nature and measurement of the public's real wants.23 And we would have to be satisfied that our processes of measurement—whether predominantly scientific, as in a public-opin-

ion poll, or predominantly political, as in a system of representation—
adequately approximated a dialogue between "the public" and a well-
intentioned critic. Nothing less could yield a reliable version of what the
public really wanted—its real "interests" as opposed to its unauthoritative
"inclinations," to use a distinction of importance to the authors of
*The Federalist.***

The question of what the authoritative public approves thus be-
comes indistinguishable from what the public would approve if it wanted
to remain worthy of normative authority and if it were in a position to
give the matter full and fair consideration. Abstractly put, the public
would have to want what is simply right or as close to what is right as its
material conditions permitted. And this is a question upon which in-
formed and reflective individuals can form opinions that are worth treat-
ing as responsible hypotheses—often at least as responsible as the
hypotheses concerning the public mind produced by established scientific
and political processes. Thus, *Federalist* No. 71 could state as a general
truth of republican theory and the authoritative public mind:

The republican principle demands, that the deliberate sense of the
community should govern the conduct of those to whom they entrust
the management of their affairs; but it does not require an unqualified
complaisance to every sudden breeze of passion, or to every transient
impulse which the people may receive from the arts of men, who flatter
their prejudices to betray their interests. It is a just observation, that
the people commonly *intend* the PUBLIC GOOD. This often applies
to their very errors. But their good sense would despise the adulator,
who should pretend that they always *reason right* about the *means* of
promoting it. They know from experience, that they sometimes err;
and the wonder is, that they so seldom err as they do; beset as they
continually are by the wires of parasites and sycophants, by the snares
of the ambitious, the avaricious, the desperate; by the artifices of men,
who possess their confidence more than they deserve it, and of those
who seek to possess rather than to deserve it. When occasions present
themselves in which the interests of the people are at variance with
their inclinations, it is the duty of the persons whom they have ap-
pointed to be the guardians of those interests, to withstand the tempo-
rary delusion, in order to give them time and opportunity for more
cool and sedate reflection.***

With this understanding of why we are interested in what the Senate
did, we can now assess the broader moral significance of the Bork epi-
sode. For this understanding puts Bork's view of the meaning of the
Senate's action at a disadvantage. If the public should accept Bork's con-

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24. *The Federalist* No. 71, at 482-83 (A. Hamilton); see also *id.* No. 63, at 424-25 (J. Madison).
25. *Id.* No. 71, at 482-83 (A. Hamilton) (emphasis in original).
stitutionalism it has to be prepared to claim that, in principle, it can do no wrong, except (for some reason) behave inconsistently with principles of its own making. Such is the upshot of Bork's view that the majority's own will provides the sole legitimate standards for limiting majority will. This assertion of community power to define the most basic standards of right and wrong would conflict with the presuppositions of our ordinary moral experience, as manifest most clearly in our ordinary patriotic desire to praise our community. Praising the community presupposes standards which the community can either succeed, approximate, or fail to live up to. Praising the community makes sense only where failure is assumed to be possible. Assume Bork's radical conventionalism as a normative position within the community, and it would be unpatriotic not only to suggest that the community should try to be other than it is, it would be unpatriotic also to praise the community for being whatever it might happen to be.

Bork's conventionalism is thus at odds with the presuppositions of our conventional understanding of political morality. Our conventional understanding is a moral realist understanding because our social practices presuppose that the community is capable of both justice and injustice and therefore amenable to praise and blame and worthy of either preservation or change. Bork's conventionalism is therefore faithless to our conventions; it self-destructs. To borrow from Michael Moore's argument against philosophical conventionalists like Richard Rorty:26 If Bork is right in his belief that the community cannot err, he is wrong to say so, because our community allows that it can err, morally and in other ways. And if Bork's conventionalist beliefs are wrong, he errs in professing them. If he is right he is wrong, and if he is wrong he is wrong.

