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The Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence

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NOTES

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The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[1]

INTRODUCTION

The Supreme Court decision in *Bowers v. Hardwick*[2] marked a significant departure from the Court's previously controlling privacy precedents.[3] The *Bowers* Court upheld the constitutionality of a Georgia criminal statute that outlawed acts of sodomy between consenting homosexual adults.[4] Although the state law extended even to intimate sexual relations within the privacy of the home, Georgia had not violated Michael Hardwick's constitutional right to privacy.[5] The Court noted that its earlier decisions had never "construed the Constitution to confer a right of privacy that extends to homosexual sodomy . . . ."[6]

The *Bowers* decision gives civil libertarians reason to fear that the Supreme Court may be retreating from or even abandoning its modern substantive due process doctrine—the method by which the Court locates various rights in the "liberty" provision of the due process clause. The *Bowers* majority wrote that the "Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[7] At least one

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1. U.S. CONST. amend. IX.
2. 478 U.S. 186 (1986).
3. Privacy rights dealing with child rearing and education were recognized by the Court in Carey v. Population Services Int'l, 431 U.S. 678 (1977), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923); with family relationships in Prince v. Massachusetts, 321 U.S. 158 (1944); with procreation in Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); with marriage in Loving v. Virginia, 388 U.S. 1 (1967); with contraception in Eisenstadt v. Baird, 405 U.S. 438 (1972) and Griswold v. Connecticut, 381 U.S. 479 (1965); and with abortion in Roe v. Wade, 410 U.S. 113 (1973).
4. 478 U.S. 186. The Georgia law prohibited various forms of sodomy. The *Bowers* Court, however, adhering to the particular facts of the case before it, had occasion to pass only on the constitutionality of the statute's prohibition of homosexual sodomy.
5. *Id.* at 189.
6. *Id.* at 190; *see also* cases cited *supra* note 3.
7. 478 U.S. at 194.

commentator has suggested that *Bowers* threatens "the theoretical underpinnings of the modern Court's substantive due process doctrine"[8] and may thus "portend the second death of substantive due process."[9]

Proponents of a broad judicial interpretation of the Constitution, apparently concerned that the Supreme Court may no longer be willing to give adequate protection to unspecified constitutional rights, are now urging a privacy rights jurisprudence rooted in the ninth amendment.[10] They are critical of the *Bowers* decision, insisting that judicial recognition of various unmentioned privacy rights[11] is not illegitimate, but rather is constitutionally compelled. Indeed, the language of the ninth amendment, they argue, expressly authorizes courts to locate such rights, as well as any "others retained by the people."[12]

Proponents of a narrow constitutional interpretation, by contrast, counter that the ninth amendment does not empower courts to locate unmentioned privacy rights.[13] These originalists, who advocate strict adherence to the explicit language of the original document, applaud the *Bowers* Court for refusing to "manufactur[e] privacy rights lickety-split."[14] They condemn the judicial practice of protecting privacy rights that have no specific textual basis, and that are grounded only in the nebulous language of various constitutional provisions, such as the ninth amendment and the due process clause.[15] Originalists thus maintain that the ninth amendment is merely a rule of construction and not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights.'"[16]

This Note addresses the constitutional quandary of the ninth amendment's proper adjudicative role. Part I provides a synopsis of the Supreme Court's evolving fundamental rights doctrine, focusing on the Court's traditional reliance on the due process clause as a source of unnamed constitutional rights. Part II examines the ninth amendment's historical background and inquires into the amendment's intended jurisprudential purpose. This section concludes that the amendment was devised solely as a principle of construc-

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8. Conkle, *The Second Death of Substantive Due Process,* 62 IND. L.J. 215, 216 (1987).

9. *Id.* at 215.

10. *See* Massey, *Federalism and Fundamental Rights: The Ninth Amendment,* 38 HASTINGS L.J. 305 (1987); Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention,"* 74 GEO. L.J. 1719 (1986); Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences,* 22 HARV. C.R.-C.L. L. REV. 95 (1987).

11. *See* cases cited *supra* note 3.

12. U.S. CONST. amend. IX.

13. *See* Berger, *The Ninth Amendment,* 66 CORNELL L. REV. 1 (1980); Caplan, *The History and Meaning of the Ninth Amendment,* 69 VA. L. REV. 223 (1983).

