

“A Republic, If You Can Keep It”: The True Meaning Of the Ninth Amendment

Legend has it that, at the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powel stood outside the door, anxiously awaiting the results. When Benjamin Franklin emerged, she asked him directly: "Well Doctor, what have we got, a republic or a monarchy?" "A republic, if you can keep it," responded Franklin.

The difference, of course, is in where power lies.

The Framers saw the world through the lens of John Locke. Man was endowed with certain natural rights, bestowed by the Creator of the universe himself. When men congregated in societies, they did so to protect those rights from infringement -- giving up a portion of them to preserve the others. This arrangement, known as the “social contract,” added an array of contractual rights and imposed an array of duties. For instance, as the whole point of the social contract was to provide for the common defense against other societies, one of the first duties was to pick up arms to defend against invasion.

It was a rational transaction for a rational world.

As science pulled relentlessly against the shroud of mystery, it revealed a clockwork universe. In turn, this precipitated a so-called natural religion, where God’s truths were revealed not on parchment, but on the palette of nature. It became known as the “deist heresy,” infecting and then profoundly changing Christianity. And in one of life’s little ironies, Locke, an avid Christian who detested this new heresy and even wrote a diatribe against it,¹ probably did more than any other man to advance it.

Locke observed that in a state of nature, men had both the natural tendency to want to dominate others, and the countervailing desire to avoid domination by others. Therefore, if one man were given absolute power over others, he would indulge his basest instincts. From there, Locke theorized that if the power in a society were diffused -- creating what Lincoln later referred to as ‘a team of rivals’ -- it would be much less amenable to abuse, thereby creating a stable and just society.

The Framers’ solution to this problem was both simple and elegant: give government only the powers and resources it needed to perform essential functions, and diffuse those powers by creating three quasi-independent branches of government, along the lines that Locke had proposed. Their first attempt to create a loose federation of states (culminating in the Articles of Confederation) failed because the national government was too weak to be taken seriously. Version 2.0 -- now venerated as our Constitution -- was, nonetheless, built on the same core principles.

¹ John Locke, *The Reasonableness of Christianity* (1696), available through Google Books.

The term “republic” carried a significant meaning to Mrs. Powel and indeed, all early Americans. Pure democracy was like two wolves and a sheep deciding what to have for dinner; monarchy was like one wolf and a hundred sheep making the same decision. A republican form of government provided a reasonable assurance that there would be no king but the law, and that all men would be equal before it.

But of course, the devil is always in the details.

Version 2.0: The Constitution of 1787

The Constitution in general -- and the Bill of Rights, in particular -- were intended to protect individual rights through their structure. As Justice Thomas observes (albeit not speaking *ex cathedra*):

We should always start, when we read the Constitution, by reading the Declaration [of Independence], because it gives us the reasons why the structure of the Constitution was designed the way it was. And with the Constitution, it was the structure of the government that was supposed to protect our liberty.

A Conversation with Justice Clarence Thomas, *Imprimis*, No. 36, Vol. 10 (Oct. 2007) at 6.

The Constitution is at essence a suzerainty agreement, common to the Middle East in biblical times. Therein, the vassal lords would cede a portion of their powers to the suzerain in exchange for his protection. This is seen most clearly in the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, the Republican Form of Government Clause, *id.*, art. IV, § 4 (member states required to maintain a republican form of government, and entitled to defense against invasion) and the Supremacy Clause, *id.*, art. VI, cl. 2, all of which cede aspects of that legal authority they can otherwise exercise as sovereigns. Tribute is paid, *id.*, art. I, § 8, and the suzerain is granted command over the vassal lords’ armies, *id.*, art. II, § 2, cl. 1, but the vassal states yield only delineated powers, retaining their identities as sovereign states. Nowhere is this relationship demonstrated more transparently than in the Massachusetts Constitution:

The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.

Mass. Const. (1780), part 1, art. IV.