Bork's constitutionalism is therefore wrong—either simply wrong or wrong with us, wrong in this community. Should spokespersons for this community seriously assert that in principle the community can do no wrong, this community would adjudge them either willful, stupid, shameless, or blasphemous. And these are not terms we would want to apply to ourselves or our collective selves. A community fairly characterized in this way would lose its moral authority with us. Thus, The Federalist saw clearly that the community deserved, and that the community believed it deserved, praise for its forthright recognition of its proneness to instrumental and moral error and its willingness to strive

for self-improvement.27

In sum, I think that upon full and fair consideration the public certainly would reject Bork's constitutionalism. And so we should hope that the facts of the Bork episode can bear the interpretation that Bork's critics would give them. I want next to propose that if the public has rejected Bork's constitutionalism, or when it does, it should embrace the constitutionalism of which the ninth amendment is emblematic.

III. THE NINTH AMENDMENT'S CONSTITUTION

I have suggested that officials and citizens faithful to the ninth amendment would conduct themselves and perform their duties in a manner calculated to hold the community and its agent-government responsible to real standards of political morality, real as opposed to standards believed to be merely conventional or of the community's own making. This understanding of the ninth amendment is a broadened form of what I shall call the current liberal (and libertarian) conception of the ninth amendment. The liberal conception holds that individuals and minorities enjoy judicially enforceable rights against the community beyond those rights specified in the constitutional document. The language and history of the ninth amendment certainly admit, though they may not compel, the liberal interpretation.28 And Bork's inkblot argument, the most publicized recent argument against honoring the amendment, concedes the liberal reading when it decides to treat the ninth amendment as a mistake. I submit in this section an affirmative case for a broad liberal reading of the ninth amendment. The concluding section takes up objections to the liberal reading.

I argued in the preceding section that we should hope that past and future facts permit us to interpret the Bork episode as the nation's rejection of Bork's constitutionalism. In order fully to recognize the American public as a norm authority, the public's acts must meet our expectations of what is worthy of normative authority. A public that

27. See supra text accompanying note 25; see also The Federalist No. 1, at 3-6 (A. Hamilton); id. No. 9, at 50-51 (A. Hamilton); id. No. 10, at 57, 63-64 (J. Madison); id. No. 15, at 91-93 (A. Hamilton); id. No. 49, at 341-43 (J. Madison); id. No. 51, at 349-53 (J. Madison); id. No. 55, at 377-78 (J. Madison); id. No. 63, at 422-25 (J. Madison); id. No. 78, at 528-29 (A. Hamilton). For a broadly similar statement of the American character as reflected in the founding, see Goldwin, Of Men and Angels: A Search for Morality in the Constitution, in The Moral Foundations of the American Republic 24 (R. Horwitz ed. 1986). Perry's theory of an American tradition dedicated to moral growth—"growth" as distinguished from mere "change," presumably—is vitiated by Perry's ultimate embrace of a conventionalist metaphysics. See M. Perry, supra note 12, at 96-102, 110-11, 119-21 (1982); Perry, supra note 12, at 1049-75.

took Bork’s constitutionalism to heart could not meet the requisite expectations. A similar argument holds for interpretations of the framers’ intent. If the framers’ language and the historical record yield interpretive options, some of which honor and some that dishonor the framers, and if we seek their intentions in a context that presupposes them worthy of authority, then we should choose the interpretation that honors them. There is nothing novel in this approach. Nor does it make impossible claims to settle concrete questions in a direct way; it can only move discussion in the right direction.

Thus, Taney wanted the country to believe that he was moved to his interpretation of the Declaration by a desire to avoid the conclusion that its authors were hypocrites.29 Herbert Storing termed Taney’s view (the common view in our own day, Storing believed) “a gross calumny on the Founders,”30 and partly to avoid this calumny Storing defended Lincoln’s interpretation of the Declaration. Taney saved the Declaration’s authors from hypocrisy only to suggest that they may have been guilty of injustice,31 and he covered that suggestion by separating law from morality,32 a move that calumniated the law. Lincoln’s was the better interpretation. By imputing to the framers an aspiration to overcome slavery, Lincoln reconciled the framers to simple justice without denying the undeniable gap between their words and their deeds. He could face the fact of this gap without depreciating the framers and the law because aspirations presuppose such gaps. Gaps between word and deed do not necessarily signal hypocrisy, and both the framers and the law could have aspired to simple justice.