14. Will, *The Constitution and the Privacy Right,* Indianapolis Star, July 3, 1986, at 14, col. 5.

15. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

16. Berger, *supra* note 13, at 2.

tion and not as a source of judicial authority with which courts could elevate unmentioned rights to constitutional status. Part III explores the only Supreme Court case that makes any significant contribution to ninth amendment jurisprudence and evaluates the conclusions reached in the relevant separate opinions.[17] Finally, Part IV surveys some of the contemporary literature addressing the ninth amendment and reveals that many authors seem more concerned with achieving "desirable" judicial results than with adhering to proper constitutional processes.

I. A BRIEF ABSTRACT OF THE SUPREME COURT'S EVOLVING FUNDAMENTAL RIGHTS DOCTRINE

Judicial recognition of what the Supreme Court has called a constitutional "right to privacy" commenced with its decision in *Griswold v. Connecticut*.[18] *Griswold* nullified a state statute that proscribed the use of contraceptives by married persons.[19] The Connecticut law extended to conduct within the confines of the marital bedroom, the intrusion of which by state authorities was considered no less than "repulsive" by the Supreme Court.[20] Accordingly, the Court invalidated the state law by pointing to various "zones of privacy"[21] that are "emanations from those [specific] guarantees"[22] of individual rights expressly enumerated in the first eight amendments and made applicable to the states via the due process clause of the fourteenth amendment.[23]

Though *Griswold* is a watershed decision in the line of privacy cases, the Court's method of locating fundamental rights by relying on the due process clause is by no means unprecedented. During the first third of this century, the Supreme Court routinely applied a similar substantive due process analysis to economic rights.[24] Following its so-called *Lochner* doctrine, the Court had determined that these economic rights included a general right to engage in free enterprise, most notably the freedom to contract, without the interference of the police power of the state.[25] As a result, legislative attempts to impose, for example, minimum wage or maximum hour regu-

17. For a discussion of the relevant separate opinions in *Griswold,* 381 U.S. 479, that address the ninth amendment, see *infra* Part III.

18. 381 U.S. 479 (1965).

19. *Id.*

20. *Id.* at 486.

21. *Id.* at 484.

22. *Id.*

23. *Id.*

24. *See, e.g.,* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

25. *See* 2 R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.3, at 41, 43 (1986) [hereinafter R. ROTUNDA].

lations were likely to be struck down as violations of the fundamental constitutional right "of master and employe[e] to contract with each other in relation to their employment."[26]

Courts have long since discredited the *Lochner* series of cases.[27] In Justice Holmes's famous *Lochner* dissent, he criticized his majority brethren for imposing their own economic philosophy upon the state of New York.[28] Some thirty years later the Court itself questioned *Lochner*,[29] the Great Depression probably the catalyst for the doctrine's eventual demise.[30] In rejecting *Lochner* the Court implicitly acknowledged that the role of *legislatures* is to formulate and implement social policy, whereas the role of courts is to defer to those determinations unless specific constitutional provisions are thereby infringed. In the context of economic rights, since the Constitution does not embody Adam Smith's version of laissez-faire capitalism, no constitutional violation occurs when state legislatures choose to deviate from that model.

Significantly, modern privacy rights cases have not reflected that same animus of judicial deference that characterized the era following *Lochner's* abandonment. For the most part, the current line of privacy cases, beginning with *Griswold,* typifies the Court's willingness once again to locate fundamental rights within the broad and "open-ended" language of the due process clause. Notwithstanding the Court's protestations to the contrary,[31] *Griswold* can thus fairly be said to represent a resurrection of substantive due process.[32] Indeed, the last twenty years have witnessed the Supreme Court's further expansion of the list of unmentioned privacy rights that are deemed to be of fundamental constitutional stature,[33] a woman's right to procure an abortion among the most noted and controversial.[34] Current constitutional protection of a variety of sexual and reproductive intimacies is attributable to the *Griswold* case, making it a truly seminal decision.

II. Background of the Ninth Amendment

A. History

Under the Articles of Confederation, each sovereign state retained the privilege of self-government, including, for example, the right to establish

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26. *Lochner,* 198 U.S. at 64.

27. *See, e.g., Griswold,* 381 U.S. at 481-82; West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

28. 198 U.S. at 75 (Holmes, J., dissenting).

29. *West Coast,* 300 U.S. at 392 n.1.

