Constitutional Rhetoric and the Ninth Amendment

Sanford Levinson
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THE NINTH AMENDMENT

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INTRODUCTION

I am rightly identified with those constitutional theorists who are
decidedly skeptical of the enterprise of searching for singularly “correct”
interpretations of the Constitution. Instead, I am often more interested
in analyzing the diverse rhetorics of argument that comprise the working
repertoire of the constitutional lawyer. Why certain arguments arise at
given times—and why, concomitantly, others pass out of fashion—is of
central interest to me, at least as a scholar. It is this interest, then, that is
reflected in the first part of the article, where I view myself primarily as
what might be termed simply an analyst of our legal culture.

No one who is familiar with contemporary constitutional discourse
could fail to be impressed by the re-emergence of the ninth amendment
into the consciousness of constitutional analysts. I want to suggest some
possible reasons for this renewed interest at this particular time in our
history. Law, as James Boyd White well reminds us, is a “culture of
argument,”¹ and it is that culture, as well as some of the specific argu-
ments, that I want to explore in the first portion of this article.

The second part of the article is best conceived by imagining a shift
of roles from detached cultural analyst to a more involved teacher of
constitutional law and analyst of constitutional arguments. I argue that
revival of the ninth amendment as a live part of our constitutional rheto-
ric will force us to confront in radically new ways the constitutional case

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I am grateful to my colleague Doug Laycock for his willingness to read repeated drafts of this essay
and to discuss the ideas being broached. I also benefited from Scot Powe’s review of an earlier draft,
as from Philip Bobbitt’s probing (and chastening) scrutiny of a later draft. In particular, I regret
that the pressure of time makes impossible taking into full account Bobbitt’s points. This version
also reflects some of the advice given in a very helpful letter from Professor Randy Barnett respond-
ing to an earlier version delivered at the meeting of the American Association of Law Schools in
Miami on January 18, 1988. Finally, Professor Steven Siegel of De Paul University College of Law
made several extremely helpful suggestions that I hope have enabled me to organize my argument
more effectively.

¹ See J.B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTI-
TUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984). For a discussion of the Declara-
tion of Independence and McCulloch v. Maryland, see id. at 231-74. See also J.B. WHITE,
law of chattel slavery and, beyond that, the legitimacy of particular forms of legal reasoning.

Perhaps in recognition of the fact that I occasionally take on the role of practicing lawyer, however, I will turn in the final section to some tentative suggestions as to how a revitalized ninth amendment might actually function in our legal culture. I also will make some even more tentative suggestions concerning the role of the judiciary—particularly the "finality" of its interpretations—in regard to a revitalized jurisprudence of the ninth amendment. As suggested at the outset, one should not read the ensuing pages for a general theory of how "correctly" to interpret the ninth amendment. I hope, though, that this lack will not doom my remarks to irrelevance.

I. CONSTITUTIONAL MODALITIES AND THE REDISCOVERY OF FORGOTTEN CONSTITUTIONAL TEXT

Even if my theoretical position did not caution against confidently offering a particular interpretation of the ninth amendment as the uniquely correct one, I would be reticent for another reason: I certainly do not consider myself to be an "expert" on the amendment. The theme of this first section, though, is that my status as "non-expert" is less attributable to personal deficiencies than to my socialization into the legal academy—a socialization shared by most readers of this symposium. I suspect my knowledge of the ninth amendment is equivalent to that of most legal academics, including those who are considered well educated in constitutional law. It may therefore be worthwhile to consider which aspects of our legal culture might account for this "trained incapacity" regarding this particular aspect of the Constitution.

What constitutes a particular culture is the set of statements that are considered to be "warrantedly assertable" within it. That is, the performance of linguistic acts does not lead a speaker's audience to dismiss the speaker as an incompetent participant in the cultural conversation, worthy only of dismissal. "To think like a lawyer," the training in which is presumably the mission of legal education, is, as we all know, to be educated into what count as "intelligent" statements about legal possibility. Part of such intelligence is knowing what arguments not to make because they serve mainly to demonstrate one's lack of intelligence within the relevant context. It is useful in this regard to recall Justice Holmes' derision some sixty years ago of those hapless lawyers who, lacking truly "legal" arguments, would descend to invoking the equal

There was a reason that the first book to appear on the ninth amendment had the plaintive title *The Forgotten Ninth Amendment*. As if in confirmation of its own thesis, this 1955 effort to resurrect the amendment scarcely made much of a ripple. Moreover, the sad fact is that Patterson's book serves best as a heartfelt plea for recognition of the amendment's existence; its analytical contribution is minimal. Leslie Dunbar did write in 1956, *James Madison and the Ninth Amendment*, a helpful analysis of the history of the amendment; however, he basically throws up his hands at the prospect that the amendment might actually help justify judicial invalidation of governmental activity. Although Dean Redlich was willing in 1962 to argue for the relevance of the ninth amendment in contemporary constitutional jurisprudence, his discussion of the "judicial criteria" for its application is limited to the last three pages. And, as we all know in any case, legal education was (and largely remains) dominated by the writing of Supreme Court justices.

As a law student at Stanford in the early 1970's, I did have Justice Goldberg's opinion in *Griswold v. Connecticut* to parse. There Goldberg indeed mentioned the ninth amendment, cautioned that we ought not "ignore" it, but then immediately indicated that he did "not mean to imply that the ninth amendment is applied against the States by the Fourteenth." In any event, however, I think it accurate to say that the opinion in that much-discussed case that was most popular with legal academics—at least those who supported the decision—was Justice Harlan's. Incorporating by reference his earlier opinion in *Poe v. Ullman*, Justice Harlan relied on the sweep of the liberty that is protected against infringement by the due process clause of the fourteenth amendment. Goldberg's reference to the ninth amendment for many, I suspect, simply corroborated the suspicion that he was basically a liberal ideologue and certainly not the very model of a careful lawyer that Justice Harlan represented, especially to his former clerks and other admirers who contributed so much to the molding of that generation's view of what "thinking like a constitutional lawyer" meant.

5. 42 Va. L. Rev. 627 (1956).
7. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).
8. Id. at 492.
9. Id. at 499 (Harlan, J., concurring in judgment).
11. See Gunther, In Search of Judicial Quality on a Changing Court: The Case of Justice Pow-
Not the least cost of Justice Goldberg's premature retirement from the Court was the loss of a context within which he might elaborate the thoughts that he only introduced in *Griswold*. From a more sociological viewpoint, one also notes the loss of his opportunity to mold a generation of law clerks who might take his new and disturbing ideas back to the legal academy. As Goldberg himself pointed out in a footnote, the ninth amendment had scarcely ever been cited by the Court, let alone used as a central focus of analysis by scholars otherwise devoted to foraging the constitutional text for help in analyzing the variegated issues confronting contemporary analysts. There was much work to be done and, for a variety of reasons, only Justice Goldberg seemed interested in doing it. But, of course, Justice Goldberg made his disastrous decision to go to the United Nations, and neither of his successors—Abe Fortas or, later, Harry Blackmun—seemed interested in elaborating the work only begun in *Griswold*.

The ninth amendment remained the stepchild of the Constitution, though, like Cinderella, it seems on the verge of taking center stage. As already suggested, this development owes relatively little to the Court, although it is true that it has been somewhat awkwardly cited by several justices, including Blackmun and Chief Justice Burger, in cases involving abortion and the rights of newspapers to gain access to criminal trials. Moreover, a number of important articles have appeared in law reviews over the past several years, and Charles Black made it the focal point of his most recent book.