A similar argument applies to interpretations of the ninth amendment. We who look to the amendment for guidance presuppose its authority; we should read it, if its language and history permit, in ways that preserve its authority. And it claims moral as well as legal authority because the document of which it is a part claims moral authority, as did those who defended the document at the founding. That the document claims other than mere legal authority, and therefore possibly moral authority, is evident first as a logical matter. Because the Constitution declares itself “supreme Law,” our reason for honoring that declaration cannot itself be a law, at least not in the same sense of “law” or law of the

32. Id. at 405.
same kind.33

Secondly, the Constitution presents itself in the preamble as enacted for the sake of ends, including "Justice," that the document leaves undefined; these ends subsume the Constitution as a bundle of means. This basic understanding of the Constitution as means to ends that the law does not define is evident throughout The Federalist.34 Thus, Federalist Nos. 9 and 10 defend the entire constitutional scheme as designed to control the effects of faction and majority faction in particular, with "faction" defined as a group which acts in a manner "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."35 When Federalist No. 40 defends the Philadelphia Convention's circumvention of Congress' charge merely to amend the Articles of Confederation, it cites "rules of construction dictated by plain reason, as well as founded on legal axioms" that, under the circumstances, require abandoning the Articles for a new constitution. As applied under the circumstances, these rules would have had the delegates consider "[w]hich was the more important . . . the happiness of the people . . . and an adequate government . . . or that an adequate government should be omitted, and the articles of confederation be preserved."36

Federalist No. 45 flatly says that "no form of Government whatever, has any other value than as it may be fitted for the attainment of . . . the solid happiness of the people."37 Federalist No. 51 says "[j]ustice is the end of government . . . the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."38 As we have seen, Federalist No. 71 distinguishes the objective "interests" of the people from their "inclinations," speaks of "the true means" of pursuing the former, and charges officials with the "duty" of that pursuit in opposition to "passion" and "transient impulse" of the public if need be.39 And Federalist No. 78 charges judges not only with correcting infractions of the Constitution in properly brought cases and controversies, but also with "mitigating the severity, and confining the operation" of "unjust and partial laws" that may happen to be within the

33. See R. FLATHMAN, POLITICAL OBLIGATION 48-50 (1972) (the general rule that law should be obeyed cannot itself be a legal rule).
34. See sources cited supra note 27.
35. THE FEDERALIST No. 10, at 57, 60-61 (J. Madison); id. No. 9, at 50-52 (A. Hamilton). For an argument that protecting rights and serving the objective interests of a truly constitutional community are not incompatible objectives, see S. BARBER, supra note 13, at 105-15, 214.
36. THE FEDERALIST No. 40, at 259-60 (J. Madison).
37. Id. No. 45, at 309 (J. Madison).
38. Id. No. 51, at 352 (J. Madison).
39. Id. No. 71, at 482 (A. Hamilton).
government's constitutional grant of powers.\textsuperscript{40}

These passages presuppose standards of political morality to which government is responsible despite their nonreducibility to positive legal formulas. The liberal reading of the ninth amendment fits this reference of the law to higher authority and serves to remind us of it, as the Bork episode shows. For when positive law requires officials to honor rights beyond those specified in the positive law, it charges officials with prudent efforts to bring out the best in the legal and social material with which they have to work by preventing at least some forms of injustice beyond those against which the positive law directly provides. This serves to nudge the law toward simple justice. When the ninth amendment directs officials to honor unenumerated rights, it suggests the Constitution's openness to justice—the continuing, never-ending aspiration to justice of which Lincoln and Madison spoke. This is an aspiration that convention can neither satisfy nor contain.

This view of the ninth amendment preserves our moral authority as a people because it expresses a praiseworthy recognition of, and a praiseworthy response to, the facts of our common moral experience. The facts I refer to are: (1) the evident defeasibility of all concrete conceptions of general normative ideas like justice, along with the familiar "indeterminacy" in the application of general legal-moral standards in concrete cases; and (2) the ordinary assumption or sense that, although defeasible in formulation and controversial in application, some conceptions and decisions are morally superior to others. A view that can account for this mixed moral experience must recognize both elements of the mixture.