The Articles of Confederation stated this arrangement explicitly: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” Articles of Confederation, art. II (U.S. 1777) (repealed) (emphasis added). The

language in the Massachusetts Constitution tracks the Articles precisely, telegraphing the intent of the people to retain their sovereignty in its entirety. Moreover, as that particular provision of the Massachusetts Constitution has never been altered -- even to this day -- its delegates to the Constitutional Convention had no legal authority to grant sovereignty to the General Government -- and thus, did not do so.

For the most part, the Lockean notion of popular sovereignty held sway in most of the Colonies: most state constitutions (DE, GA, MD, NH, NJ, PA, VA) never even used the word. New York's constitution contained an affirmative rejection of Britain's claim to sovereignty, N.Y. Const. (1777), art. XXXV (repealed), but did not claim it for the state. North Carolina's Declaration of Rights included an affirmative assertion of popular sovereignty, Declaration of Rights, &c. (N.C. 1776), art. XXV, while South Carolina's oath of office required officeholders to "acknowledge the State of South Carolina to be a free, sovereign, and independent State." S.C. Const. (1778), art. XXXVI (repealed).² This was the bedrock upon which the Framers built.

It probably runs counter to everything you have been taught in Government class, and may even sound a bit counter-intuitive, but **the United States is not a sovereign nation.** It is but a mere agent of the people, who merely delegated powers to and imposed duties (by and through their agents in the state governments) upon the new federal government.

Virtually every state constitution -- Rhode Island didn't even bother to write one until 1843 -- began with a formal declaration of the rights of its citizens. Massachusetts' 1780 Constitution was representative:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Mass. Const., part I, art. I; see e.g., Va. Declaration of Rights (Va. 1776), § 1.

Debate over a federal bill of rights in the Constitutional Convention was conspicuous by its absence. George Mason of Virginia first proposed that the Constitution be prefaced with one on Sept. 12; Roger Sherman of Connecticut countered that it was superfluous, as state declarations remained in force.³ While Col. Mason felt so strongly about this that he

² Vermont was not admitted to the Union until 1791 -- mostly, because Massachusetts, New Hampshire, and New York were fighting over it. Vermont's Constitution of 1777 did not speak of sovereignty, but its 1786 one did. Connecticut and Rhode Island continued to use their colonial charters which, evidently, were quite adequate for their purpose. *See generally*, The Avalon Project: Colonial Charters, Grants and Related Documents, Yale Law School, http://avalon.law.yale.edu/subject_menus/statech.asp#nc (html copies of all pertinent documents; last visited Mar. 1, 2009).

³ James Madison, Debates in the Federal Convention of 1787 (~1840) (reprinted by the Constitution Society at http://www.constitution.org/dfc/dfc_0000.htm in searchable form).

refused to sign the final product, the Federalist Sherman carried the day; although he may have won that day's battle, he obviously lost the war.

Version 2.1: Adding a Bill of Rights

While detailed discussion of the pros and cons of adding a Bill of Rights is beyond the scope of this essay, the Federalist and Anti-Federalist factions were in lockstep agreement as to the need to protect individual rights as against infringement by the new federal government. Federalists insisted that the universe of individual rights, ranging from the profound to the trivial, could not possibly be enumerated in full and thus, under the principle of legal interpretation known as *expressio unius est exclusio alterius* (an express mention of one thing excludes all others), any right that wasn't enumerated would be presumed to have been relinquished to the federal government. The Anti-Federalists, citing England's bill of rights as an example, countered that unless individual rights were granted the protection of paramount law, they could be usurped by a mere act of a future Congress, and were therefore insecure.

Problem is, they were both right ... and more importantly, some of the new states saw the omission as a deal-killer. Abraham Lincoln's arguably illegal⁴ crusade to preserve the Union was still some four score years in the distant future, and the failure of one or more key states to join would have been fatal to the proposed confederation.

⁴ Again, this might seem counter-intuitive to those of us who had propaganda drummed into our heads in high school civics class, but the Declaration of Independence invoked the right to self-determination:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to these ends, **it is the right of the people to alter or to abolish it**, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Declaration of Independence (U.S. 1776), para. 2 (emphasis added).