I believe that the most important contributors, ironically enough, to the now cascading recognition of the presence of the ninth amendment in our Constitution are Edwin Meese and Robert Bork. The brooding omnipresence over the constitutional debate of the past couple of years has

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12. 381 U.S. at 490 n.6.
been Attorney General Meese, with his emphasis on the so-called "juris-
prudence of original intent." And it has become a cliche that the most
important celebration of the constitutional bicentennial turned out to be
the hearings concerning the successor to Lewis Powell (who, incident-
tally, seemed to express no interest in the possible meaning of the ninth
amendment). Judge Bork was deprived of a seat on the Supreme Court
largely because of his refusal to acknowledge the "unenumerated" right
to privacy as being part of the set of constitutional rights legitimately
enjoyed by Americans. It is, I think, accurate to describe Judge Bork's
attitude toward the ninth amendment as one of disdain.

Although many defenses of privacy were offered both by witnesses
and senators themselves, probably the most important involved the pre-
sentation of the ninth amendment as a warrant for decisions like *Griswold*.
I would argue that the most important result of the Bork hearings, be-
yond their leading to his rejection, was the embrace by many of the sena-
tors of the rediscovered amendment, which thereby gained a public
prominence hitherto lacking. The subsequent hearings concerning the
confirmation of now-Justice Anthony Kennedy also included significant
references to the ninth amendment, and his seemingly more favorable
references to the amendment helped to warrant the view that he is dis-
trustingly more "moderate" than Bork.

Anyone interested in constitutional rhetoric, however, must in-
stantly recognize that the desire to defend *Griswold* by no means requires
the embrace of the ninth amendment. As already suggested, the opinions
in *Griswold* themselves demonstrate that there are a multiplicity of ways
to arrive at the result that at least some version of privacy is constitu-
tionally protected. I have already mentioned Justice Harlan's reliance on the
due process clause. There is also, of course, the formal opinion for the
Court, written by Justice Douglas, which invoked the "penumbras and

19. See Senate Comm. on the Judiciary, Nomination of Anthony M. Kennedy to be
an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 113, 100th
Cong., 2d Sess. 20-21 (1988). The section is headed by the following, which is capitalized in the
original: "V. JUDGE KENNEDY HAS A REASONED AND BALANCED APPROACH TO
THE NINTH AMENDMENT, ONE THAT IS FULLY CONSISTENT WITH HIS UNDER-
STANDING OF 'LIBERTY' IN THE DUE PROCESS CLAUSE." The Committee's discussion
goes on to note that Judge Kennedy had testified that the framers had believed "that the first eight
amendments were not an exhaustive catalogue of all human rights" and that "the Court is treating
[the Ninth Amendment] as something of a reserve clause, to be held in the event that the phrase
'liberty' and the other spacious phrases in the Constitution appear to be inadequate for the Court's
decision." *Id.* at 20 (emphasis added by the Committee).
emanations" of the Bill of Rights. Why not settle for one of these opinions and leave the ninth amendment in its accustomed obscurity?

In regard to Douglas' opinion, I think the answer is relatively simple: His attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade. For example, one may recognize that the fourth amendment protects privacy, but one must also recognize that the amendment speaks just as strongly in behalf of overriding privacy so long as another important value—protection of public security—and an important process—the granting of a limited search warrant by what we have come to call a "neutral and detached magistrate"—are followed. The protection against compulsory self-incrimination of the fifth amendment may at first appear to be a better example of a categorical vindication of privacy, save for the willingness of the Court (over Douglas's dissent) to allow the overriding of any privacy right via the grant of immunity to the otherwise silent witness. Such grants destroy any argument that the fifth amendment is a strong protection of privacy rather than, for example, a recognition of the distaste that we have for a person's being the agent of his or her own subjection to punishment or simply a protection against untoward police practices that we fear will result if we allow the police to seek confessions for use in subsequent criminal trials. One could similarly critique all of Douglas' other citations to the constitutional text. I think it fair to say that there is no constitutional scholar who endorses the Douglas opinion.

Still, we can ask why those who support Griswold's result do not settle for Harlan and forget the ninth amendment entirely? There can certainly be no doubt that Harlan's opinion, as an intellectual synthesis of a particular way of looking at the Constitution, is one of the greatest achievements in our judicial history. It may well suffice for many. Nevertheless, an analysis of the contemporary culture of constitutional argument reveals good reason to return to Goldberg's invocation of the ninth amendment.

In his valuable book *Constitutional Fate*, my colleague Philip Bobbitt develops a theory of what he calls the "modalities" of constitutional argumentation. Bobbitt is referring to the modes of argument that participants within the practice of American constitutional law use to try to persuade one another of their points of view. There is obviously an affin-

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20. 381 U.S. at 484-86.
ity between “modalities” and rhetorics, and Bobbitt’s is the fullest examination that exists of what count as warrantedly assertable propositions that can be made by those engaged in the specific practice of constitutional interpretation.

Bobbitt offers six modalities, but two are particularly important to this part of my analysis. These are the “textual” and the “historical.”

The first refers to the words (and their presumptively plain meanings) found in the constitutional text; the second, to the intentions of the persons who contributed to making the words legally binding. Both of these modalities are richly reflected in our standard constitutional discourse. “Textuality,” after all, is the motif of Marbury, where Marshall proclaimed the “obvious” meaning of the allegedly plain text. And Justice Hugo Black, throughout his career, took up the cudgels in behalf of text and against a purportedly unfettered judiciary. It was he, after all, who dissented in Griswold, citing the inability to find “privacy” in the text. Moreover, it was Black as well who emphasized the importance of original intent in his interpretations of the first amendment or his claim that the fourteenth amendment was meant to incorporate the Bill of Rights. His confidence that the first amendment’s “no law” meant “no law” was bolstered by his particular reading of the background of the Bill of Rights, which enlisted the almost sacred figures of Thomas Jefferson and James Madison as proponents of Black’s particular reading.

There are other contending modalities, including reliance on doctrinal precedent; prudential analysis that takes into account the political consequences of a specific decision; structural analysis predicated on the division of the American government into separate branches horizontally and separate units of state and nation vertically; and, finally, what Bobbitt somewhat confusingly calls “ethical” argument, which involves reference to the constitutive norms of our cultural “ethos,” our fundamental norms that define us as a particular socio-moral order.

That being said, it is nonetheless important to recognize the special hold (some would say stranglehold) of text and history over much of ordinary public discourse concerning constitutional interpretation. (The desire to

24. Id. at 7, 25-38.
25. Id. at 7, 9-24.
26. 5 U.S. (1 Cranch) 137 (1803).
27. See especially Marshall’s discussion. Id. at 156-60.
28. 381 U.S. at 508-10 (Black, J., dissenting).
be textual, after all, is what explains Douglas' own desperate search for legimization within the "four corners" of the standard (i.e., non-ninth amendment) Bill of Rights.)

Attorney General Meese, like Bork, is the champion primarily of a "historical" modality, though both also emphasize the importance of the text as they criticize judges who allegedly disregard both text and history in the name of their constitutionally untethered visions of politics. Although some of us (who are sometimes labeled "nihilists" for our efforts) are indeed roaringly skeptical of the plausibility of looking to text or history for authoritative guidance, it is only fair to recognize that this theoretical argument often antagonizes audiences who tend to define law as consisting precisely of an authoritative text with meanings constituted by the intentions and purposes of the authors undergirding the particular document.