If these elements are ineluctable aspects of our moral experience, as they evidently are, a successful approach will give each its due. All such approaches will be moral realist in that they preserve the sense that moral terms like justice refer to real and partially accessible relationships, not just conventional ones or wholly inaccessible ones. These requirements favor that form of moral realism which conceives concrete conceptions of general moral standards as defeasible theories of the real relationships signified by general moral terms. Thus "justice" refers to justice, and our "justice" would be a conception or a theory of justice, a theory that could be improved. The task of moral philosophy on this view—the task, rather, of anyone interested in justice, whether politician, citizen of a regime that pretends to justice, philosopher, or anyone else—is to do what one can feasibly do to achieve progressively better versions

\textsuperscript{40} Id. No. 78, at 528 (A. Hamilton).
of justice, in theory and in practice, or to support in one's own way a system that actively aspires to such achievement.

In this connection, the open-endedness of the ninth amendment warrants special emphasis and elaboration. By allowing that there can be actionable injustices beyond the positive law, the ninth amendment implies that the legal instruments for insuring justice can never be fully codified. The ninth amendment is thus express authorization for a power that *Federalist* No. 78 assumes already in the possession of our courts: the power to mitigate governmental injustices that occur within the scope of authorized governmental power.41 This is a power to restrict the use of unjust but not expressly proscribed means to authorized governmental ends. Thus, Storing could say that even "[w]ithout a bill of rights our courts would probably have developed a kind of common law of individual rights to help to test and limit governmental power."42 And with the addition of the ninth amendment and other essentially open-ended clauses, like the due process and equal protection clauses, Ely is correct to conclude that the Constitution issues to courts what is in effect "a rather sweeping mandate" to review the substance of legislative decision virtually across the board.43

Yet Ely and others err in thinking constitutional theory should look for ways to close the ninth amendment and other open-ended provisions by identifying "sources" to which judges and others can go to locate rights for application in concrete cases. This quest for sources is an error when open-endedness is part of the very logic of a provision, as it is in the case of the ninth amendment. Even if we were to amend the Constitution to incorporate by reference all state constitutional rights, common law rights, rights enumerated in treaties and other international conventions, implied structure-based rights, rights rooted in tradition and conventional morality, rights derived from sacred texts and revealed by divine dispensation, and all other positive and conventional rights in the broadest sense of these terms, the ninth amendment would still be meaningful. It would still make sense to say that there are rights beyond those enumerated and incorporated by reference. Since one could still question

41. Id.
42. Storing added:

Might the courts thus have been compelled to confront the basic questions that "substantive due process," "substantive equal protection," "clear and present danger," etc., have permitted them to conceal, even from themselves? Is it possible that without a bill of rights we might suffer less of that ignoble battering between absolutistic positivism and flaccid historicism that characterizes our constitutional law today?

the justice of the system and the adequacy of recognized rights, one could hold the government obligated to avoid unanticipated injustices. Because of the elusive nature of justice and the defeasible character of all conceptions of justice, the system's conception of justice, however dense, would fall short of the system's expressed aim of simple justice.

A similar logic is found in the meaningful forms of judicial review under current fifth and fourteenth amendment doctrine. By the meaningful forms of review I mean those that require "intermediate" to "strict scrutiny" of legislation. These meaningful forms are to be opposed to "minimal" or "relaxed scrutiny" because the "mere rationality" required in matters calling for relaxed scrutiny is a test with no critical bite at all, and a test that is no real test is fraudulent.44

Applying some meaningful test of reasonableness would find judges and others conducting case-by-case review of legislation in changing circumstances. For the reasonableness of measures is a contextual matter. Because we cannot control the future, we cannot know in advance of particular circumstances where the harm visited by government on some individual or minority would be justified by a credible view of the common good within the system's capacities.45 Thus, a reasonableness test is incorrigibly open-ended. And the right to be harmed only by governmental acts that are reasonable by some honest test is the least of the protections we could expect under the ninth amendment.