30. *See* 2 R. Rotunda, *supra* note 25, § 15.4, at 52-53. The Court's ultimate repudiation of *Lochner* was complete with its decision in Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955). *Id.* at 56.

31. *Griswold,* 381 U.S. at 481-82.

32. Conkle, *supra* note 8, at 215.

33. *See* cases cited *supra* note 3.

34. Roe v. Wade, 410 U.S. 113 (1973).

legislation that protected individual liberties.[35] Very little authority was vested in the Continental Congress, which was an impotent body, unable to levy taxes, assemble troops, or regulate commerce.[36] Splintered by many regional differences and no national unifying force, the "union" suffered economic instability as a result of numerous tariffs, trade barriers, and other commercial rivalries among the states.[37] Similarly, individual states frequently pursued a foreign affairs agenda that was incompatible with the interests of the "national" government,[38] rendering the Articles ill-suited for the conduct of foreign policy.[39]

The Constitutional Convention attempted to rectify the shortcomings of the confederation by creating a stronger central authority, empowered adequately to contend with "the exigencies of Government and the preservation of the Union."[40] But widespread fear of unchecked national power led many to resist the Constitution's adoption.[41] This issue of allocating power between the national government and the states soon evolved into a great debate that pervaded every aspect of the Convention.[42]

There was little dispute that the envisioned national government ought not to interfere with its citizens' key liberties.[43] Instead, the controversy focused on how to achieve this result.[44] The antifederalists were concerned that, as the supreme law of the land, the Constitution would supplant and thus annul the existing state bills of rights.[45] Consequently, they urged passage of a federal bill of rights, fearing that individual liberties would be meaningless unless the Constitution expressly declared them reserved.[46] George Mason, who had drafted the Virginia Bill of Rights, typified the antifederalist position.[47] He sought a very weak central government and insisted (albeit largely unsuccessfully) on explicit protections of individual liberties in the new Constitution.[48]

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35. Caplan, *supra* note 13, at 236.
36. *See* 3 R. ROTUNDA, *supra* note 25, § 23.37, at 517-18.
37. *Id.*
38. *Id.*
39. *Id.*
40. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. XXXVIII (1972).
41. 1 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 342-47 (1916).
42. *See* A. COOKE, ALISTAIR COOKE'S AMERICA 137 (1973).
43. Massey, *supra* note 10, at 309.
44. *Id.*
45. Caplan, *supra* note 13, at 239 n.65.
46. *Id.* at 239.
47. A. COOKE, *supra* note 42, at 140.
48. The original Constitution contained very few express protections of individual liberties. Examples of those rights set forth include the privilege of the Writ of Habeas Corpus, U.S. CONST. art. I, § 9, cl. 2, and the protection against Bill of Attainder and ex post facto laws. *Id.* at cl. 3.

At the other end of the spectrum from Mason was Alexander Hamilton, a staunch federalist, who advocated a powerful central government, and who once even called for the abolition of the states altogether.[49] Federalists believed that an enumeration of rights would be unnecessary and even dangerous because any listing, necessarily incomplete, would imply that unmentioned rights were intended to be surrendered to the federal government.[50] Hamilton likewise objected to a bill of rights, commenting that such a specification "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 [to the federal government]. For why declare that things shall not be done which there is no power to do?"[51]

James Madison, proclaimed the "Father of the Constitution," proved to be the Convention's great conciliator, helping to forge a consensus between the federalists and the antifederalists. Madison "seized the principle that made the American Constitution durable; . . . he had the instinct of the balance valve, which yields steam protectively first to one side, then the other."[52] He knew that states possessing too much power would swallow up the central government (as had happened under the Articles).[53] Yet, he foresaw that a national government endowed with sufficient power to impose its own will on defiant states would provoke civil war.[54] Consequently, Madison professed, the proper balance of state-versus-national power should be drawn so that "the national government shall not coerce the states or be their rival. Both exist to protect the [individual]."[55]

Madison initially opposed the addition of a bill of rights because he felt, as did Hamilton, that the federal government—a government of limited powers—was not empowered to abridge individual liberties.[56] Forever the pragmatist, however, Madison soon "saw the writing on the wall": Sensing that ratification might be jeopardized, he vowed to push for the enactment of a bill of rights.[57] Ultimately, the Constitution's ratification was secured, at least in part, by the understanding that a bill of rights would be added to ensure that certain fundamental rights of the people were beyond federal government encroachment.[58]

