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UNENUMERATED RIGHTS

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

RIGHTS RETAINED BY THE PEOPLE

Aside from contending that a bill of rights was unnecessary, the Federalists responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that inasmuch as it would be impossible to list all rights it would be dangerous to list some because there would be those who would seize on the absence of the omitted rights to assert that government was unrestrained as to those.[1] Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. "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 against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."[2] It is clear from its text and from Madison's statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas

[1] THE FEDERALIST No. 84 (Modern Library ed. 1937).

[2] 1 ANNALS OF CONGRESS 439 (1789). Earlier, Madison had written to Jefferson: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." 5 WRITINGS OF JAMES MADISON, 271-72 (G. Hunt ed., 1904). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1898 (1833).

not enumerated, and that it does not contain within itself any guarantee of a right or a proscription of an infringement.[3] Recently, however, the Amendment has been construed to be positive affirmation of the existence of rights which are not enumerated but which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in decisions of the Supreme Court[4] until it became the subject of some exegesis by several of the Justices in *Griswold v. Connecticut*.[5] There a statute prohibiting use of contraceptives was voided as an infringement of the right of marital privacy. Justice Douglas, writing the opinion of the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] Thus, while privacy is nowhere mentioned, it is one of the values served and protected by the First Amendment through its protection of associational rights, and by the Third, the Fourth, and the Fifth Amendments as well. The Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference. Justice Goldberg, concurring, devoted several pages to the Amendment.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth

[3] To some extent, the Ninth and Tenth Amendments overlap with respect to the question of unenumerated powers, one of the two concerns expressed by Madison, more clearly in his letter to Jefferson but also in his introductory speech.

[4] In United Public Workers v. Mitchell, 330 U.S. 75, 94-95 (1947), upholding the Hatch Act, the Court said: "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth, and Tenth Amendments." *See* Ashwander v. TVA, 297 U.S. 288, 300-11 (1936), and Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143-44 (1939). *See also* Justice Chase's opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), and Justice Miller for the Court in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662-63 (1875).

[5] 381 U.S. 479 (1965).

[6] Id. at 484. The opinion was joined by Chief Justice Warren and by Justices Clark, Goldberg, and Brennan.

Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [7]

While, therefore, neither opinion sought to make of the Ninth Amendment a substantive source of constitutional guarantees, both did read it as indicating a function of the courts to interpose a veto over legislative and executive efforts to abridge other fundamental rights. In this case, both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and in this case, really, the Ninth Amendment added almost nothing to the argument. But if there is a claim of a fundamental right which cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment? [8]

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[7] Id. at 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty," (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. at 500. It would appear that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id. at 481-82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

[8] As Justice Scalia recently observed, "the [Ninth Amendment's] refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people" Troxel v. Granville, 530 U.S. 57, 91 (2000), (dissenting from recognition of due-process-derived parental right to direct the upbringing of their children).

Notice the recurrence to the Ninth Amendment as a "constitutional 'saving clause'" in Chief Justice Burger's plurality opinion in Richmond Newspapers v. Virginia, 448 U.S. 555, 579-80 & n.15 (1980). Scholarly efforts to establish the clause as a substantive protection of rights include J. ELY, DEMOCRACY AND DISTRUST—A THEORY OF JUDICIAL REVIEW 34-41 (1980); and C. BLACK, DECISION ACCORDING TO LAW (1981), critically reviewed in W. Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L. J. 207 (1981). For a collection of articles

on the Ninth Amendment, *see* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989).