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29. The Ninth Amendment and Contemporary Jurisprudence

The importance of the Ninth Amendment for contemporary jurisprudence was dramatically displayed in the confirmation hearings before the Senate Judiciary Committee on the nomination of Judge Robert Bork to the Supreme Court. Almost the only topic that aroused any interest was the right to privacy. There was much discussion about the *Griswold* case and the role of the Court in articulating "unenumerated" rights. Judge Bork, of course, deplored the Court's creation in that case of what he called "a generalized right to privacy." When pressed as to whether he thought the Connecticut law banning the use of contraceptives for married couples should have been struck down, Judge Bork was unequivocal. It was, he said in agreement with Justice Stewart's dissent in *Griswold*, an "uncommonly silly law." Judge Bork told the Senate Judiciary Committee that he believed the Connecticut law could have been struck down without resort to the creation of an undefined (and undefinable) right to privacy that was not rooted in any text of the Constitution.

When pressed, Judge Bork suggested that the Fourteenth Amendment's due process clause might have been a better vehicle, the reasoning being that the Connecticut law deprived married couples of a protected liberty. Judge Bork immediately realized that he had misspoken and retreated from this ill-advised answer, saying that the due process suggestion was perhaps not a good idea because it relied on what Justice Black in his dissent in *Griswold* had called "natural law due process philosophy." The due process solution, Judge Bork recanted, would allow the same unfettered discretion to judges as the generalized notion of a right to privacy.

Judge Bork was in something of a dilemma: "There may be an equal protection question here," he said, "but I haven't thought it through. I suppose an argument could be constructed on equal protection grounds, but I will have to think about it." This colloquy points to the problem most scholars and judges have in trying to understand the question of unenumerated rights posed by the Ninth Amendment. Unless Judge Bork was simply being disingenuous before the committee, he demonstrated his inability (or unwillingness) to grapple with what has become the jurisprudential question of our time. His opponents on the committee were even less able to grasp the issues of constitutional interpretation involved in the Ninth

Amendment. Yet they had the advantage. Judge Bork had allowed himself to be put on the defensive by conceding the moral (and rhetorical) high ground to his detractors. They were able to portray themselves as the defenders of rights against the assaults of Bork and his epigones. It was impossible for Bork to regain the high ground because he was unwilling to argue the moral superiority of the constitutionalism of the framers. Judge Bork believed that an argument derived from the text of the Constitution, rather than its principles, was sufficient.[1]

The political attack upon Bork had been prepared some years in advance by academics. In 1981 Charles Black, always on the leading edge of academic fashionableness, declared that it was a matter of utmost urgency for the nation to adopt "at long last" the Ninth Amendment. Black reasoned that "[w]e need the Ninth Amendment, for the sake of honesty and for the sake of utility."[2] Presumably, Professor Black was not unmindful of the fact that the Ninth Amendment had been adopted in 1791. No doubt, in his mind the fact that the amendment had fallen into seeming desuetude in the intervening years was proof that it had never been adopted. Black was calling for "contemporary" ratification. Contemporary ratification was an urgent necessity because it was, in his view, dishonest to continue to extend the due process and equal protection clauses into areas of ambiguous or doubtful legitimacy. This could be remedied by the adoption of the Ninth Amendment since, in Black's view, that amendment would serve to legitimate a variety of measures that could not be justified even under the most expansive reading of the so-called open-textured clauses of the Constitution.

The extension and expansion of rights under the aegis of the Ninth Amendment could be justified by what Black calls "the analogical and structural modes of inference." This "open Ninth Amendment approach" sets up "an atmosphere *hospitable* to the establishment of unnamed rights" that are "closely analogous or functionally similar to a named right."[3] And the hospitality of the Ninth Amendment is so great that it can be transformed into a veritable "foundation of law."[4]

Professor Black gives some very instructive examples of the structural and analogical derivation of rights. It is rather disingenuous, Black argues, to attempt to justify any prohibition against discrimination based on sex through the equal protection clause. Even though that provision refers to "persons," the history of the Fourteenth Amendment ties it closely to race, and sex is not the same as race although it may be analogous. In any case, the structural derivation is missing since "it would be laughable" to insulate women against discrimination based on "the Carolene Products footnote."[5] Here, then, is a perfect example of how the capacious confines of the Ninth Amendment might be used to establish reserved rights. Resort to the Ninth Amendment avoids a host of problems that arise under the Fourteenth Amendment. It renders irrelevant the interpretive baggage that surrounds

equal protection analysis, such as whether sex is a "suspect classification" or only subject to an intermediate level of scrutiny. Under the Ninth Amendment the right to be free from discrimination based on sex could be protected directly and would almost certainly establish an effects test as the measure of discrimination.[6]