Popular demand for a bill of rights prevailed, and following the Constitution's ratification, Madison was responsible for drafting a set of proposed

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49. A. COOKE, *supra* note 42, at 137-40.
50. Caplan, *supra* note 13, at 240.
51. THE FEDERALIST No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961).
52. A. COOKE, *supra* note 42, at 141.
53. *Id.* at 143.
54. *Id.*
55. *Id.*
56. Caplan, *supra* note 13, at 251-53.
57. *Id.* at 252-53.
58. 1 ANNALS OF CONG. 427 (J. Gales & W. Seaton ed. 1836) (remarks of Elbridge Gerry) [hereinafter ANNALS OF CONG.].

amendments.[59] Submitting to antifederalist concerns, Madison endeavored to secure, by explicit mention, certain fundamental rights that lay outside the reach of the federal government's grasp.[60] He also wanted to ensure that other fundamental liberties, protected under state law, were not simply abolished by the new Constitution, and so he further sought a "declaration that defeated such a construction."[61]

Madison's proposed declaration, which became the ninth amendment, was proffered to guarantee that federal law would not supersede the rights traditionally protected by the states simply because not all such liberties were expressly enumerated in the new Constitution.[62] Madison defended his proposed amendments, and what became the ninth amendment, by explaining:

> 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 [by the inclusion of the ninth amendment].[63]

As eventually ratified by the necessary three-fourths of the several states,[64] the ninth amendment, in its final version, provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[65]

B. Jurisprudential Implications

The history and language of the ninth amendment demonstrate its appropriate role in fundamental rights cases. The amendment's function is well-defined and limited. Its insertion into the Bill of Rights was intended simply to assure those who opposed excessive central government authority that unmentioned rights were not to be "construed" as ceded to the federal government merely because they were not enumerated. The ninth amendment does no more. It does not, for example, prevent these "other" rights from ever being "den[ied] or disparage[d]." It provides only that unspecified rights shall not be construed as having been denied or disparaged simply

59. *Id.* at 424.
60. Caplan, *supra* note 13, at 245.
61. *Id.*
62. *Id.* at 254.
63. 1 ANNALS OF CONG., *supra* note 58, at 439.
64. U.S. CONST. art. V.
65. U.S. CONST. amend. IX.

because certain rights (those that constitute the first eight amendments) were expressly mentioned in the Bill of Rights.

The ninth amendment's role in fundamental rights jurisprudence is thus twofold. First, the amendment in no way prevents *Congress* from affirmatively acting to abridge any of these unmentioned rights, traditionally protected by state law, so long as Congress acts within one of the express or implied powers granted to it. Not only does the supremacy clause[66] deem legislative enactments of the Congress as paramount to those of the state legislatures, but also the ninth amendment does not represent an independent source of positive law. Rather, it serves merely as a rule of construction, designed to prevent the inference that unspecified rights were automatically relinquished to the federal government.

Second, the ninth amendment does not empower the *judiciary* to overturn state statutes that are thought to violate unspecified rights. The amendment is not a repository of some amorphous set of fundamental rights. It was devised to safeguard, not regulate, state legislation and to make sure "that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by [subsequent] state enactment . . . ."[67]

III. *GRISWOLD*'S CONTRIBUTION TO NINTH AMENDMENT JURISPRUDENCE

Judicial exegesis of the ninth amendment has been extremely sparse in Supreme Court case law.[68] Indeed, very few cases have ever purported to forge a meaning and proper application of this "forgotten"[69] amendment, and these attempts have involved mere dicta or the opinions of individual Justices.[70] A majority of the Court has never reached consensus on the ninth amendment's jurisprudential function.

Certainly the most prolific judicial treatment of the ninth amendment came, interestingly, in the *Griswold* case.[71] Thus, not only did *Griswold* signify the debut of the Court's modern "privacy" doctrine, but also the

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66. U.S. CONST. art. VI, cl. 2.

67. Caplan, *supra* note 13, at 228.

68. Massey writes that "[o]nly seven Supreme Court cases prior to [*Griswold*] dealt in any fashion with the ninth amendment: Roth v. United States, 354 U.S. 476, 492-93 (1957); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); United Pub. Workers v. Mitchell, 330 U.S. 75, 94-96 (1947); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 143-44 (1939); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330-31 (1936); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 551 (1833) . . . ." Massey, *supra* note 10, at 305 n.1.

