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DOING MORE THAN REMEMBERING
THE NINTH AMENDMENT

MORRIS S. ARNOLD*

The recent revival of interest in the ninth amendment is partly due
to dissatisfaction with the intrusive bureaucratic state created in this
country over the last fifty years. The ninth amendment is, of course, a
fairly obvious place to look for protection from the ravages of positivism,
for it holds out at least a modicum of hope to those who value liberty and
autonomy—those, that is, who would like to locate in the Constitution
something like a general right to be left alone. Such people used to be
called liberals, but that label has ironically been appropriated by persons
with a social vision which requires massive coercion to effect and main-
tain it. This coercion appears in a large number of forms, but most fre-
quently it manifests itself in two ways: first, in interventionist statutes
that prohibit the enforcement of some contracts or compel the creation of
others; and second, in takings and redistributions of wealth that have
rendered the promise of just compensation held out in the fifth and four-
teenth amendments a virtual dead letter. Since the possibility of enforce-
ment is what often, though by no means always, induces obedience to
law, guns and jails lurk behind these laws, however subtle may be the
camouflage, and however worthy their progenitors think them to be.
Much recent ninth amendment scholarship is generated by a desire to
find some sanctuary from what is perceived as majoritarian tyranny.

Professor Sager's finely tuned arguments aimed at helping us under-
stand what the ninth amendment might mean raise every plausible possi-
bility and, indeed (deliberately) one or two implausible possibilities as
well.1 It is a most sophisticated addition to the literature which, though
contributors to it have exhibited remarkable energy and creativity, is rap-
idly exhausting the subject. However, to one who has recently fallen
from grace, that is, has assumed a judgment seat in the real world after
fifteen years as an academic lawyer, it is a little troubling to conclude, as
Professor Sager does, that what we can mainly do with the ninth amend-
ment is remember it. I no longer have the luxury of musing luxuriantly

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1. Sager, You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on
Earth Can You Do with the Ninth Amendment?, 64 CHI.-KENT L. rev. 239 (1988) (Professor
Sager's article appears in this symposium issue).
over cases. Real people have real cases that require decision, and deciding real cases requires a court to give content to words if it can. I shall therefore try to answer the question posed by Professor Sager's title in a slightly different way.

I

At the risk of appearing tendentious, it would seem right to begin with the observation that the ninth amendment means what it says and that it was included in the Constitution simply to prevent the Bill of Rights from triggering the maxim *inclusio unius*. Having said that, another observation is in order: There is little anxiety in the eighteenth-century sources about where judges and others were supposed to look to discover what the rights protected by the ninth amendment were. To the modern mind this creates a real puzzle. That it does so is attributable to the positivistic character of modern legal systems and to our doctrine of *stare decisis* (not well established in the eighteenth century) which combine to make us uneasy about reaching conclusions that are not readily attributable to some legislative or judicial text. The notion that law could be discovered in custom or usage or simply by the application of moral minds to facts is not one with which the twentieth century is very comfortable, but moral skepticism was not a characteristic of eighteenth-century republicanism. Another possible explanation for the lack of guidance provided us as to the content of the ninth amendment is that the revolutionary generation had not completely thought through what the amendment meant because the practice of judicial review was not all that firmly established. It is certain, of course, that that generation would not have asked itself immediately, as we would, what a court would do with a proposed constitutional text, because the Constitution was not thought of as belonging exclusively or even primarily to one branch of the government, and, moreover, the power of courts to transform societies had not yet been experienced. Lastly, in attempting to understand the vagueness of the ninth amendment, it is well to remember that, at least among that class of persons who were likely to hold power in the government, there was a very general agreement about what government was for and therefore about what individual rights in fact existed. We are dealing with a time in which the way that a moral world was ordered was regarded almost as a palpable fact. This cultural homogeneity, of course, can be easily exaggerated, but its existence explains a number of legal phenomena, such as the great power of eighteenth-cen-
tury juries and the almost total lack of jury-control devices in colonial America.

There is nothing even approaching a homogeneity of opinion today on what individual rights deserve recognition or on, what is the same thing, the proper role of government in our people's social and economic lives. Indeed, we do not even agree on whether it is useful or honest or logically possible to differentiate between our social and economic lives. This is due, in large measure, to the extension of political power to classes excluded from participation in government in the eighteenth century. It says nothing about the abstract merits of a person's politics to observe that the extent of his or her devotion, to, say, contract and property as ordering moral principles is likely to depend somewhat on that person's economic and social position. But whoever may be right, the accession of large numbers of persons to full political rights has made it difficult, if not impossible, for the time being at least, to recapture the day when there was a consensus about what natural law means. This may lead to the somewhat gloomy conclusion that while the ninth amendment, as a technical legal matter, must mean something, it cannot, as a practical matter, mean anything.

It might be argued that the inability to reach consensus on the content of natural law does not prevent a court from resorting to it to decide cases. After all, judges do not agree with each other now on the meaning of texts, so disagreement over natural law could hardly disqualify it as a source for decisions. This argument has some force, and it is also well to remember that natural law principles might plausibly be found not only in custom and usage or in moral rumination but also in statutes and state or colonial constitutions. But it would be wrong to attempt to reconstruct what natural law meant in the eighteenth century and pretend that that version of natural law is enshrined in the ninth amendment. There are many reasons that this is impracticable, but the most fundamental is that while natural law is immutable, people's understanding of it can improve, and it can be revealed that a previous appreciation of its content was erroneous. One's comprehension of natural law, in other words, is capable of evolution. As a modest example of the kind of evolutionary process that I mean, let us take a look at the amendment immediately previous to the ninth, the eighth, which prohibits cruel and unusual punishment. It commands us not to inflict cruel and unusual punishment, but it does not say that we are bound by the revolutionary generation's

view of what is cruel and unusual. It tells us not to be cruel in an absolute, Platonic sense. In other words, we are bound to do as the framers said, not as they did. The same argument can easily be transported into cases invoking the ninth amendment.

Even if we cannot have natural law back, we can give meaning to the ninth amendment, without giving it any particular content, by ascribing to it a kind of supplementary role. The ninth amendment can usefully serve as a directive that rights ought to be taken seriously. It is altogether plausible to take the position that the ninth amendment serves as a direction to us to adopt a broad view and liberal construction of the first eight amendments and to regard the personal liberties enumerated there as deserving the most meticulous, fastidious, and expansive protection. At the very least, this would mean that in doubtful cases the balance ought to be struck against the existence of governmental power. A judicious use of the amendment in this way could create a constitutional jurisprudence which sees government powers "as islands surrounded by a sea of individual rights" rather than seeing "rights as islands surrounded by a sea of government powers."³ Such a role for the ninth amendment could radically alter the outcome of many cases. It at least satisfies the need to give meaning to everything in the Constitution, not to mention the duty to defend freedom.