In any event, for defenders of Griswold to insist on the use of other possible "modalities," including the "ethical" mode, seems to allow the Meeses or Borks to claim victory in regard to their claim that there is no textual or historical warrant for certain doctrines like that of "privacy." As a political matter, such a concession is simply stupid, something to be done only if one believes that there is no alternative. Thus, the revival of the ninth amendment, for many of the arguments made by its proponents rely precisely on what Meese and Bork purportedly respect—constitutional text and historical intention. Indeed, after writing a first draft of this paper, I had a conversation with one of the architects of the strategy that led to Bork's defeat that supported the inference that the decision to emphasize the ninth amendment was made in part precisely on the grounds suggested.

Consider in this light the fact that one of Judge Bork's most important critics—and adverse witnesses at the Senate hearings—was Philip Kurland of the University of Chicago Law School. I suspect that Profes-


34. Indeed, at a Symposium on the unwritten constitution sponsored by the Federalist Society in Charlottesville, Virginia on March 5, 1988, I heard Dean Redlich, the author of the 1962 article that so influenced Justice Goldberg, offer his own rationale for embracing the ninth amendment in precisely the same textual and historical terms suggested in the text.
Kurland is best known to many of us as the author of the single most vituperative anti-Warren Court article ever to appear in the *Harvard Law Review*. Kurland has consistently presented himself as a person for whom text and history were important, and he denounced the Warren Court for its purported willingness to ignore both in the interests of its own vision of the political or social good. In the normal course of events, one might have expected Kurland to applaud the appointment of a man whose declared position seemed indeed the desirability of shooting the piano players of the Court (or at least changing the music drastically).

Instead Kurland wrote passionate condemnations and delivered forceful testimony denouncing Bork. Why did this happen? Part of the reason may lie in Kurland's respect for adherence to precedent, even when the initial decisions were mistaken, and in his perception that Bork was not similarly respectful. But this does not explain Kurland's own willingness to invoke the ninth amendment, which, as already seen, has scarcely provided much of the scaffolding for decided case law. Instead, he pointed to his own self-education that occurred while compiling, with Ralph Lerner, *The Founders' Constitution*, which brings together many of the background sources of the Constitution. Like most of us, Kurland had not previously thought very much about the ninth amendment. To put it mildly, it was not one of his mentor Felix Frankfurter's favorite parts of the Constitution. One can only imagine what Kurland thought of Goldberg's opinion in 1965. But *The Founders' Constitution* could scarcely delete it, and Kurland was forced to confront it.

On turning to Volume Four, the reader discovers twelve pages devoted to the now famous patch of text: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." As a piece of text, it seems hard to interpret this, at least on the surface, as anything other than a reminder that the notion of constitutional rights should not be limited to those enumerated in the Constitution; rather, they should include as well "others retained by the people." Accompanying the text, though, are a set of documents that help one to understand the reasons for the insistence that the ninth amendment be included as part of the Bill of Rights.

38. U.S. Const. amend. IX.
that were proposed by the First Congress and ratified by the States very shortly thereafter.

The debate about the Bill of Rights began almost immediately upon the submission of the 1787 Constitution to the states for ratification. George Mason had refused to sign the document because it lacked a bill of rights, and many "Antifederalists" picked up this charge. Many of them elaborated one or another version of natural rights, and it is no surprise that the first entry in the Kurland-Lerner text is William Blackstone's powerful evocation of the English tradition of natural rights. Moreover, the American sources emphasize the (altogether realistic) fear that the failure adequately to recognize the limits upon government would serve as a future warrant for the aggrandizement of governmental power.

The Antifederalists were responding to arguments earlier made by supporters of the Constitution, who emphasized that the new national government was a limited one, possessing only the powers that were assigned to it in the text of the document. This fact that the national government required assigned powers, of course, was what differentiated it from state governments, viewed as possessing plenary power, which in turn required the prohibitions of bills of rights and the like to withhold certain powers from the states. This argument was most powerfully made by James Wilson in a Philadelphia speech and by Alexander Hamilton in the 84th Federalist Paper. Both argued that the national Constitution was one of only limited, assigned powers. What the national government had not been specifically authorized to do, it could not do. Hamilton's argument does not fit altogether well with his defense of implied power only four years later in relation to the chartering of the Bank of the United States, but we can let this point pass. The far more substantial flaw in the Wilson-Hamilton argument, as many of the Antifederalists pointed out, is article I, section 9 of the Constitution, where Congress is prohibited, among other things, from establishing titles of nobility. The 1787 Constitution is not merely an assignment of power;

40. The Founders' Constitution, supra note 36.
41. See 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 436 (J. Elliot 2d. ed. 1836).
42. The Federalist No. 84 at 575 (Hamilton) (J. Cooke ed. 1961). Suzanna Sherry points out that James Iredell used the same argument in North Carolina. Sherry, supra note 15, at 1162-63.
section 9 is an explicit *limitation* of power. The obvious question, then, is why there exist *only* the limits found therein. Had section 9 not appeared in the original Constitution, the Wilson-Hamilton argument would have made a lot of sense logically; with section 9, however, it collapses.

Still, there remained a powerful truth to the Federalist argument. Did any enumeration of limitations on government carry with it the negative pregnant that everything else was in fact permitted? The importance of this question was only heightened by the introduction of the Bill of Rights, which specified in the first eight amendments a variety of limitations upon government. This question receives its answer in the ninth amendment. As James Madison put it, speaking to the House of Representatives on June 8, 1789,

> 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.\(^4\)

The “guard” was the ninth amendment, with its message, as plain as one might hope for given the vagaries of language, that the specification of some rights was not to be interpreted as denying the equal presence within the legal system of other, unenumerated rights.

In *Griswold*, Justice Goldberg specifically wrote that he did not “mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government.”\(^4\) Laurence Tribe, in his magisterial treatise on the Constitution, similarly points out the impossibility of viewing the ninth amendment as the *source* of rights.\(^4\) Rather, it *acknowledges* the existence of rights not specified in the text. As then-Justice Rehnquist put it, though referring to the tenth amendment, it is “an express declaration”\(^4\) of what was almost universally acknowledged among the generation of the framers to be a truth about the nature of limited government.

\(^{44}\) 1 *ANNALS OF CONGRESS* 456 [439] (1789). Sherry notes that two versions of the *Annals* exist, with different pagination; thus the alternative page in brackets. Sherry, *supra* note 15, at 1162 n.150.

\(^{45}\) 381 U.S. at 492.


For a constitutional interpreter to say, as both Justice Black and Judge Bork have done, that the set of enforceable constitutional rights is limited to those specified in the text is, as my colleague Douglas Laycock has pointed out, precisely to defy the ninth amendment by denying that there are other rights retained by the people and by disparaging the enterprise of searching for a mode of analysis that might flesh out this admittedly otherwise skeletal reminder. Those who emphasize text and history, whether judges like Black and Bork or their academic counterparts like Raoul Berger and Henry Monaghan, seem to be hoist on their own petard: they can no longer claim that adherents of the constitutional right to privacy are unwilling to apply textual or historical modes of argument, just as they can no longer argue that these modes work against the recognition of unenumerated rights, even if sharp debate can obviously continue on their specific content.