69. B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

70. 2 R. ROTUNDA, *supra* note 25, § 15.7, at 80 n.10.

71. Griswold v. Connecticut, 381 U.S. 479 (1965). *See id.* at 486 (Goldberg, J., concurring) and *id.* at 507 (Black, J., dissenting).

decision represents the Court's most important contribution to ninth amendment jurisprudence. Two separate opinions offer a prolonged discourse by a pair of Justices who propound conflicting theories of the ninth amendment's role in fundamental privacy rights cases.

In his *Griswold* concurrence, Justice Goldberg "rescued [the amendment] from obscurity"[72] when he wrote that "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."[73] There is little dispute with this reading of history—that "other" fundamental rights exist in addition to those specifically mentioned in the Bill of Rights. But his analysis did not end here. Justice Goldberg's reasoning begged two key questions: What are these "other" rights? and, more importantly, who is to make that determination? Justice Goldberg answered that the federal judiciary was obliged to identify these ninth amendment rights, which became enforceable against the states by virtue of the amendment's incorporation through the due process clause of the fourteenth amendment.[74]

Justice Black, writing in dissent, fervently disagreed; he was critical of the Court's opinion and Justice Goldberg's exposition of the ninth amendment. Justice Black vehemently objected to the proposition that the federal judiciary was the branch of government constitutionally suited to identify the nature of these "other" rights. He stated:

> [The Ninth] Amendment was passed, not to broaden the powers of this Court or any other department of the [Federal Government], but as every student of history knows, to assure the people that the Constitution . . . was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment . . . , it was not given by the Framers, but rather has been bestowed on th[is] Court by th[is] Court.[75]

Justice Black also challenged the view that the ninth amendment (said to be incorporated by the fourteenth amendment's due process clause) could be used by the Court to invalidate state legislation the Justices found to be contrary to the "traditions and [collective] conscience of our people."[76] Justice Black properly understood that the ninth amendment is different from the first eight. These earlier amendments contain an enumeration of particular rights, which were enforceable against only the federal government until the fourteenth amendment rendered most of these liberties enforceable

72. Berger, *supra* note 13, at 1.
73. *Griswold,* 381 U.S. at 492 (Goldberg, J., concurring).
74. *Id.* at 492-93.
75. *Id.* at 520 (Black, J., dissenting).
76. *Id.* at 518-19.

against the states as well. The ninth amendment, however, is of another breed. The ninth amendment does not contain substantive rights enforceable against either state or federal governments. Instead, the amendment is simply a principle of construction, intended to protect the individual rights that exist by virtue of state law.[77] That is, the ninth amendment was drafted to ensure that the identification and protection of these other rights are to remain in the domain of state law, where they resided under the Articles of Confederation.

Justice Goldberg's reading of the ninth amendment, though popular among those who seek an expanded judicial role, is thus inconsistent with the amendment's original understanding. To paraphrase Professor Raoul Berger, "The notion that the [f]ramers, so fearful of the greedy expansiveness of power, would [intend the ninth amendment as an] unlimited grant [of judicial authority] verges on the incredible."[78] Even John Hart Ely, certainly no advocate of strict textualism, remarks that "read for what it says the Ninth Amendment seems open-textured enough to support almost anything one might wish to argue, and that thought can get pretty scary."[79]

Hence, Justice Goldberg's conclusion that a broad constitutional right to privacy can be deduced from the language of the ninth amendment is unwarranted. He wrote that the ninth amendment "show[s] the existence of other fundamental personal rights, now protected from state, as well as federal, infringement."[80] In fact, the amendment supports no such conclusion. Thus had Justice Goldberg unwittingly sanctioned the opening of Pandora's Box.

IV. CONTEMPORARY LITERATURE

Encouraged by Justice Goldberg's misapprehension of history, several recent commentators have steadfastly sought to disregard the ninth amendment's true function, preferring instead an expanded meaning and application in fundamental privacy rights cases.[81] Lawrence Mitchell condemns the Court's modern doctrine—its methodology, not its conclusions—for locating new rights simply by stretching the meaning of explicitly protected liberties.[82] "The Court," says Mitchell, "has attempted to fit square pegs into round holes, by forcing rights that might properly be protected by the broad language of the ninth amendment into constitutional provisions where no amount of pushing can comfortably make them fit."[83] Mitchell thus

77. *See supra* Part II.B.
78. Berger, *supra* note 13, at 22-23.
79. J. ELY, DEMOCRACY AND DISTRUST 34 (1980).
80. *Griswold,* 381 U.S. at 493 (Goldberg, J., concurring).
81. *See supra* note 10 and accompanying text.
82. Mitchell, *supra* note 10, at 1726-27.
83. *Id.* at 1727.

implores the Court to abandon its prevailing subterfuge and to acknowledge forthrightly its long-standing willingness to impose its own values upon the people's elected representatives.