Although unacknowledged by Black, Justice William Douglas was the inventor of the argument from structure and analogy. Douglas has used the doctrine to reach some remarkable—if not indeed bizarre—conclusions. Fortunately, the most egregious of these conclusions—with the notable exception of *Griswold*—were never accepted by a majority of the Court. In his dissent in *Palmer v. Thompson* (1971),[7] Douglas brought the argument from structure and analogy to its logical reductio ad absurdum. *Palmer* was a controversial decision. Instead of obeying an order to integrate its swimming pools, the city of Jackson, Mississippi, closed all its public swimming facilities, citing the need to maintain order and fiscal considerations. Justice Black, writing for the majority, declined to inquire into the city's motives for closing the pools. The real question, Black noted, is "whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike."[8] Since the Fourteenth Amendment creates no obligations for the states to provide public swimming facilities, Black concluded, the equal protection clause is not offended when all are denied access equally: "Should citizens of Jackson or any other city be able to establish in court that public, tax-supported swimming pools are being denied to one group because of color and supplied to another, they will be entitled to relief. But that is not the case here."[9]

Justice Douglas, however, found Ninth Amendment grounds to object to the majority's decision. Douglas conceded that the actions in question did not directly violate the Fourteenth Amendment. They may, however, fall within the "penumbras" of, not only the Fourteenth Amendment but the Thirteenth and Fifteenth as well. And those rights that fall within the penumbras of these amendments "should be in the category of those unenumerated rights protected by the Ninth Amendment. If not included, those rights become narrow legalistic concepts which turn on the formalism of laws, not on their spirit."[10] Douglas did suggest some of the "penumbral" rights that might be claimed on this occasion, implying that the assertion of these rights was the appropriate means of rendering the Constitution "modern." There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights "retained by the people" under the Ninth Amendment. May the people vote them down as well as up?[11] In Douglas's irrefragable logic the question posed was merely rhetorical. Others have extended Douglas's logic, suggesting that the Ninth

Amendment should be read to incorporate the United Nation's Declaration of Rights—presumably including the right to a vacation.[12]

In Professor Black's vision (and that of Justice Douglas), the job of articulating the substance of the Ninth Amendment's unenumerated rights falls to the courts. Since the judiciary is isolated from the majoritarian political process, it can insulate those rights against the depredations of self-interested majorities.[13] This does not present a problem for democratic theory, Black reasons, because the Congress has the power to control the appellate jurisdiction of the courts.[14] As long as the political or representative bodies of government allow the courts to indulge in the task of enumerating unenumerated rights, as apparently they have done by not invoking their power under the exceptions clause, then the Court cannot be accused of acting the part of "virtual representative," although it must occasionally do so to protect the rights of "discrete and insular minorities" from the acts of hostile majorities.

Black, of course, is not serious. He knows as well as anyone that the exceptions clause will never be an effective check upon the power of the courts. Indeed, it is precisely the collusion of the courts and Congress that Black expects to complete the creation of the centralized administrative state. Congress has been quite content to leave the most controversial policy decisions (e.g., affirmative action, busing, school prayer, etc.) to the courts. As John Marini remarks, "the situation today is this: Congress controls the administrative details of politics through the bureaucracy it created, and the judiciary reigns supreme in the realm of politics or regarding general policy matters. In terms of constitutional government, this arrangement has prevented the true sovereign—the American people—from exercising its decisive political role."[15] The recent decision in *Morrison v. Olson* (1988)[16] indicates the extent to which the Supreme Court is willing to cooperate with Congress in its incursions upon the executive branch.

One scholar, however, did seem to take Black's argument seriously, although it is difficult to believe that he was not being facetious or naive. In any case, this scholar faulted Black for his attempt to legitimize the Court's role under the Ninth Amendment by invoking the exceptions clause as a democratic limit to the power of the courts. It is counterproductive, this scholar contends, to publicize and invite the use of a constitutional power (the very constitutionality of which is suspect) which might diminish the Court's power to articulate new rights under the guise of numerating the unenumerated. This scholar is not troubled, as Black pretends to be, by a bad conscience concerning the legitimacy of courts in a constitutional democracy. It seems that a new consciousness—not deterred by questions of constitutional legitimacy—must accompany the newly found judicial activism occasioned by the readoption of the Ninth Amendment.[17]

It is very difficult—nay, impossible—to imagine that the framers of the Ninth Amendment could ever have contemplated such a transmogrification of their handiwork. In the First Congress, Madison supported the inclusion of a bill of rights as a matter of political expediency: it will be "highly politic for the tranquility of the public mind, and the stability of the Government, that we should offer something . . . to be incorporated in the system of Government, as a declaration of the rights of the people."[18] It was not a simple matter, however, to accomplish the task in a way which would "not injure the constitution."[19] The Ninth Amendment was the principal instrument designed by Madison to prevent such injury.