Indirect confirmation of this point is provided by the intellectual shoddiness of a recent article by Assistant Attorney General Charles Cooper in which he purports to analyze “the ninth amendment’s forgotten lessons.” Cooper, a major proponent of “new right” constitutional theory, must deny any operative meaning to the ninth amendment, or at least any meaning that is different from that of the tenth amendment. As many modern commentators have recognized though, the tenth amendment refers to powers, not to rights. The federal government has not been assigned power in certain areas even if legislation would not otherwise violate anyone's individual right. Concomitantly, it might well be able to legislate in other areas even at the cost of violating individual rights. This is altogether different from the ninth amendment’s protection of “the people” (and not at all the states) by limiting the means that can be chosen by the national government to achieve even those powers that are quite clearly within the province of that government. The reminder at the end of the tenth amendment that power might also be reserved “to the people” reminds us that there may be some powers that no level of government has, but one can still differentiate the ninth and tenth


49. Cooper, Limited Government and Individual Liberty: The Ninth Amendment’s Forgotten Lessons, 4 J.L. & Pol. 63 (1987). The article is answered by Michael Wells, Means, Ends and Original Intent: A Response to Charles Cooper, id. at 81, who writes:

I suspect Cooper has an agenda of his own, unrelated to the need for fidelity to the Framers’ intent. . . .

. . . What really matters to Cooper and others [of the New Right] may not be the intent of the Framers, but the usual aim of rulers, to curb civil liberties and restrict remedies for governmental wrongs by any available means.

Id. at 87-88.
amendments. One ironic proof of this distinction is that even those who disdain the tenth amendment by pronouncing it, with Chief Justice Stone, a mere "truism" about the allocation of power, do not reduce the ninth amendment to the same kind of tautology. The problem with the ninth amendment is not its obviousness, but rather its mystery.

In any event, I hope that I have sketched a plausible explanation for the particular rediscovery of the ninth amendment at this time. Still, to establish the propriety of introducing the formerly forgotten ninth amendment into the ongoing conversation of constitutional lawyers does not begin to resolve the important interpretive problems linked to it. I now turn to consideration of some of those problems, repeating, however, the caveat introduced at the beginning of this article that I do not purport to have achieved a "decoding" of the mysteries of this piece of text.

II. THE NINTH AMENDMENT AS A LIMITATION ON STATE POWER (OR, WHY NOT REVIVE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT?)

Meese and Cooper could concede much of the argument so far, but then go on to say it still does not justify Goldberg's invocation of the amendment in *Griswold* for one very simple reason: it recognizes limits only on the national government and says nothing about the state governments being similarly limited. There is surely something to this argument. The standard reading of the Bill of Rights, after all, is that it was meant to apply only to the national government. Indeed, Madison apparently initially proposed that the amendments be interspersed throughout the original text rather than collected in a separate catalogue, and the ninth amendment was to be assigned to article I, section 9, which unequivocally applies only to the national government. Moreover, the remark quoted earlier refers to "the hands of the General Government," even though we know that Madison engaged in a losing effort to add an amendment that would have limited the state's ability to regulate speech or abridge freedom of conscience.

It is obviously open to an interpreter to argue that the separate placement of the amendments is significant and affects the meaning we should assign to them. The ninth amendment does not specifically refer to the federal government; instead, it seems to announce a *general* princi-

51. See B. Pattrerson, *supra* note 4, at 12.
52. *Id.* at 13.
ple of construction: enumerations of limitations should not be read as announcing a negative pregnant—that which is not specifically limited is therefore permitted. There are two enumerations of limitations in the Constitution. Article I, section 10, sketches out certain limitations on the power of the states, and one does not do any violence to the text to argue that the ninth amendment points to the incompleteness of section 10 just as surely as it does to that of section 9. However, this argument has not been generally accepted.

Part of the reason it has not been accepted, ironically enough, is that early decisions that did clearly rest on a notion of unenumerated constitutional limitations of government, such as Calder v. Bull,53 did not cite the amendment. As Suzanna Sherry has recently demonstrated, there are many such early decisions,54 and part of the problem is that presented to Sherlock Holmes: Why did the dog not bark in the night? Did Justice Chase, for example, fail to cite the ninth amendment because he viewed it as irrelevant to the case, which, after all, arose at the state level and had nothing to do with the actions of the national government? Or did he fail to cite it because it literally went without saying that the principle of construction applied to all cases that were otherwise properly before the courts? One might, of course, ask similar questions about Marshall’s and Johnson’s failure to cite the amendment in Fletcher v. Peck,55 which is otherwise full of tips of the judicial hat to the existence of natural justice as a limitation on government.

Nor, apparently, was the ninth amendment cited as a restriction on state power even by those with the greatest incentive to do so—radical antislavery lawyers. William Wiecek points out that the materials of “anti-slavery constitutionalism” were forged out of two provisions of article IV—the privileges and immunities clause and the guarantee of a republican form of government—and the due process clause of the fifth amendment.56 Indeed, one of the most remarkable pieces of evidence for the argument that the reach of the ninth amendment is limited comes from the radical antislavery lawyer Gerrit Smith. Rejecting Marshall’s holding in Barron v. Baltimore57 that the fifth amendment did not apply to the states, Smith specifically conceded that the first, ninth, and tenth amendments were exclusively directed against the national

53. 3 U.S. (3 Dall.) 386 (1798).
54. See Sherry, supra note 15, at 1167-76.
55. 10 U.S. (6 Cranch) 87 (1810).
57. 32 U.S. (7 Pet.) 243 (1833).
This history goes a long way toward supporting the argument of Assistant Attorney General Stephen Markman, made in a letter to the *Wall Street Journal* on January 15, 1988, that the ninth amendment "has no limiting effect at all on the powers of the states." Is there a plausible response to this argument? I think that there is. It involves shifting our attention to another oft-forgotten section of the Constitution, the privileges and immunities clause of the fourteenth amendment. Indeed, I have found myself wondering quite often over the past several months, as I have tried to lessen my ignorance of the ninth amendment, why it is that it, rather than the privileges and immunities clause, has become the focus of so much attention. No one can doubt that the fourteenth amendment, by text and intention, controls state conduct and, as we shall presently see, it is not very difficult to show that the notion of "privileges and immunities of United States citizenship" could well comprehend the unenumerated rights protected against (at least) national interference by the ninth amendment. What, then, explains this feature—this non-barking dog, as it were—of our contemporary constitutional rhetoric?

One answer to this question was given me by Mark Tushnet, who suggested that the very fact that the ninth amendment has played such an inconsequential role in our case law is a potential source of strength, for there are extremely few embarrassing precedents that must be overcome. Clever lawyers have an almost free slate on which to write their imaginative arguments. The privileges and immunities clause, on the other hand, confronts an absolutely disastrous barrier from the perspective of the conventional lawyer. That is, of course, the *Slaughterhouse Cases*, in which Justice Miller and his colleagues in the majority eviscerated the clause by trivializing its meaning. To use the privileges and immunities clause as the source of legitimation for *Griswold* would not only be intellectually daring; it would also require overruling one of the established warhorses of our case law.

What this illustrates, among other things, is the way that we as scholars are prisoners of the intellectual structures generated by our obsessive attention to the judiciary as the source of authoritative legal

60. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.
61. 83 U.S. (16 Wall.) 36 (1872).
norms. Recent scholarship by Michael Kent Curtis and Robert Kaczorowski, among others, has demonstrated as clearly as one can reasonably expect that the consciousness behind the privileges and immunities clause in 1866 was far more radical than that described by Justice Miller in 1873 (when, among other things, Northern supporters of radical reconstruction had lost their nerve and were rapidly moving toward reconciliation with the white Southern elites).  