Most states had analogous provisions, such as this excerpt from Virginia's bill of rights:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Declaration of Rights (Va. 1776), §3; *see also, e.g.*, Pa. Const. (1776), preamble (repealed).

While South Carolina may have had the raw legal right to secede from the Union in 1860, a right is only as good as your ability to enforce it, and Lincoln had other ideas. Might made right, as it generally does.

A prominent Federalist, Madison opposed the idea -- but in this matter, he was not his own master. To placate his critics, he drafted a series of twelve amendments, deliberately eschewing any attempt to enumerate the rights "retained by the people," under the explicit rationale "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." 1 Annals of Congress 456 (1789) (statement of Rep. Madison). His first proposed draft of our Ninth Amendment read as follows:

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.

Id. at 452 (statement of Rep. Madison).

These two statements are crucial for purposes of judicial interpretation, as "the office of all judges is always to make such construction [of a statutory law] as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief ... according to the true intent of the makers of the act." *Heydon's Case* [1584] 76 Eng. Rep. 637. The "mischief" which the Bill of Rights was intended to suppress is expressed succinctly by Madison:

I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

1 Annals at 450 (statement of Rep. Madison).

To the Framers, it was axiomatic that governments do not create natural rights; they can only take them away. What they can create is contractual rights, which are ancillary to the enjoyment of natural rights in a civil society. In turn, these contractual rights can best be thought of as remedies. For instance, the right to habeas corpus is in substance a remedy: You have a natural right to come and go as you please, which can be restricted by the government under certain circumstances which you, as a member of that society, have agreed to. Moreover, the government has the right to restrict your movements in those circumstances, and no other; the remedy of habeas corpus is a "safeguard" against abuse of the sovereign power by the magistrate. Without it, our government could lock you up and send you to Camp Gitmo for the next twenty years, because they claim that

you are a “terrorist.”

As President Obama incisively observed, “generally, the Constitution is a charter of negative liberty.” Paul Moreno, Obama and the “Second Bill of Rights,” History News Network, Dec. 16, 2008, at <http://hnn.us/blogs/entries/58356.html> (reciting an interview of Obama aired on a Chicago radio broadcast during 2001).

This is the key unlocking the curious phraseology of the Bill of Rights. Whereas state constitutions declare that the people have Rights A, B, and C, the Bill of Rights says what the federal government may not do. Every passage of that document may be reduced to a simple formula: **“Because X right is protected, the federal Government may not do Y, and the citizen has procedural safeguard Z.”** As Justice Douglas observes:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

The best way to demonstrate this point is to start with the First Amendment. “[Because we have a right to worship God “in the manner and season most agreeable to the dictates of his own conscience,” Mass. Const., pt. 1, § 2,], Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof [and every American citizen shall have resort to any and all legal remedies necessary to prevent governmental intrusions].” Every passage of the first eight Amendments follows this format, whether it declares what the government may not do, or those legal remedies it must provide. This, in turn, is grounded upon an incorrigible principle of the common law:

If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal.

Ashby v. White [1703] 92 Eng.Rep. 126, 136; *accord, Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884). “To take away all remedy for the enforcement of a right is to take away the right itself.”

With those principles in mind, it is time to examine the Ninth and Tenth Amendments.

The Ninth and Tenth Amendments: Indispensable Bulwarks of Liberty

Constitutionally speaking, the preamble to the Bill of Rights is almost a dead letter. It is unlikely that even one in ten lawyers even knows that it exists but yet, it is an essential piece in the puzzle that is the Ninth and Tenth Amendments. It provides, in pertinent part:

THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

Bill of Rights (U.S. 1789), Preamble (emphasis added).

At the risk of stating the obvious, the institution charged with making the final determination of what the Constitution says is the federal judiciary, *Marbury v. Madison*, 5 U.S. 137 (1803), as any other conclusion would leave Congress as the sole judge of its own powers, and defeat the purpose of even having a republic. Canons of construction are expected to limit judicial discretion in the making of their determinations: Alexander Hamilton asserted that to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." *The Federalist No. 78*, at 470 (A. Hamilton) (C. Rossiter ed. 1961). Accordingly, the primary audience for the Bill of Rights is our judiciary, which, in turn, is why it was written in such a radically different style than any other constitution of its day.