Similarly, Calvin Massey writes that "the ninth amendment was intended to do more than secure unenumerated . . . rights[;] . . . it was also to serve as a barrier to encroachment upon natural rights."[84] According to Massey, a natural right is "generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual."[85] Massey's view is troubling. Not only is it contrary to the lessons of history, but also it creates problems of implementation for the judges who must apply it. How can courts reconcile, on the one hand, judicial recognition of a general privacy right[86]—which would include, for example, Michael Hardwick's claimed right to engage in homosexual sodomy[87]—with Massey's stipulation, on the other, that ninth amendment protection be afforded only those "natural" rights that are "generally recognized by a significant portion of contemporary society . . ."?[88] That the Georgia legislature has spoken by prohibiting various forms of sodomy would seem to indicate that a majority of that state's citizenry finds the practice immoral, offensive, or otherwise objectionable. To insist then, under Massey's approach, that Hardwick's asserted sodomy right is worthy of ninth amendment protection, notwithstanding the law proscribing its practice, is at best contradictory.

Professor Laurence Tribe's contribution to ninth amendment scholarship begins with the premise that "the [Supreme] Court must *always* act with caution, not simply to avoid the *accusation* that it has . . . imposed its own value choices in the Constitution's name, but to avoid the *reality* of doing so."[89] Tribe then chastises the Court for its *Bowers* ruling, describing the decision as "a poor excuse for judicial legitimation of majoritarian morality."[90] Tribe adds: "To say [—as the *Bowers* Court seemed to—] that unenumerated rights are deserving of [constitutional] protection only when they are embraced by social consensus is to relegate them to a distinctly lower and more suspect status, one barely entitled to respect and certainly not to full veneration."[91]

Tribe's comments are predictably eloquent, but they are unpersuasive. Tribe knows that no claimed right to anything is a constitutional right

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84. Massey, *supra* note 10, at 322.
85. *Id.* at 331.
86. Massey writes that "[t]he right of privacy . . . is the constitutional right most closely associated with the ninth amendment." *Id.* at 331.
87. *See supra* text accompanying notes 2-6.
88. Massey, *supra* note 10, at 331.
89. Tribe, *supra* note 10, at 105 (emphasis in original).
90. *Id.* at 107.
91. *Id.* at 106.

unless reasonably implied by the document's language and design. Certainly no specific textual basis can justify calling Hardwick's claim a constitutional right. Nor does the ninth amendment elevate such a claim to constitutional status. Absent the requisite textual grounding, Hardwick's asserted right is necessarily "lower and [not] entitled to [constitutional] veneration."[92]

All of the aforementioned authors seem preoccupied only with the Court's achieving particular results. Perhaps with the best of intentions, they press for judicial recognition of textually unjustified rights, irrespective of the unconstitutional means the Court might choose to get there. Their urging, for instance, that the state of Georgia ought not to concern herself with the private intimacies of her citizens in their bedrooms is compelling. A bad policy, however, is not necessarily an unconstitutional law. Many silly statutes, perhaps regrettably, are nevertheless perfectly legal. Courts must not use the ninth amendment as a panacea for a judicially incurable ill. Indeed, nothing about the amendment enables the Court (legitimately) to —Presto!—make appear a sodomy right that just ain't there. Justices must show resolve by resisting the temptation to disregard the Constitution's language and design, even while pursuing what may appear to be a "desirable" constitutional end. "The Constitution," wrote former Judge Robert Bork, "is the judge's only mandate, and if he is wrong, if he denies the right to govern of persons who have been elected as he has not been, then he commits a mortal sin against the very constitutional order he is sworn to defend."[93]

Such admirable judicial obedience was demonstrated in Justice Black's *Griswold* dissent. "I like my privacy as well as the next one," wrote Justice Black, "but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision."[94] He continued:

> My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly [elected] legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise . . . , or irrational. Th[is Court's] adoption of such a loose . . . standard for holding laws unconstitutional . . . amount[s] to a great unconstitutional shift of power to the courts which . . . will be bad for the courts and worse for the country.[95]

Justice Black appreciated then precisely what threatens the American constitutional system today. Well-meaning and doubtless sincere individuals

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92. *Id.* at 106. "[Tribe is not] an unbiased and altogether detached commentator on the subject of [*Bowers*. He] argued the case on behalf of Michael Hardwick in the Supreme Court." *Id.*

93. Indianapolis Star, July 31, 1987, at 22, col. 1.

94. Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting).