As Senator Trumbull put it, "To be a citizen of the United States carries with it some rights, and what are they? They are those inherent, fundamental rights which belong to free citizens as free men in all countries . . . ." These are the privileges and immunities which belong to persons simply by virtue of their status as citizens of the United States. These fundamental rights are protected against national interference by the logic of national citizenship. As Curtis emphasizes, many Republicans believed that they were already protected against state interference, so that the second sentence of the fourteenth amendment, prohibiting state abridgement of these privileges and immunities was simply declarative of what the Constitution, correctly interpreted, already required. The Constitution, from this perspective, had not been correctly interpreted. Marshall, for example, in *Barron v. Baltimore*, had limited the reach of the Bill of Rights to the federal government. But, like other misinterpretations, it could be overruled by a later court with more wisdom. This was, among other things, the reason that some Republicans believed that the fourteenth amendment was wholly unnecessary as a matter of constitutional logic, even if it served as a reminder for the dimwitted that the states were indeed subject to the full slate of constitutional limitations.

Still, there exists the smelly carcass of *Slaughterhouse*, and relatively few lawyer-scholars seem willing to argue frankly that Justice Miller's opinion should be forthrightly disregarded as a statement of the meaning of the fourteenth amendment. Is there any other advantage to focusing on the ninth instead of the fourteenth amendment? My colleague Douglas Laycock suggests that there is: the text of the ninth amendment com-


63. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866), cited in Kaczorowski, Revolutionary Constitutionalism, supra note 62, at 899 (emphasis omitted).

64. See M. CURTIS, supra note 62, at 41-56, 161-67.

pels recognition of unenumerated rights, whereas even a vigorous reading of the privileges and immunities clause can stop short of that recognition. We see this point most clearly in regard to the debate about the "incorporation" of the Bill of Rights, which is most often defined as consisting of, at most, the first eight amendments. Judicial conservatives who are willing to concede the legitimacy of incorporation can avoid the charge of ignoring or eviscerating the privileges and immunities clause by conceding that it incorporates the first eight amendments while denying that it does anything else. This was, of course, Justice Black's view. One can argue that Black was mistaken—that the clause not only incorporates the first eight amendments but also recognizes the existence of unenumerated rights that are equally enforceable by the judiciary—but those who take Black's view are not in the untenable position of saying that the clause adds nothing (or so little as to be practically meaningless) to the Constitution. They are in that untenable position with respect to the ninth amendment. Those who would deny that it protects unenumerated rights can offer no plausible alternative construction; they must instead, like Robert Bork, deny that it means anything at all.

One can, then, be a full incorporationist and yet remain narrowly textual in one's privileged modality insofar as one incorporates only the rights purportedly specified in the first eight amendments. Even if one makes a textual argument for taking the ninth amendment into account—it is, after all, part of the text—the mode by which one breathes life into it is scarcely textualist. Instead, one is invited by the text to adopt a specifically non-textualist modality of argument in order to answer the question what comprises the set of unenumerated rights.

Laycock is right in terms of describing the patterns of argument, but one answer is simply to attack Justice Black's reading of the clause as too limited. Or, concomitantly, one can extend the ambit of "full incorporation" to the patch of text overlooked by Justice Black namely, the ninth amendment itself. Still, even if these arguments are accepted in regard to "unenumerated" limitations on the powers of the states, that does not solve, at least for a textualist, the application of such limitations to the national government, given the textual application of the fourteenth amendment only to the states. There is no satisfactory theory, for example, that explains the imposition on the federal government, in *Bolling v. Sharpe*, of the equal protection norms enunciated that same day in

66. See his dissenting opinion in *Adamson*, 332 U.S. at 71-89, coupled with his dissent in *Griswold*, 381 U.S. at 507.
67. See sources cited supra notes 60-61 and accompanying text.
Brown v. Board of Education. One cannot, then, omit the ninth amendment from general constitutional law, even if one might prefer that unenumerated rights vis-a-vis the states be handled through a revived privileges-and-immunities jurisprudence.

In any event, we should assume for purposes of discussion that the ninth amendment remains our cynosure. We are still left with the problem of providing some positive content to its otherwise negative reminder that our rights are not exhausted by enumeration. What are some of the central problems, and what might be a solution? The next section focuses on the former; the concluding section offers a tentative approach to the latter.

III. CHATTEL SLAVERY AND THE CHALLENGE TO THE JURISPRUDENCE OF THE NINTH AMENDMENT

I believe that the arguments presented above, however theoretically interesting, are overshadowed by that great brooding omnipresence of American constitutional jurisprudence—chattel slavery. At the very least, I believe that those who argue in behalf of the vitality of the ninth amendment, in regard to either the national or state governments, must confront the existence within our positive jurisprudence of a variety of laws that enforced or otherwise legitimated the practice of chattel slavery. It is the purpose of this section to argue that our history presents one extremely important, even if not necessarily fatal, obstacle to reviving the ninth amendment. I should, however, make clear what argument I am not making: I am not here arguing that the failure, as mentioned earlier, of even anti-slavery theorists to cite the ninth amendment is dispositive (or even highly relevant) for the interpretation that we can give it. Instead, I am arguing that we today must address the relevance, within our own suggested approaches to the ninth amendment, of chattel slavery and must indicate how our theories would handle slavery. More particularly, the “we” used in the preceding sentence refers especially to those of us within the legal community who teach or otherwise concern themselves with educating others about the implications of legal arguments. I believe that an increased focus on the possibilities of the ninth

69. 347 U.S. 483 (1954). See, for example, the exchange between Judge Bork and Senator Specter on this point. Judge Bork, like Attorney General Meese, purports not to view Brown as a deviation from the “jurisprudence of original intent,” but he admitted that he could not rationalize Bolling within this jurisprudence (though he also assured the senators that he would not overrule the decision). One could, however, view the right not to be the victim of stigmatic discrimination on the grounds of race as precisely the kind of unenumerated right recognized by the ninth amendment as applying to the actions of the federal government.
amendment must lead as well to paying greater attention to the questions surrounding chattel slavery when we engage in classroom exposition of the Constitution.

There are two quite different arguments that an anti-slavery theorist might raise through citation of the ninth amendment. One might first assert that the ninth amendment, properly understood, invalidated all legal enforcement of or collaboration with slavery. This argument depends in turn on viewing the ninth amendment as a general way of introducing natural justice into discussions of constitutional meaning. If, as Justice Johnson suggested in *Fletcher*, reflecting an argument made by Grotius in the 17th century, even God could not violate natural law, then it would seem to follow that a mere nation of humans would be equally bound, with obvious consequences for the legal legitimacy of slavery. A second argument would be more modest: it would admit that positive law can override natural justice, but then argue that the ninth amendment nonetheless could prove useful as a principle of construction in favor of limiting the incursions on natural justice. That is, just as we are often told to construe statutes to avoid the possibility that they conflict with known constitutional norms, one could construe the Constitution itself to avoid the possibility of conflict with natural justice. What links both of these arguments together is their frank use of notions of natural justice, derived completely extra-textually.

Perhaps the most noteworthy rejections of such arguments are those of John Hart Ely and my colleague Douglas Laycock. In *Democracy and Distrust*, Ely criticizes Justice Black severely for his willingness to ignore the ninth amendment. But Ely also vigorously attacks those who would inject extra-textual values into the Constitution. Instead, he presents an alternative method of breathing life into the ninth amendment, which involves extrapolation from the themes and values already implicit in the Constitution. As Ely puts it, the “content [of the ninth amendment] should be derived from the general themes of the entire constitutional document and not from some source entirely beyond its four corners.”

Laycock, in a long review-article on Ely, has presented the most

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70. 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring) (“I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”).


72. For illumination about the extent of Ely’s rejection of “extra-textuality,” I am indebted to a careful analysis of Ely’s thought by James Fleming in his forthcoming Ph.D. dissertation to be submitted to the Politics Department of Princeton University.