The Ninth and Tenth Amendments preserve the original understanding of limited and federal government as espoused in the Articles of Confederation. The states, as agents of their citizens, retaining every aspect of the sovereignty which they exercised as agents for the citizens as tenants in common. They provide:

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

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. IX, X.

The rights-powers language is consonant with the language of the Constitution itself, wherein it is stated that the legislative, executive, and judicial powers of the general government are vested in its three enumerated branches. U.S. Const. art. I, §; art. II, § 1, cl. 1; art. III, § 1. The Constitution is permeated by the language of agency, and intentionally so. Rights are "retained by the people," whereas the general government has the power to invade them, but only as specified in the four corners of the instrument. The general government only has the power to act as directed by the principals: the individual states, and

more fundamentally, the people they serve. Indeed, the word "sovereign" does not even appear in the Constitution. There is no grant of sovereignty, nor could they be.

Murder Of the Ninth Amendment: The Judiciary, With the Pen, In the Courthouse

Here, we turn to the Ninth Amendment. The question to be addressed is one of which natural and contractual rights were retained by the people, and the answer is both simple and tautological: *Where powers begin, rights end*. The Constitution is a statement of the outer boundaries of the scope of the federal government's agency to act on our behalf. It is incumbent upon our courts to draw that line and unsurprisingly, their ability to draw the line exactly where they need to draw it to achieve a predetermined end is constrained only by their own audacity -- and creativity.

The "judicial power" is a pristine example of this. Article III states, in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. Const. art. III.

The Constitution identifies who has it and when it may be used, and places conditions on by whom it can be held, but nowhere is there a definition of what the judicial power is. Where we find the outer bounds of the judicial power is where it infringes upon the rights of the citizenry.

To raise a simple and absurd example, assume that Pastor John Hagee persuades the people of Texas to enact a state constitutional provision declaring that Pentecostalism is its official state religion, and that the practice of Catholicism is outlawed. Of course, that creates a federal case or controversy, which may be adjudicated in the federal courts of Texas. And if the judicial power is unlimited, District Judge Lush could uphold the law as constitutional, and order all parish churches to be closed forthwith. But the judge's freedom of action is limited, at least in theory, by the Constitution; by virtue of the First and Fourteenth Amendments, no legislature shall pass a law establishing a state religion or prohibiting the free exercise thereof.

Now, to use a real, live example that was actually placed on the ballot in the state of Colorado, let us assume that Ken Scott persuaded the people of his state to enact a constitutional provision declaring that human life begins at conception and therefore, fetal life is entitled to the full panoply of rights enjoyed by those who already have been born.⁵ The Constitution and Bill of Rights do not provide explicit guidance as to whether the potential mother has reserved the right to terminate her pregnancy -- mostly, because back then, it was not possible for an abortion to be performed, even if it was absolutely and indisputably necessary to save the mother's life. How you answer the question of where the reach of government power ends and where unenumerated individual rights "retained by the people" begin suddenly becomes a life-or-death matter.

As Professor Randy Barnett observes, there are four distinguishable approaches that judges may take toward legislation infringing unenumerated rights: (1) judicial deference to Congress, (2) the original "Footnote Four" approach [to be explained in due course for the uninitiated, (3) the modernized Footnote Four approach, and (4) what Barnett calls the "presumption of liberty." Randy Barnett, *Restoring the Lost Constitution* (Princeton Press, 2004) at 253-54. A fifth, advocated mostly by Judge Michael McConnell of the Tenth Circuit and rarely considered outside of Federalist Society circles, is that unenumerated rights are relegated to second-class citizenship, receiving only the same level of protection they had at common law.