As everyone seems to know, Madison proposed the Ninth Amendment in part to overcome a defect that was inherent in all attempts at enumerating rights: the fact that any enumeration would be read as exhaustive under the rule of construction that the inclusion of one thing necessarily means the exclusion of another. From this point of view, every enumerated right would be a disparagement of an unenumerated one, precisely because every unenumerated right by implication would be given over to the government rather than being retained by the people. James Wilson had stressed this point in the Pennsylvania Ratifying Convention in countering objections that the Constitution contained no bill of rights. "A bill of rights annexed to a constitution, is an *enumeration* of the powers reserved. If we attempt an enumeration, every thing that is not enumerated, is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete."[20] Madison made the same point in introducing the amendments to the Constitution in the First Congress:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].[21]

Madison, of course, always considered a bill of rights superfluous.[22] He, like Hamilton, believed that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[23] The idea that an enumeration of rights was superfluous in a constitution of merely delegated powers was precisely the idea that Madison intended to express in the Ninth Amendment.

The principal danger of a bill of rights, however, was not that the list of

enumerated rights would be read as an exhaustive list of rights, but that the specific prohibitions would be construed as grants of power. From this point of view the addition of a bill of rights was not simply superfluous but positively dangerous. As Hamilton explained in *The Federalist Papers*, a bill of rights

> would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulation power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.[24]

Thus, every exception expressed in terms of the rights of the people implied that, in the absence of the explicit limitation, government would have the power to act. This conveys the impression that the mass of sovereign power belongs to government and that the people's liberties reside only within the interstices of the exceptions to power that they have fashioned for themselves.

Those who insisted upon the addition of a bill of rights never seemed to grasp the importance of the new constitutionalism that was proposed by the Convention. Rather, they took as their models the great charters of English liberty, such as Magna Charta and the English Bill of Rights.[25] But these documents had no relevance to a system of government that was derived from the "consent of the governed." As Hamilton pointed out,

> bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. . . . It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations.[26]

Constitutional government, therefore, means that the people retain the mass of sovereign power and delegate only certain portions of that sovereignty in the form of enumerated powers to the government. Specific reservations of power (or rights) are thus superfluous at best. The power of government is defeated, not by the assertion or enumeration of rights, but by devices (primarily the separation of powers and the federal relationship) that insure that government exercises only those powers which the people

have delegated to it.[27] As Justice Scalia acerbically noted in his recent dissent in *Morrison v. Olson*, "[w]ithout a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon the mere words of ours."[28]

Madison's first version of the Ninth Amendment referred to a reservation of rights as well as a restriction on powers: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."[29] The two aspects of rights and powers are necessary counterparts. As Madison wrote to Washington in December, 1789, "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended."[30] Madison's original version of the Ninth Amendment, of course, appeared in final form as two amendments, the Ninth as a reservation of rights and the Tenth as a reservation of powers. A reservation of rights would be ineffective without the clear recognition that a reservation of rights cannot be construed as a grant of powers. Thus both amendments are declaratory of relations already established in the Constitution.[31]

The reservation of rights in the Ninth Amendment must be read as an affirmation that the federal government is a government of limited powers and can legitimately exercise only those powers delegated to it or those which are a necessary and proper inference from the delegated powers. The Ninth Amendment is necessary because the very fact of enumerating rights implies a grant of power to the federal government. It is thus never necessary to specify the unenumerated rights protected by the Ninth Amendment since the burden of justifying the exercise of governmental power rests with those who are exercising the power to justify that exercise in terms of some delegated power. It is in this sense that the Ninth Amendment provides a rule of construction. It provides the rule for construing the Bill of Rights in a manner which is not inconsistent with the principles of the Constitution: even though the natural implication of an enumeration of rights is to construe the enumeration as exhaustive, that must never be done; even though the natural implication is to read every enumerated right as a disparagement of every unenumerated right, this must never be done; even though the natural implication is to treat every exception as implying a grant of power to the federal government, that must never be done. As a recent report published by the Justice Department's Office of Legal Policy states, "the Ninth Amendment is a rule of construction that creates no rights, but makes clear that those rights of the people not surrendered by

the delegation of limited powers to the federal government are retained by the people, whether or not explicitly mentioned elsewhere in the Constitution."[32]

This is not, of course, the view of the matter that fashionable commentators—and I daresay the courts—hold today. They are more apt to view the federal government as possessing plenary power to act except where some right retained by the individual or by the people can defeat that power. These advocates of judicial activism seek to convert a reservation of unenumerated rights into a grant of unexpressed power on the part of the federal judiciary to define and enforce those rights. We find it necessary today to manufacture rights—either by listing those implied in the "penumbras formed by emanations" from various provisions of the Bill of Rights or by specifying those unenumerated rights reserved in the Ninth Amendment—in order to defeat the exercise of government power. But this is precisely what the Ninth Amendment was designed to guard against. The burden does not rest on the people to enumerate retained rights but on the government to justify the exercise of power in terms of some delegated (or enumerated) power. It is the impulse to define the unenumerated rights to defeat government power that has led to the intrusive use of government power not derived from any provisions of the Constitution. It is our belief today that the federal government has the power to do everything except intrude upon fundamental rights. Yet the Ninth Amendment was an attempt to reaffirm that the federal government is one of limited, delegated powers and that the mass of power or sovereignty was retained by the people. As Madison remarked, "rights . . . are reserved by the manner in which the federal powers are granted."[33] This is the exact idea that the Ninth Amendment was intended to convey. It is precisely when the Ninth Amendment appears moribund that it is working in the manner that its framers intended. Those who wish to define the unenumerated rights—whether by analogy or some functional or structural construction—are simply disparaging the rights guaranteed by the Ninth Amendment.