73. J. ELY, supra note 71, at 12.
ambitious attempt yet available to outline such a theory. He is a self-described constitutional positivist, and he sharply rejects the natural-justice interpretation of the amendment. Instead, he, like Ely, adopts what might be described as a true “penumbras and emanations” approach. “Unenumerated” rights are derived from a close reading of the existing text. But in Laycock's view, they are protected by the ninth amendment itself—not by the other texts from which they are extrapolated. Presumably the lack of a ninth amendment would render illegitimate the derivation of “unenumerated” rights that he otherwise endorses.

In a strong, supple argument, Laycock finds a right to travel and a right to privacy amply present in the existing Constitution. He is far more skeptical, however, about constitutional anti-slavery arguments of the kind I am suggesting. He emphasizes (and gives priority to) repeated textual acknowledgment of slavery and argues that this limits what one can legitimately derive from the equal textual presence of the ninth and tenth amendments.

Pointing to the fugitive slave clause in article IV of the Constitution, Laycock argues that it generates a legal obligation of a free state to return an escaped slave. (Indeed, Laycock has suggested that this obligation should have been enforceable via a writ of mandamus in the federal courts.) Moreover, he argues, as indeed did almost everyone prior to 1861, that Congress was wholly without power to abolish slavery in the slave states. No doubt he would argue that any attempt prior to 1808 to abolish United States participation in the international slave trade would have been unconstitutional under article V (which protected the trade even against abolition through the ordinary process of amendment). These examples raise profound problems, especially for those who wish to re-infuse natural law into constitutional interpretation, but I am willing to leave them undiscussed here, for the more fundamental challenge to ninth amendment theorists is presented by certain cases and statutes that cannot so easily be defended within the terms of Laycock's textualist positivism.

Consider within this context the repudiation by Chief Justice Marshall of the natural rights promise he had enunciated in Fletcher in a case arising fifteen years later, The Antelope. There Marshall used all of his formidable rhetorical skills in behalf of a distinctly non-textual form of legal positivism. A ship, the Antelope, was apprehended off the coast of

74. Laycock, supra note 48.
75. Id. at 363.
76. Id. at 365.
77. 23 U.S. (10 Wheat.) 66 (1825).
Florida by a United States revenue cutter; 280 Africans were on board. United States law of the time provided that persons discovered attempting to import slaves would forfeit their ships and that the slaves would be returned to Africa. What made the case difficult was that the Antelope was in the control of pirates who had seized the Africans from several slave ships. The original Spanish and Portuguese "owners" of the slaves sued to get their "property" back, claiming that they had not attempted to circumvent the American law and that they therefore deserved to have their slaves returned to them. Marshall wrote the opinion for a unanimous Court ordering the return of at least some of the slaves to their "owners." The rhetoric is entirely different from that observed in *Fletcher*.

Marshall begins his discussion by reminding the reader that "this court must not yield to feelings which might seduce it from the path of duty and must obey the mandate of the law." But what might be the seduction that so worries Marshall? The answer lies in the moral claims to be made against slavery and the concomitant temptation to act in accordance with those claims. Justice Story, one of Marshall's colleagues, had earlier denounced the slave trade as "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice." And he had gone on to say that "it is impossible, that [the trade] can be consistent with any system of law, that purports to rest on the authority of reason or revelation." Marshall himself notes how "abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice." Indeed, it "will scarcely be denied" that slavery "is contrary to the law of nature." All of this having been said, however, the Court cannot escape recognizing that "[t]he Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in" the slave trade, and that established international law protects the trade, at least in the absence of domestic prohibition. The United States can surely prevent Americans from engaging in the trade and, of course, can prevent anyone from importing slaves into the United States. But, Marshall held, the United States must recognize the claims of "innocent" foreign owners who were not violating the law of their own countries in attempting to ship slaves to a country that could legally receive them.

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78. *Id.* at 114.
80. 23 U.S. at 120.
81. *Id.* at 114-15.
is heard about the ninth amendment as a possible limitation on the general duty of the United States to conform to positive international law.

Similarly, Story, whatever his views about the morality of slavery, upheld the constitutionality of the Fugitive Slave Act of 1793 when it was challenged in *Prigg v. Pennsylvania*. Not the least remarkable feature of that Act, of course, is that it is wholly unsupported by the assignment of power to the Congress in article I. Story, a masterful interpreter of the Constitution, makes no effort to point to any article I source of the Act. Instead, he engages in a far more daring invocation of "implied powers" than any ever dreamed of by John Marshall, for Story's opinion requires that one accept article IV as a de facto assignment of legislative authority to Congress. In effect, he inferences from the specific history of the Constitution, and the grand compromise between slaveowners and their opponents, the constitutional legitimacy of the Act. (It may also be noteworthy, of course, that the 1793 Act was passed by the Second Congress of the United States, which included many members who might have been expected to object to an expansion of federal power. It must mean something, for example, that the Madison who was so eloquent in denouncing the legitimacy of the First Bank of the United States was apparently silent about this exercise of national power. One could, of course, explain Madison's silence as simply displaying political prudence, given the likely views of his slaveholder constituents.)

If one wishes to deny the general power of Congress to pass the Act, it would probably suffice to cite the tenth amendment. There is, though, even here some rhetorical "bite" to the ninth, for one might read it as cautioning that a specific congressional "power"—protection of slavery—should be construed as narrowly as possible in order to avoid denying or derogating the undoubted, even if unenumerated, right generally to be exempt from being a slave.

An even clearer example of my point involves congressional authority over the territories. There is undoubted textual warrant for the exercise of such power. The tenth amendment simply does not apply. But might not the ninth amendment have been read as preventing Congress from including within its regulations for the territories any recognition of the legitimacy of slavery? This point applies with even greater force to congressional regulation of the District of Columbia. Could recognition of slavery within the District possibly survive full recognition of the

82. 41 U.S. (16 Pet.) 539 (1842).
83. *Id.* at 610-22.
84. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States . . . ").
meaning of the ninth amendment? This argument, of course, stands Tanney's *Dred Scott* argument on its head: he argued that the fifth amendment had the effect of *forcing* Congress to recognize the legitimacy of slavery in the territories.\(^8\) I am arguing that the ninth amendment has the effect of *forcing* Congress to withhold any legal recognition of slavery there, save perhaps for the necessity under article IV of returning from the territories fugitives from slave states. But, of course, the central fight concerning the territories involved not fugitives, but the right of slaveowners to bring their slaves into the new territories as part of the process of settling there.

Thus, I ask if we can heed the call for a revival of the ninth amendment without a radical revisioning of our constitutional history? Those who view the ninth amendment as pointing us to a source of legal limitations relatively unconstrained by the text must come to terms with slavery in a way that Laycock, an unabashed positivist, does not—though, to his credit, he at least recognizes the existence of the problem. He thinks the best reading of the original Constitution is that slavery was legal and state slave laws were constitutionally protected; the illegality of slavery therefore could not be used as a premise for constitutional interpretation, even under the ninth amendment. But he acknowledges room to argue that constitutional protection for slavery was limited to a few specifics; therefore, judges could have used the ninth amendment to attack slavery in every way in which it was not specifically protected.