I am not suggesting that it would be a mistake to create a common law list of specific rights under the ninth amendment—Griswold's right to privacy, for example, and the acknowledged substantive due process rights. It is the quest for sources and the limitation of rights to those that can take their place on such lists that offends what seems the best interpretation of both the ninth amendment and the Constitution as a whole. To reiterate, the best interpretation would have to conform to the two undeniable facts of our common moral experience: the defeasibility of our conceptions of justice and the sense that we can distinguish better from worse conceptions. I contend that a successful explanation of these facts must view our conceptions as mere versions of justice, a real relationship which we know through progressively better theories. Other approaches are untenable, either simply untenable, or untenable with us, or both. Thus, to deny the presupposition of moral truth behind our common sense of better and worse answers in moral controversies is to lapse

44. S. Macedo, supra note 13, at 59-68. "[C]onstitutionalism's core commitment to genuine reasonableness is threatened by the ersatz rationality standard." Id. at 61.
45. For a defense of this interpretation of meaningful rationality, see S. Barber, supra note 13, at 126-31.
ultimately into a profound philosophical skepticism that is unable to sustain itself, for the thoroughgoing skeptic cannot defend the prescription implicit in the very enunciation of the skeptical thesis itself—i.e., that we ought to believe it.⁴⁶ And denying the defeasibility of our moral conceptions in the face of their manifest defeasibility signals qualities ranging from a cowardly unwillingness to face the evidence, to jingoism, willful blindness, and even repressive zealotry—virtues all, with us at least, and perhaps simply.

So we could have a common law list of rights—an "honor roll" of sorts—as well as an active reasonableness test under the ninth amendment. But a difference would remain between constitutionally expressed rights like those of the first amendment and a declared ninth amendment right. The difference would reside in the added force of positive constitutional status behind the expressed constitutional right. Improvement in our understanding of justice can change old views of what rights we ought to honor as well as old conceptions of rights the positive law requires us to honor. Thus, our best thinking on the subject at a given point in time can persuade us that we ought to recognize a right to privacy, a liberty to contract, and a freedom of speech. Later we might decide we were mistaken and that the mistake was grave enough to outweigh the real values associated with honoring precedent (stability and equality of treatment, for example). We then have an argument for withdrawing recognition of these rights. But expressed constitutional provision supports one of these rights, and that fact counts as an argument in behalf of retaining that right, an argument that is not available for the other two. The positive law would thus require us to honor some conception of free speech, however minimal, even if we were convinced it was a mistake to honor any. Perhaps we might decide to put free speech "in the course of ultimate extinction," as Lincoln proposed for the purely positive right to property in human beings. But it would remain a positive right for a time and derive some support from the values that we have reason to associate with honoring the positive law generally. The same could not be said for the rights to privacy and contract. They would owe their status to the force of the arguments that directly support them. Of course, these arguments would have to consider the costs of disestablishing mistaken rights, costs like weakening or destroying the public and private institutions that support the rights or depend upon them, a calculation Bork seemed willing to make before disestablishing

⁴⁶. For the reduction of conventionalism to skepticism, see Moore, Natural Law Theory, supra note 13, at 291-301, 309-13.
rights to privacy.\textsuperscript{47}

A moral realist approach to the ninth amendment therefore does risk what Justice Black decried as an accordion-like "power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'"\textsuperscript{48} One must concede Black's point notwithstanding the problems he had in remaining faithful to his professed positivism.\textsuperscript{49} But I would respond that it makes no sense to defend the positive law by putting its professed aims (justice, for example) in tell-tale quotation marks, thus relegating it to the rationally defenseless, if not the fraudulent. And I would add that an open-ended ninth amendment as here conceived is firmly linked to values that are in turn linked to some of the rights we now honor in the positive law.

These values include first and foremost the substantive value of truth—moral/scientific truth as a value all rational creatures can in principle share. They also include progress toward truth, which in turn requires self-critical striving and reasoned openness to better arguments regardless of the personalities, social status, and other personal qualities of those who advance those arguments. I need not elaborate the general connection between these values and such established and proposed rights as the freedoms of conscience and inquiry; the freedoms of speech, press, and association; the freedoms from racial, sexual, and ethnic discrimination; and the opportunities for the individual privacy and material independence needed to form fresh arguments that can either reaffirm established opinions or change them for the better.\textsuperscript{50}

\textsuperscript{47} N.Y. Times, Sept. 21, 1987, at B 14, col. 1.