A good example—one that even the ideological liberals should be able to understand—of how rights might be disparaged by enumeration was given by Madison in a letter to Thomas Jefferson written in October, 1789: "[T]here 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. One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews, Turks, & infidels."[34] Again, in Madison's view, the greatest protection for rights was not their enumeration in a bill of rights but in well-constructed government that was limited to the exercise of delegated powers. The Supreme Court reflected

Madison's understanding as late as 1947 when in *United Public Workers v. Mitchell* it rejected a Ninth Amendment claim.[35] The Court delineated the proper mode of construing both the Ninth and Tenth Amendments:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments must fail.[36]

The important idea here is that a claim against the exercise of government power does not depend upon the plausibility of the "right" being asserted but upon whether or not the government has the delegated power to act, or whether the exercise of power is necessarily and properly implied from a delegated power.

Griswold v. Connecticut (1965)[37] changed this calculus and began the modern era of the Ninth Amendment. Since *Griswold*, the Ninth Amendment has almost become the exclusive argument of last resort in constitutional cases. It has been invoked for fanciful as well as frivolous reasons.[38] Strictly speaking, of course, *Griswold* was not a Ninth Amendment case—or was so only tangentially. Justice Douglas's majority opinion listed the Ninth Amendment, along with the First, Third, Fourth, and Fifth, as containing "specific guarantees . . . [that] have penumbras, formed by emanations [that] create zones of privacy."[39] Since the Connecticut statute banning the use of contraceptives among married couples entrenched upon "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees," it was offensive to the Constitution. There is something of an air of mystery about Douglas's lack of specificity. If the right of privacy was derived in part from the emanations of the Third and Ninth Amendments, are those particular emanations applicable to a state law? The Third Amendment has never been incorporated, and the Ninth Amendment as a rule of construction cannot—any more than the Tenth Amendment—be incorporated.

Douglas chose this line of reasoning in order to avoid "a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment."[40] Substantive due process was the hallmark of the "Old Court," and Douglas wanted to disassociate himself in every way from that discredited doctrine. In a statement drawing its intellectual sustenance from *Carolene Products*, Douglas disdainfully declared that "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[41] But since the present case involved "an intimate relation of husband and wife" falling

within the zone of privacy, the Court can become a "super-legislature." The "presumption of constitutionality" is not accorded legislation when it touches upon fundamental individual liberties deemed "to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[42] But as Justice Black pointed out in his dissent, Douglas's opinion, despite his protestations to the contrary, was bottomed on the due process clause. It otherwise made no sense whatsoever. Black believed that complete deference to the state legislature—whether the issue "was personal rights" or "economic rights"—was the only sure way to avoid substantive due process (or "Lochnerizing" as the current technical term has it).[43]

The interesting Ninth Amendment analysis was adumbrated in Justice Goldberg's famous concurring opinion. He proposed a marriage between the Fourteenth Amendment's due process clause and the Ninth Amendment. Goldberg protested that he was not "turning somersaults with history" in stating that "the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."[44] Further, Goldberg continued, established due process jurisprudence is adequate for determining which of the unenumerated rights are "fundamental" (presumably some unenumerated rights are therefore not "fundamental").

The mistake of Goldberg's analysis, of course, resides in the impulse to define an unenumerated right in order to defeat the exercise of a governmental power. Rather, the thrust of the analysis should be to test the exercise of power in the light of the powers delegated to government. If this were a question of the federal government's power to prohibit the use of contraceptives among married couples, there would be no doubt about its unconstitutionality. But since *Griswold* involved a state law, the matter is somewhat more complicated. The government of the state of Connecticut, no less than that of the United States, is one of delegated powers. The people retain ultimate sovereignty and thereby retain unenumerated rights. The question, then, is whether the Connecticut Constitution authorized the state legislature to act in the manner it did. Prior to the adoption of the Fourteenth Amendment, this would have been entirely a matter for determination by the state of Connecticut, and it is still today as long as there are no federal constitutional questions involved.[45] The question that must be openly confronted, however, is whether or not the prohibition on the use of contraceptives deprived married couples of liberty in violation of the due process clause of the Fourteenth Amendment. This is a question that neither liberals nor conservatives wish to debate openly (the one side not wanting to be accused of "Lochnerizing," the other not wanting to risk the onus of engaging in "natural law due process philosophy"). Yet, the

resolution of this question can take place on the level of constitutional debate—it is a constitutional question and does not (and should not under a proper interpretation of the Ninth Amendment) involve an attempt on the part of the Supreme Court to articulate unenumerated rights.