Whatever one's theory of the ninth amendment (assuming that one *has* a theory of the amendment and does not maintain it in its oblivion), I am arguing that to say, as lawyers, that such decisions as *The Antelope* or *Prigg* were "correct" is to make much of the contemporary recourse to the ninth amendment intellectually tenuous and quite possibly indefensible. Why am I so certain about this point? The answer is that one simply cannot take refuge in notions of evolutionary development whereby one distances oneself from figures in the past by saying, for example, that they did not have our own acuity in recognizing the immorality of a particular practice. Ronald Dworkin, for example, has usefully differentiated moral concepts and conceptions to justify an argument that a generalized commitment to "fairness" should override a particular time-bound judgment that a given practice was in fact fair. All of us have made use of such arguments, I suspect, including Judge Bork, who wrote a strongly pro-press opinion in a libel case by suggesting that the framer's commitment to freedom of the press required much stronger

\(^8\) 60 U.S. (19 How.) 393 (1857).
One can hardly use such arguments in regard to slavery, however. As Marshall and Story (or tormented state judges like Edmund Ruffin) amply illustrate, they fully recognized at the very instant they were judging that the practice of slavery was indefensible from the perspectives of natural rights, natural law, and Christianity. They were no less enlightened than we today consider ourselves to be about the immorality of slavery. We cannot justify their decisions by recourse to the easiest kind of historicist arguments involving "paradigm shifts" and the other modes of analysis so common to our contemporary sensibility.

We are thus forced to assess the arguments of Marshall and Story and to decide whether they survive an appreciation of the force of the ninth amendment. If we answer affirmatively, then I submit that the ninth amendment loses much of its rhetorical power as a legitimator of judicial invalidation of injustice. (I suppose that someone might argue that only some injustices, for instance those that do not threaten civil war, can be handled by the judiciary, so that prudence might legitimate overriding the force of the amendment in regard to slavery but not, say, in regard to the violations of marital privacy seen in Griswold.)

If, on the other hand, we save the ninth amendment, as it were, by deciding, retrospectively, that the pro-slavery decisions were wrongly decided, then we must take such a conclusion into account as we teach our constitutional law courses. We must subject Marshall and Story to some of the same critique now reserved for Taney and his egregious opinion in Dred Scott. If we answer, as I suggested at the outset is my own tendency, that there is no such thing as "correct" interpretation or, somewhat more modestly, that "correct" interpretation can nonetheless violate the law of non-contradiction so that both A and not-A can be equally correct, then the reintroduction of the ninth amendment as a rhetorical device turns out to lose some of its impact—though one should not underestimate the importance simply of legitimizing ninth amendment citation as a proper example of constitutional argumentation.

IV. TOWARD A CONTEMPORARY JURISPRUDENCE OF THE NINTH AMENDMENT

In this final section, I want at least to sketch how a revitalized ninth amendment might operate within contemporary constitutional argument. In particular, I want to discuss the fact, which I am certainly not the first to note, that many persons today do not find meaningful a view of the Constitution that relies on such notions as natural rights and natural jus-
tice, however historically warranted the invocation of such notions might be. Consider, for example, Alexander Hamilton's statement, quoted by Suzanna Sherry in her recent article, *The Founders' Unwritten Constitution*:

The sacred rights of mankind are not to be rummaged for, among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.  

This is surely powerful evidence for the belief in "sacred rights" that transcend any "parchment," including that of the 1787 Constitution. But the obvious question is whether we continue to inhabit in any significant sense Hamilton's world. Here is where historicism, which cannot be used very well to defend Marshall or Story, may nonetheless prove fatal to the invocation of Hamilton within the contemporary constitutional debate. For my surmise is that relatively few of us continue to believe in the existence of a foundational "human nature" or the presence of a "divinity" who inscribes his or her teachings either into a decodable text of nature or upon our minds via self-evident truths or disciplined right reason. The language of natural rights or natural justice raises every one of the foundational questions that have proved so embarrassing to the enterprise of post-Kantian philosophy. I am sure that some readers do in fact adhere to some variety of naturalism. Most, however, are unlikely to, and the command to consider the Constitution as including the dictates of right reason is literally meaningless.

Professor Randy Barnett has suggested that it may be irrelevant that we today do not share the framers' views. He notes that even moral skeptics (like myself) do not deny that the founding generation, as a general matter, accepted the idea of natural rights. “Given their political views and fears, had they been positivists, they would have insisted on more positive protections.” Their failure to do so is in some sense evidence of the faith they put in future generations to remain sensitive to the existence of unenumerated rights. “Enforcing the original scheme,” says Barnett, “requires that unenumerated rights be treated ‘as if’ we believed in them.” Fully to address this point would both make this article much longer than it already is and require delving into some extremely complex issues of philosophy that are beyond my ken. One might summarize

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the problem, though, by asking if it is possible to "do" (rather than merely analyze the "doing" by others of) for example, Christian theology if one does not believe in the existence of God. This is not meant as (merely) a rhetorical question; if it were, there would be no complexity to it. But I am suspicious about an approach that asks us in effect to be unfaithful to our deepest views about the nature of moral reasoning (or, indeed, the structure of the world).

Does this "skeptical" response doom the enterprise of giving meaning to the ninth amendment? I think that one can escape this unhappy conclusion. Instead, one can shift the argument at this point and adopt a quite different tone of voice, one that is often classified in contemporary debate as "interpretive." Its most prominent American proponents include Clifford Geertz\textsuperscript{88} and, within the realm of political theory, Michael Walzer.\textsuperscript{89} Although Walzer is a person of the left, similar views can be discerned in the thought of the English conservative Michael Oakeshott.\textsuperscript{90} All of them reject abstract rationalism and suggest in its place close attention to the narratives by which we constitute our own particularistic way of life. Such listening—and the careful interpretation of what we hear—will enable us to grasp the deep structures that constitute our political order and to understand as well that some transitory political notions, even when embodied in legislation, could be in serious conflict with these structures. This understanding could generate two quite different models of critique.

One model is the standard form of judicial review, particularly as is often transmitted to our students. That is, one might ask what it is that a particular piece of legislation seeks to do and then ask whether our political tradition, correctly understood, allows this result. There are at least two crucial problems with this model, as suggested by, among others, John Ely. First, why would one believe that the judiciary is the better interpreter of "our" political tradition than a legislature? If it is a truly shared tradition, then there is no reason to believe that one particular institution would be so much better in its mode of apprehension that it is entitled to set aside the contrary determination of another.

A second problem with this model is that it has an overtone of stasis; it can be heard as suggesting that there is a single, changeless tradition that structures our social order, the memory of man (and woman) knowing not to the contrary. This is scarcely tenable, even, one suspects,

\textsuperscript{88} C. Geertz, Interpretations of Culture (1973).
\textsuperscript{89} M. Walzer, Interpretation and Social Criticism (1987).
\textsuperscript{90} See, e.g., M. Oakeshott, Rationalism in Politics (1962).
for the various exotic tribes that have contributed to the classical anthropologists' vision of an atemporal, ahistorical society. Traditions change, and with them notions of what is viewed as fundamentally important also change.

Still, no one with a sociological or anthropological bent argues that our world is simply one of randomized Brownian motion. To recognize something as "a society" is to suggest the presence of certain structuring conventions, even as we can also suggest that these conventions are being transformed as the result either of conscious decisions or the pressures of other changes in the social order. What one can do, at least on certain occasions, is to confront one's fellows with the implications of their decisions and to ask if they are really willing to accept the consequences.

This leads to a potential second model of critique, which in substantial ways adopts Ely's own emphasis on procedure. It would ask the following question: Is there good reason to believe that the legislator or any other primary decision-maker in fact considered the implications of the given piece of legislation for values that do indeed seem central to "our" tradition? And, even if the answer to this question is affirmative, did the consideration happen recently enough in the past that we can recognize the legislators as our contemporaries?