\textsuperscript{49} See, e.g., J. ELY, supra note 15, at 38-39. (Black vitiated his positivism by ignoring the plain language of the ninth amendment and its clear implications for the breadth of judicial power).

\textsuperscript{50} These rights are all exemptions from governmental power. Whether the Constitution is open to welfare rights which judges can enforce is of course most problematic. But there is no problem in principle with affirmative rights to governmental services that courts can declare and exhort officials to, even where there is no power of judicial enforcement. The Federalist consistently construes the powers granted republican governments in terms of a duty to achieve the ends that moved the sovereign people to grant powers in the first place. Welfare rights are therefore a possibility. The question would turn on several considerations: a substantive theory of the ends of government, whether serving those ends sometimes could entail legislative entitlements, and whether courts
IV. CONCLUSION: THE NINTH AMENDMENT AND OTHER CONSTITUTIONAL PRINCIPLES

Other objections remain, for many join Justice Black and Judge Bork in regarding an open-ended ninth amendment as an instrument of judicial supremacy in derogation of democracy, the authority of the framers, and the rule of law. These objections underscore the fact that there are different conceptions of "democracy," "framers' intent," and other general normative ideas. For friends of the ninth amendment can argue, as I have argued here, that the nation should interpret the framers as having intended a continuing effort to bring our democracy and law as close to justice as we can, thus doing all that we can to vindicate the claims that our democracy and our law have always made for themselves. Opponents of the ninth amendment are free to assert their versions of the general normative ideas of democracy, framers' intent, and the rule of law—versions that call for ignoring the ninth amendment. But we have a right to know more than their conclusions about what we all should approve. We need to know if critics of the ninth amendment have reasons why the nation should prefer their particular versions of democracy and the rest. Those who think they can answer that question abandon essential elements of their argument against honoring the ninth amendment. They implicitly concede the Constitution's openness to standards of political morality beyond the positive law. They act as if they believe that reason compels us to incorporate into our understanding of the Constitution their versions of democracy, framers' intent, and the rule of law. They believe this despite the fact that the constitutional document mentions nothing about democracy, framers' intent, and the rule of law, much less specific versions of these ideas. They also depreciate what the document does say about justice, equality, due process, and unenumerated rights.

If critics of the ninth amendment should stick by their basic position regarding the nation's alleged aspiration to simple justice, then they would have to say we cannot have a reason for preferring particular versions of other general norms, like democracy and the rest. They might then contend that we must settle for established beliefs about these things. And on our noting that the very debate among us indicates disagreements in crucial areas, if not the most basic ones, they might believe could exhort a reluctant community to its constitutional aspirations. Despite judge-made doctrine regarding the case and controversy requirement, Marshall's opinion in Marbury v. Madison could provide precedent for a judicial power to exhort officials to duties whose performance judges cannot enforce. 5 U.S. (1 Cranch) 137 (1803). See also S. Barber, supra note 13, at 71-83, 129-31, 201-03, 212-13.
we have no choice but to postulate answers and proceed from there. Just how we would distinguish postulated answers of this sort from the impositions of some tyranny is a question we would have to address, and soon. For it would take an enormous amount of political power and good fortune to transform a postulated answer into a political consensus. Even then, the conventionalists would leave us without real reasons for preferring the order and stability gained through postulated solutions to goods of the kind to which disorder gives scope: the heroic achievement of successfully postulating one's own solution, for example.