Justice Stewart, in his dissent in *Griswold*, characterized the Connecticut statute as "an uncommonly silly law."[46] This was one point upon which the whole Court agreed. An "uncommonly silly law" is presumably one that lacks rationality or reasonable purpose. But the existence of an irrational law brings into question the very possibility of the rule of law. To the framers of the Constitution at least, the rule of law was identical with the rule of reason. For whatever else the rule of law may mean, it requires that principle or reason rather than human fiat or will be the informing agent of the law. James Wilson in his justly famous "Lectures on Law" delivered at Philadelphia College in 1790–91 put reason at the center of the definition of law: "Law is called a rule," he said, "in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law."[47] In the same vein, the authors of *The Federalist Papers* often used "reason" and "law" as interchangeable terms.[48] And for the framers generally, it was precisely the presence or absence of the rule of law (or perhaps due process of law) that distinguished constitutional government from despotic government.[49] Certainly no member of the *Griswold* Court would disagree that an arbitrary and capricious law was unconstitutional.[50] But there was considerable disagreement about whose reason was authoritative in determining which laws are arbitrary or capricious.

Justice Black—in an opinion shared by Stewart—argued that the Connecticut legislature should prevail, regardless of whether the law was reasonable. Black went even further:

> I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.[51]

This is not the first time such sentiments in favor of legislative deference have been expressed on the Court. Justices Holmes and Brandeis were

proponents of this point of view, Brandeis advocating that the states be left to serve as laboratories for "novel social and economic experiments."[52]

But Justice Goldberg rightly pointed out that such experimentation could never be allowed to innovate upon the fundamental liberties of the people. Simple majoritarianism, whether at the state or federal level, is not sufficient for the rule of law or for constitutional government. The question of majority faction dominated the writings of the framers. As Madison noted, republican government required the transformation of numerical majorities into constitutional majorities, majorities that were capable of ruling in the interest of the whole rather than merely in the interest of the part (the majority). As Madison remarked in *The Federalist Papers*, "it is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[53] Thomas Jefferson expressed this same idea in his First Inaugural: "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."[54] Thus the authority of the majority is legitimate only to the extent that its will is reasonable—that is, as long as its decisions are directed toward the rule of law understood as the equal protection of equal rights. According to Jefferson—and I daresay this was the view of the founding generation—this is the sacred principle of republican government. "An *elective despotism*," Jefferson mused, "was not the government we fought for."[55] Jefferson, however, was never so sanguine as to think that the majority would always be reasonable. Thus it was necessary to include in the Constitution institutional arrangements—principally representation and the separation of powers—designed to refine the public will or to check it on those occasions when it overstepped constitutional boundaries.

What then is the role of the courts in this calculus of republican government? "It is . . . rational to suppose," Hamilton wrote in *The Federalist* No. 78, "that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[56] An independent judiciary is necessary to insure the legislature's—and the people's—adherence to the Constitution when an intrepid sense of its own strength inspires it to ignore the supreme law of the land. As Hamilton noted, "the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it." Yet it is "the reason alone of the public, that ought to control and regulate the government."[57] It is the principal task of the judiciary to defend the reason of the public (expressed in constitutional form) against all assaults.

Chief Justice Marshall expounded this point of view in *Marbury v. Madison* (1803) when he described the Constitution as "paramount law" derived from the "supreme will" of the people that was superior to the Constitution itself.[58] Whenever the legislature contravenes the supreme will of the people, it is necessary for the Supreme Court to defend the sovereignty of the people against the temporary will of the legislature. This is not a usurpation of the right of the people to act through their elected representatives but a vindication of the "original right" of the people to establish the "fundamental principles" of their own governance by confining the legislature to the exercise of delegated powers. It was this reasoning that led Hamilton to remark that "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments."[59] This does not mean, of course, that the courts can substitute their will for the "supreme will" of the people or constitute themselves as "a day to day constitutional convention."[60] But the framers were acutely aware of the fact that in a republic the greatest danger of usurpation would arise from the legislative branch, not from the executive or judicial branch.[61] Even as a member of the First Congress debating the amendments to the Constitution, Madison emphatically stated that the greatest precautions "must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control."[62]

The natural home of majority faction was, of course, the states. It was in the states, Madison noted, "that measures are too often disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[63] An extensive federal republic embracing a multiplicity of interests offered some hope that constitutional majorities would be formed. But debate over the precise nature of the federal relationship in the "partly national, partly federal" republic that emerged from the Convention was not resolved (at least in principle) until the Reconstruction Amendments.