95. *Id.* at 520-21.

recognize many legitimate problems that confront contemporary society, but these individuals have become discouraged with the inherently slow and deliberate machinations of the democratic process. So they have resorted to the courts and have attempted there to force through what *they* believe to be the best solutions to society's troubles and what *they* believe can better address the problems that society faces. Too often they have been successful because courts have been all too eager to accommodate them.

Traditionally, courts obliged by resorting to the tenuous language of the due process clause as a textual source of those unnamed rights the judges found to be deserving of constitutional dimension. More recently, the judiciary, to its credit, has responsibly shown a reluctance to attribute ever more rights to the vague and inexplicit language of the fourteenth amendment. This recent swing has prompted some commentators to urge the Court to adopt a ninth amendment foundation to its fundamental privacy rights cases. These commentators implore the courts to ignore the amendment's proper role as a rule of construction and instead to give it substantive content, thereby once again trying to justify the judicial protection of values that lack specific textual grounding.

The American constitutional system was not designed to operate this way. The *Griswold* line of cases represents clear examples of judicial law-making, in which the Court seemed to be saying that "when the [language or intention of the] Constitution is not clear, decisions of great moral moment cannot be left to the people to decide through democratic processes but must be imposed by the superior wisdom of the Court."[96] As a result, fundamental rights analysis has recently involved little more than a determination by a majority of the Justices that certain individual rights, nowhere mentioned in the Constitution, are nonetheless fundamental and worthy of the judicial scrutiny dubbed "'strict' in theory, fatal in fact."[97]

About this judicial circumvention of democratic procedures, Adam Smith's words, though from a different context, are nevertheless appropriate: Judges who would arrogate to themselves prerogatives that properly belong with the People "would [assume] an authority . . . which would nowhere be so dangerous as in the hands of [men] who had folly and presumption enough to fancy [themselves] fit to exercise it."[98]

As this nation enters its third century of constitutional governance, the courts must never forget that message. Nor must the People ever let them.

CONCLUSION

The ninth amendment was drafted to ensure that the identification and protection of "other" fundamental rights are to remain in the domain of

96. Neuhaus, *Democratic Morality,* NAT'L REV., July 18, 1986, at 47.

97. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

98. F.A. HAYEK, THE ROAD TO SERFDOM 56 (1944).

state law, where they resided under the Articles of Confederation. The ninth amendment thus does not alter the intended balance of power between the states and the federal government. The federal government may exercise authority only to the extent that the Constitution confers such authority expressly or by necessary implication.

To suggest, though—as some recent activist commentators have—that the ninth amendment empowers the federal government, in particular the federal judiciary, to overturn state statutes because they violate individual rights, is to ignore the amendment's history and intended role. That role was to ensure that states retained their sovereignty in protecting the integrity of their citizens' liberties from abridgement by the federal government. These activist scholars are critical of the Supreme Court's refusal to expand the ninth amendment beyond its proper function. They rationalize that improper judicial interference is justifiable because of the "desirable" social results that are thereby achieved.

This view ignores that the United States is "a government of laws, and not of men."[99] If the judiciary could disregard the strictures of the Constitution, "there would be no law other than the will of the judge."[100] The Republic cannot tolerate such governance—based only on the judge's personal predilections. Perhaps it cannot even survive.

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99. "Novanglus" (pseudonym of John Adams) Papers, Boston Gazette, no. 7 (1774). Adams attributes the quote to James Harrington. "Adams's use of the phrase gave it wide circulation in America." BARTLETT'S FAMILIAR QUOTATIONS 381:1 nn.1, 2 (J. Bartlett ed. 1980).

100. R. Bork, Speech before the University of San Diego Law School (Nov. 18, 1985), *reprinted in* THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 45 (1986).