In any case, the fact is plain enough: all participants in the current debate either pursue what they understand to be an arbitrary position or they presuppose that reason is capable of finding better and worse answers to normative questions generally. Since they are hardly likely to argue for an admittedly arbitrary position, participants in the debate will tend to proceed within the ordinary presuppositions which make the debate possible. Bork is a case in point. For all his heroic professions of skepticism, Bork proceeds as if social order is objectively good for everyone who can give the matter adequate thought and therefore a suitable foundation for collective action. Bork exempts the value of social order from the famous equal gratification principle which he applies to merely conventional goods. And he neither speaks nor acts as if this exemption is either an arbitrary or a tyrannical one. Thus, he enters into a public debate as a thinker, not just an official, with arguments, not just edicts, presumably for the sake of advancing us all toward truths about the world, truths with implications for our conduct. By entering with arguments instead of edicts he enters with submissions. He submits his propositions to the reasoned acceptance of others, and therefore potentially to the reasoned rejection of others, since there can be no reasoned acceptance without the possibility of rejection. Entering with edicts would have disqualified him for the debate. Willful assertions would not only have departed from social expectations regarding conduct in debate, they would have signaled attitudes that offend on moral grounds. Aside from the content of his theory, Bork's conduct as a theorist shows how unlikely it is that anyone can successfully deny the presuppositions of our common moral experience regarding defeasible conceptions of an elusive moral reality.

Those who oppose honoring the ninth amendment on grounds of democracy and the rest must therefore answer the following question.

51. See Address by R. Bork, supra note 8, at 4.
52. See Bork, supra note 9, at 2-4, 10.
Why should we degrade democracy, the framers, and the rule of law by conceiving these authorities in ways that deny their claim to justice—ways that mark them as unworthy of authority?

Often accompanying arguments from democracy is an objection to honoring open-ended provisions like the ninth amendment from a fear of judicial supremacy, usually coupled with a populist abhorrence of "Platonic guardians." I conclude with a brief comment on these objections.

To say that judges should perform their duties consistently with the ninth amendment does not imply that courts should monopolize the function of constitutional interpretation. If anything, it suggests the contrary. For by signaling responsibilities beyond conventional standards, the ninth amendment shifts the focus of our concerns away from all concrete versions of justice and other norms to the real things and relationships of which the versions are versions. This favors a multiplicity of interpreters as essential to the process of seeking better versions. An arrangement that discourages a multiplicity of interpreters risks a shift in attention away from the true source of authority to the instruments for realizing it. Severed from a concern for justice, courts and other institutions lose their self-critical capacities and degenerate into willfulness, stupidity, and (if anyone is left to notice, judicial monopoly resulting as it has more from the acquiescence of others than from judicial usurpation) illegitimacy. Thus, a realist argument is available for the view of Jefferson, Lincoln, and even New Right constitutionalists like Edwin Meese that officials ought to look for ways to respect judicial power in specific cases without abdicating their higher responsibility to the Constitution and its aims.53

As for the role of philosophy in mitigating unanticipated injustices to individuals and minorities, much depends on the conception of philosophy we employ. Philosophy as a set of discrete teachings to be consulted not as heuristics but for uncritical application in concrete cases—philosophy as ideology—is distinguishable in no way that is relevant here from conventional answers regarding moral/scientific truth.54 If all conceptions of justice are defeasible, so are the conceptions of philosophers.

54. Ely had philosophy as ideology in mind when he caricatured reliance on philosophy with
Because open-endedness is basic to its logic, the ninth amendment commits us more to a process or a method than any specific substantive teaching except one: that moral/scientific knowledge is better than mere opinion, that progress toward moral/scientific knowledge is objectively good, that progress toward moral/scientific knowledge is presumptively possible, and that the touchstone of truth is reality or nature, not social convention and its spokespersons, be they judges, professional philosophers, or what have you.

This process or method is nothing other than giving and exchanging reasons in an open-minded and public-spirited way about what to believe and how to live. Philosophy as a method is the most careful and ambitious form of this activity. Aside from what one might say about the teachings of some philosophers (conventionalism comes readily to mind) philosophy as a method is hardly alien to common sense. With us at least, if not simply, common sense presupposes philosophy as a process because common sense distinguishes truth from opinion, values truth above opinion, and values self-critical and public-spirited striving for truth above willful and opinionated self-assertion. Deny philosophy and its predicate—the possibility of progress toward the truth, in this case moral and political truth—and one must eventually concede the conventionalist view that nothing succeeds like success, that there is no real difference between growth and change, and that mere words like "democracy" will mean whatever those with sufficient power want them to mean. If there is any support for these conventionalist versions of the real truth, it can hardly be found in the popular mind for which the conventionalist position in constitutional theory currently purports to speak.

the example: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." J. ELY, supra note 15, at 58.