There can be little doubt that the Fourteenth Amendment was intended to change the federal relationship in important ways.[64] Most importantly, it defined state citizenship as derivative from federal citizenship, and by adding prohibitions against the states of the kind found in Article I, Section 10, it established the United States as the principal enforcer of civil rights. Conservative scholars insist that the provisions of the Fourteenth Amendment must be read narrowly. Raoul Berger, for example, argues that the Fourteenth Amendment was intended by its framers to be no more extensive than the (in his view narrowly limited) Civil Rights Act of 1866. Among a host of other considerations, Berger chooses to ignore statements such as those of John Bingham, the principal drafter of the Fourteenth Amendment in the House ("the James Madison of the Fourteenth Amendment" as he has been called) when he remarked on May 10, 1866, that

> [t]here was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state.[65]

The protection of the "inborn rights of every person" hardly sounds like an intention to protect only against "statutory discrimination with respect to the rights enumerated in the Civil Rights Act."[66] Thaddeus Stevens, a Radical Republican leader in the House, was more pointed when he introduced the amendment in the House on behalf of the Joint Committee on Reconstruction, May 8, 1866: "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States . . . Some answer, 'Your civil rights bill secures the same things.' That is partly true."[67] The clear implication of the last statement is that the Fourteenth Amendment was more extensive than the Civil Rights Act of 1866; read in the light of the earlier reference to the Declaration of Independence as the "organic law" for the amendment, there can be little doubt that it is a mistake to interpret the Fourteenth Amendment in the narrow manner suggested by Berger. The natural-law principles of the Declaration, not the Civil Rights Act of 1866, are the authority for the Fourteenth Amendment.

Is there a Fourteenth Amendment due process argument that can be brought to bear in deciding the constitutionality of the Connecticut statute which is narrow enough to rescue Judge Bork from his seemingly unresolvable dilemma? I believe there is. The laws of the state of Connecticut give legal recognition to the institution of marriage. The state of Connecticut almost certainly cannot do otherwise, although there is no specific provision in the Constitution that would prevent it from abolishing marriage. In any case, Connecticut's defense of its prohibition on the use of contraceptives among married couples was to strengthen the marriage relationship by discouraging extramarital relationships. This is, of course, a legitimate purpose falling clearly within the state's police powers. But the means chosen to accomplish this end is destructive of the liberty that is a necessary and essential element of marriage. From any point of view, it is unreasonable or irrational to allow the means to destroy the end. Connecticut's recognition of the institution of marriage means, ipso facto, the recognition of the

liberties without which marriage itself could not exist. The antiuse statute must therefore fall of its own weight—it is simply irrational and capricious. As Justice Harlan noted in his dissenting opinion in *Poe v. Ullman* (1961), "[i]t is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."[68] It is the choice of means, in Harlan's analysis, not the choice of the end, that violates due process.

The advantage of the due process analysis is that it does not attempt to articulate an unenumerated right but restricts the notion of the liberty being protected to that liberty which is a necessary part of the legally sanctioned marriage relationship. The majority in *Griswold*, however, chose to "articulate" an independent right to privacy which, once established, became subject to constructions required by other provisions of the Constitution. Thus, in *Eisenstadt v. Baird* (1972),[69] the Court was confronted with the question of whether or not unmarried couples fell within the penumbra of privacy created by *Griswold*. *Griswold* had only spoken of the "sacred" intimacies of the marriage relationship. Under *Eisenstadt*, however, equal protection considerations were at issue. As Justice Brennan observed in unmistakable tones of labored tergiversation:

> If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[70]

This reasoning was again used in the abortion case to insulate the fundamental right to privacy—now understood to mean the right to decide whether or not to procreate—from state invasion.

This definition of privacy was pressed to its natural limits in *Hardwick v. Bowers* (1986), a case involving consensual sodomy. Obviously the decisive privacy question was not governed by the individual decision of whether or not to procreate. The federal court of appeals, in finding the Georgia antisodomy statute unconstitutional, noted that while private, consensual acts of homosexuality are "not procreative," nevertheless "[f]or some, the sexual activity in question . . . serves the same purpose as the intimacy of marriage"[71] and for this reason was protected by the Ninth and Fourteenth Amendments. The court of appeals not only struck down the

Georgia law but it attempted to repeal nature as well. The court of appeals had obviously been influenced by Professor Black's argument from structure and analogy.

The Supreme Court, however, overturned the court of appeals, ruling that the practice of sodomy did not fall within the scope of the fundamental right of privacy. The Court considered and rejected a due process challenge to the Georgia statute. Justice White, writing for the majority, sardonically remarked that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent."[72] But, as the dissent pointed out, it was the exclusive reliance on due process grounds (beginning with the question "Is there a right to sodomy?") that defeated the court of appeals. Had the court begun with the question of what belongs within the zone of privacy, as the dissent urged, it would have been difficult to find a rationale as to why sodomy did not fall within that zone. It was, as the dissent vehemently pointed out, therefore unnecessary to consider Ninth Amendment arguments or equal protection arguments.