The first question bespeaks a commitment to "thoughtfulness" as the sine qua non of the republican political order that is privileged (even if not precisely "guaranteed") by the text of the Constitution itself. It has the obvious defect of any purely procedural test, that it does not on the surface limit the range of decisions that might be made. So be it. Although it is important to remember that procedure is not everything, contrary to what was sometimes urged by Alexander Bickel and other denizens of the "legal process" school, it is surely something whose importance is derided at our peril.

The second question is Jeffersonian in its inspiration insofar as it suggests that only the living are entitled to rule. 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. As Guido Calabresi argued in his fascinating study A Common Law for the Age of Statutes,91 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.

What I am doing is justifying a certain kind of judicial activism

91. G. Calabresi, A Common Law for the Age of Statutes 5-7 (1982).
should the adjudicator be confronted with either thoughtless present legislation or old statutes that have not been actively reconsidered at any recent date. But what if the questions are answered affirmatively? This may present many of us with severe analytic and political difficulty, for it then seems, at least to me, hard indeed to justify judicial invalidation of legislative decisions in such a context. This, among other things, is what makes the abortion controversy so difficult, especially in regard to post-

*Roe* laws that have been enacted after a great deal of public debate. (The same problem may be presented by the death penalty, except that capital punishment is passed by legislators who never genuinely imagine that it might apply either to them or to their friends. That, however, is not so much the situation in regard to abortion.)

One might place the argument I am making here within the context of the “remand” function of the Supreme Court, by which Congress or a state legislature is given an opportunity for an “orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made back-handedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance.”1

This notion, which countenances the possibility that the legislature might indeed decide to infringe on the value recognized as crucial, or even “fundamental,” by the Court, seemingly challenges a basic premise of judicial review—the finality of judicial decision, save for constitutional amendment or reversal by the Court itself. In teaching the dormant commerce clause cases, though, I inform my students of the reality that the Supreme Court is simply not supreme in that area. Its decisions are reviewable by Congress, which with some frequency overrules them. Might one imagine a model of judicial review as suspensive veto, returning the offending legislation to the legislature for a sober second look, this time with the legislature presumably fully cognizant of the impact of the legislation upon the Court’s reading of our social ethos?

Obviously one *can* imagine such a model: I just have. The more important question, obviously, is its desirability. My own inclination would be to support it, especially because the kinds of political interests most easily embraced under the ninth amendment (or, for that matter, the privileges and immunities clause of the fourteenth amendment) are, in contrast to equal protection claims, those that indeed are held by almost *all* of us. I tend to agree with Ely that the Court has little legitimacy in restraining a hell-bent majority insistent on depriving itself of

92. A. BICKEL, THE LEAST DANGEROUS BRANCH 165-66 (1962). See also P. BOBBITT, supra note 23, at 192, 195, for a similar notion of a “referring” function.
what had formerly been viewed as "fundamental rights." But one should not easily presume that the legislature in fact has decided to do that, and a remand does not seem wildly offensive to the majoritarian concerns that were repeatedly articulated by Judge Bork in his attack on judicial interventionism.

It is also worth mentioning in this context—i.e., respect for majority rule—that a given majority (or, more accurately, coalition of minorities) in a particular legislative setting may have only the slightest connection with majorities outside of that setting. The reason lies not simply in contingent defects in a particular election, but also in the now well-known problems associated with the Arrow paradox and other problems in the theory of social choice. To describe the legislature as necessarily representing majority sentiment on all issues that it decides is sheer ideological assertion, whose falsity can be shown both empirically and theoretically. That does not, I should hasten to add, make the judiciary a better representor of majorities, but at least it should caution us that the realities of modern politics are far more complex than the civics book-like descriptions sometimes proffered by purportedly serious analysts.

Still, unless one believes, as I do not, that our tradition speaks univocally or that it is changeless, then it is hard, if not impossible, to privilege the readings of courts against those of thoughtful legislators.93 This is, I think, a potential difficulty in the use of what Bobbitt calls the modality of "ethos."94 Even if one agrees with the not uncontroversial proposition that one can identify a given cultural ethos that helps to structure our comprehension of what it has meant to be a "free American," I do not think that it is helpful to pretend that the ethos could not undergo quite radical changes (just as it has in fact undergone such changes in the past).

Before I conclude, I should note that most of the discussion so far has focused on what are traditionally deemed "negative" rights involving freedom from state regulation. Liberalism and the accompanying notion

93. Professor Barnett suggests that judicial review does not "privilege" judicial readings so much as simply require[ ] that all three branches agree about a statute's constitutionality for it to survive. . . . If thoughtful legislators believe a measure is unconstitutional and do not propose or pass it, their view "prevails" over that of the other two branches. Only if they think a measure is constitutional do the other two branches get a voice. According equal weights to the courts (and the executive) means that when they disagree with the legislature, the statute is stricken. In sum, a requirement of consensus does not presuppose judicial superiority.

Barnett Letter, supra note 87. See also Barnett, Foreword, supra note 87, at 49. A full response to Professor Barnett’s interesting point would take this article too far afield.

94. P. BOBBITT, supra note 23, at 94-95.
of the limited state surely emphasizes such rights. It is not surprising that many latter-day rediscoverers of the ninth amendment focus on the "right of privacy"—the so-called right to be let alone. Indeed, Professor Barnett, one of the warmest supporters of the ninth amendment, would restrict it to negative rights.\textsuperscript{95} I suspect (indeed I am certain) that this attempt to capture the ninth amendment for libertarianism will itself provoke many of the most fundamental future struggles over its meaning (and use). Charles Black, for example, has led the way in reading the ninth amendment as a possible charter for the positive entitlements of the welfare state.\textsuperscript{96} But we do well to consider the fact that Professor Kurland, in collecting background sources for the ninth amendment, included an extensive passage from Blackstone's \textit{Commentaries} which, along with its expected emphasis on negative liberty, includes the following passage:

\begin{quote}
The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community . . . .\textsuperscript{97}
\end{quote}

We might listen as closely to this unexpectedly radical thrust of Blackstone as to the much more familiar paeans to traditional negative rights. Indeed, I would suggest that the Blackstone quotation should be of special interest to those who wish to use the ninth amendment as a proxy for natural justice or natural rights. "Ethos" theorists, being more positivistic at bottom, can argue that such notions of a duty to care for one another passed out of our tradition as we became more relentlessly liberal in the nineteenth century. That mode of avoidance is less available to those who wish to argue in behalf of more universal norms.

\textbf{Conclusion}

The fact that the ninth amendment is no longer forgotten clearly does not establish that many of us know confidently what to do with it. Still, the fact that one cannot (or, again more accurately, \textit{I} cannot) deliver you a satisfying comprehensive theory of the ninth amendment or of the privileges and immunities clause of the fourteenth amendment does not stand for the proposition that they should be ignored as potentially valuable additions to the standard repertoire of arguments by which we

\textsuperscript{95} See R. Barnett, \textit{supra} note 15.
\textsuperscript{97} \textit{The Founders' Constitution}, \textit{supra} note 36, at 390.
daily reconstruct the actual meaning of living within the embrace of the Constitution. The ninth amendment is not the philosopher's stone. To expect too much from it will simply doom its admirers to disappointment and, not incidentally, make it ever less likely that they will persuade their more skeptical auditors to end the process of forgetting that has characterized its history. But we should all be aware of the contribution that can come even from "a little help from one's friends," and these days a little help is nothing to snicker at.