The dissent would have relied on the right of privacy to protect the absolute right of autonomy in intimate relationships. As Justice Blackmun noted, "[t]he fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."[73] What defeated the assertion of the right to sodomy in the *Bowers* case was a due process argument. The Court did not allow itself to be dragged into the hopeless position of trying to determine the limits (if any) of the right of privacy. Understood as the absolute autonomy of the individual, there can be no limits to what may be legitimately claimed in the name of privacy. It is true that due process arguments have the potential to be (and are) abused by the courts. But this is true of every judgment that is made by a court. The possibility of mistaken judgments should not be an argument for no judgments. This is almost the argument made by Black's dissent in *Griswold.*

The Court in *Bowers* also deferred to the state legislature, arguing that the Georgia statute could be struck down only if it impinged upon a fundamental right. But, by the same token, a state statute permitting consensual homosexuality would infringe upon the same fundamental rights that were at stake in the *Griswold* case. The instance of a state statute permitting sodomy would probably be beyond the reach of the courts, but an argument based on the principles of republican government could be constructed to defeat such a statute. Homosexuality, no less than slavery, is incompatible with the principles of republicanism. Jefferson described the practice of slavery as "a perpetual exercise of the most boisterous passions" which made

both master and slave unfit to be citizens of a republic.[74] But much the same can be said of the practice of homosexuality. The exercise of a "right" without reciprocal responsibilities—as in the case of slavery and homosexuality—is not consistent with the rule of law.[75]

There is no doubt that the "fundamental right to privacy" has become a permanent part of our constitutional jurisprudence. Whether based on due process considerations or the Ninth Amendment, it represents the attempt to do what the Ninth Amendment was intended to prevent—the articulation of unenumerated rights. The general consensus of academic commentators is that the right to privacy must be understood in terms of an absolute right to "personal autonomy." As *Bowers* demonstrates, the Supreme Court has not yet accepted that interpretation, although the continued assault on the part of intellectuals and law professors to do so probably bodes ill for the future. The regime that will be created by resort to an "open Ninth Amendment" is not likely to be the regime of constitutional government that Madison and the rest of the framers envisioned. If Professor Black is successful in founding the regime of the "open-textured" Ninth Amendment, we will have a dramatic demonstration of what it means to disparage rights by enumerating unenumerated rights.

Notes

1. *See* Robert Bork, *Tradition and Morality in Constitutional Law*, Francis Boyer Lectures on Public Policy (Washington, D.C.: American Enterprise Institute, 1984), pp. 8–9.

2. C. Black, *Decision according to Law* (New York: Norton, 1981), p. 44. The extent to which fashion plays a role in academia is indicated by the not entirely facetious quarrel about who was the first to call for the "adoption" of the Ninth Amendment (*see* ibid., n. 48).

3. Ibid., pp. 48, 50. It is significant that Black here speaks of the "establishment," not the articulation of rights, reserved to the people.

4. Ibid., p. 44 n. 47.

5. Ibid., p. 61.

6. *See* Erler, *The Equal Rights Amendment and the Disproportionate Impact Standard: The Impact of the Equal Rights Amendment*, Hearings before the Subcommittee on the Constitution, 98th Cong., 1st and 2d Sess., 1984, p. 893.

7. 403 U.S. 217 (1971).

8. *Id.* at 226.

9. *Id.* at 227.

10. *Id.* at 239.

11. *Id.* at 233–34.

12. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 Cornell L. Rev. 231 (1975).

13. J. Choper, *Judicial Review and the National Political Process* (Chicago: Univ. of Chicago Press, 1983), p. 68. *See* Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education*, 8 Harv. J. L. & Pub. Pol'y. 399–426 (1985).

14. Black, *Decision according to Law*, pp. 18 n. 2, 26–27, 80–81.

15. Marini, *The Political Conditions of Legislative-Bureaucratic Supremacy*, 6 Claremont Review of Books 7 (1988).

16. *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597 (1988).

17. VanAlstyne, *Slouching toward Bethlehem with the Ninth Amendment* 91 Yale L.J. 207 (1981).

18. *Annals of Congress*, vol. 1 (Washington, D.C.: Gales & Seaton, 1834), pp. 439–40; *see also* pp. 429, 432, 442, 448, 704, 732–33.

19. Ibid., p. 108.

20. J. Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed. (Washington, D.C.: U.S. Congress, 1836), 2:435–36.

21. *Annals of Congress* 1:439.

22. *See* ibid., p. 441.

23. A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers*, ed. C. Rossiter (New York: New American Library, 1961), No. 84, p. 515.

24. Ibid., pp. 513–14.

25. *See* Erler, *The Great Fence to Liberty: The Right to Property in the American Founding*, in E. Paul and H. Dickman, eds., *Liberty, Property, and the Foundations of the American Constitution* (Albany: State Univ. of New York Press, 1989), pp. 48–50.

26. *The Federalist*, No. 84, p. 513.

27. *See* Erler, *The Constitution and the Separation of Powers*, in L. Levy and D. Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan, 1987), pp. 151–66.

28. *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597, 2622 (1988) (Scalia, J., dissenting).

29. *Annals of Congress* 1:435.

30. Madison to George Washington, Dec. 5, 1789, in R. Rutland et al., eds., *The Papers of James Madison* (Chicago: Univ. of Chicago Press and Charlottesville: Univ. Press of Virginia, 1962—), 12:459. In the Pennsylvania Ratifying Convention, James Wilson did point to a significant difference when he remarked that "an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission of the enumeration of the rights of the people" (Elliot, *Debates* 2:436).

31. *See* Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1 at 2–3 (1980). "The two [amendments] are complementary: the ninth deals with *rights* 'retained by the people,' the tenth with *powers* 'reserved' to the states or the people. As Madison perceived, they are two sides of the same coin."

32. U.S. Department of Justice, Office of Legal Policy, *Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause* (Washington, D.C., 1987), p. 2.

33. Madison to Thomas Jefferson, Oct. 17, 1788, in Rutland, *Papers of Madison* 11:297.

34. Ibid.

35. 330 U.S. 75 (1947).

36. *Id.* at 95–96. *See also Ashwander v. T.V.A.*, 297 U.S. 288, 330–31 (1937).

37. 381 U.S. 479 (1965).

38. *See* U.S. Dept. of Justice, *Wrong Turns on the Road to Judicial Activism*, pp. 5–6.

39. *Griswold*, at 484.

40. *Id.* at 481.

41. *Id.* at 482.

42. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

43. *Griswold*, at 522.

44. *Id.* at 493.

45. *See* Erler, *Independence and Activism: Ratcheting Rights in the State Courts*, 4 Benchmark 55–66 (1988).

46. *Id.* at 527.

47. James Wilson, "Of the General Principles of Law and Obligation," in R. McCloskey, ed., *The Works of James Wilson*, 2 vols. (Cambridge: Belknap, 1967), 2:100.

48. *See*, e.g., *The Federalist*, No. 78, p. 468 (A. Hamilton), No. 44, p. 285 (J. Madison), No. 81, p. 484 (A. Hamilton).

49. *See* Erler, *Natural Right in the American Founding*, in J. Barlow, L. Levy, and K. Masugi, eds., *The American Founding* (New York: Greenwood, 1988), pp. 210–13.

50. One distinguished jurist has, however, written this remarkable statement: "[L]aws need not be rational means toward some specific end . . . most constitutions impose no obligation on lawmakers or on the people themselves to enact only rational laws" (Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 187, 195 [1984]).

51. *Griswold*, at 513; in his separate dissent, Justice Stewart remarked that it was not appropriate for the courts to "substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws" (*id.* at 540).

52. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932).

53. *The Federalist*, No. 51, p. 323.

54. M. Peterson, ed., *Thomas Jefferson: Writings* (New York: Viking, 1984), pp. 492–93.

55. Ibid., p. 245.

56. *The Federalist*, No. 78, p. 467.

57. Ibid., No. 71, p. 432, No. 49, p. 317.

58. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

59. *The Federalist*, No. 78, p. 469.

60. *Griswold*, at 520 (Black, J., dissenting).

61. *The Federalist*, No. 48, pp. 309–10.

62. *Annals of Congress* 1:437.

63. *The Federalist*, No. 10, p. 77; *see inter alia* M. Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale Univ. Press, 1911–37), 1:27, 254, 2:76.

64. *See* Erler, *The Fourteenth Amendment and the Protection of Minority Rights*, 1987 B.Y.U. L. Rev. 977 (1987).

65. *Congressional Globe*, 39th Cong., 1st Sess., 2542 (1866).

66. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard Univ. Press, 1977), p. 176.

67. *Congressional Globe*, 39th Cong., 1st Sess., 2458 (1866).

68. *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

69. 405 U.S. 438 (1972).

70. *Id.* at 453.

71. *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (1985).

72. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 2844 (1986).

73. *Id.* at 2851.

74. T. Jefferson, *Notes on the State of Virginia*, Q. XVIII, in M. Peterson, *Thomas Jefferson: Writings*, p. 288. *See* West, *The Rule of Law in The Federalist*, in C. Kessler, ed., *Saving the Revolution: The Federalist Papers and the American Founding* (New York: Free Press, 1987), p. 176.

75. *See* Jaffa, *Judicial Conscience and Natural Rights: A Reply to Professor Ledewitz*, 11 U. Puget Sound L. Rev. 219, 252–53 (1988).