1. Judicial Deference

The first approach -- deferring to Congress and thereby, making it the sole judge of the scope of its own powers -- was effectively foreclosed by *Marbury v. Madison*, 5 U.S. 137 (1803). It is the model that has, until quite recently, held sway throughout the Commonwealth. However, as Canada has recently adopted its own bill of rights, called the Charter of Rights and Freedoms, its courts have consigned parliamentary sovereignty to the legal gas chamber, for an utterly compelling reason:

An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Free-

⁵ The current answer is, probably not. *See, Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997) (Justice Alito was on the panel deciding it, and did not dissent). However, if it were heard before the Tenth Circuit, Judge McConnell would be likely to sit on the panel; given his personal views, your mileage may vary.

doms. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim.

Nelles v. Ontario [1989] 2 S.C.R. 170.

Throughout the *civilised* world, following the venerable English decision of *Ashby v. White, supra*, and our own case styled *Poindexter v. Greenhow, supra*, it is axiomatic that a right without a remedy is an absurdity. A declaration by Parliament that an agent of the Crown could willfully inflict injury upon you without penalty to either him or the Crown would extinguish your rights, reducing them to the status of liberties which are inherently insecure. Accordingly, our courts have never adopted a regime of pure judicial deference.

2. Footnote Four, Version 1.0

The original Footnote Four⁶ approach, advocated by Robert Bork and Antonin Scalia, creates a rebuttable presumption that all statutes are constitutional. Statutes which appear on their face to be in conflict with provisions involving enumerated rights still enjoy that presumption, but the scope of that presumption is narrowed; in those cases, courts will be more diligent in examining the statute's bona fides. By implication, unenumerated rights can enjoy no special legal protection. The primary evil of which Judge Bork complains -- that it leaves too much discretion in the hands of a judge who may be tempted to abuse it -- is admittedly problematic, but tends to toss the baby out with the bathwater. However, this approach flies directly in the face of the Framers' intent, as clearly expressed not only by Madison but his Congressional colleagues.

⁶ Footnote Four states, in pertinent part:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face 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.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. ...

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products Co., 304 U.S. 144, 152 & fn. 4 (1938) (citations omitted).

In 1670, the young William Penn, the Quaker who would go on to found the colony of Pennsylvania, was arrested for holding a religious observance outside of his meeting hall on Grace-church Street in London, after he and his congregation had been barred from the hall by the Crown. He had what might seem to us today to be a peculiar quirk: He refused -- as a matter of religious belief -- to remove his hat in deference to authority. He refused to wear his own hat to the ensuing trial, so that he wouldn't be placed in the position of having to not remove it when the judge entered the courtroom. The judge had the bailiff place a hat on Penn's head, which he refused to remove; Penn was thereupon fined forty marks, ostensibly for insulting the dignity of the Court. The People's {Ancient and Just} Liberties Assrted in the Tryal of William Penn and William Mead (Sept. 1670), reprinted at <http://tarlton.law.utexas.edu/lpop/etext/penntrial.html> (U. of Texas Law Library).

Under Judge Bork's proposed paradigm, the modern-day Penn could be fined and even jailed for refusing to remove his hat (or the modern equivalent: rising when a judge enters the courtroom). And while it might seem to be a trivial matter to you or me, the trial of William Penn demonstrated that even this fundamental natural right could be infringed upon and therefore, was worthy of protection. Penn's trial was so infamous to a nation of religious dissenters that it was common currency to every member of the First Congress,⁷ and even the suggestion that the Bill of Rights would not have protected Penn's progeny would have been anathema to those who enacted it. *See*, 1 Annals at 759-61.

Bork's paradigm not only flies in the face of the Framers' expressed intent and flies in the face of a century of Supreme Court precedent, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to attend private school); *Shapiro v. Virginia*, 394 U.S. 618 (1969) (to travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (to marry), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (to buy contraceptives), but does violence to the plain meaning of the Ninth and Tenth Amendments. If not for the fact that it still soldiers on in the mind of Antonin Scalia, it would have been relegated to the jurisprudential scrap heap long ago.

3. Footnote Four, Version 2.0

The modernized Footnote Four approach bypasses the Ninth Amendment altogether, using the concept of substantive due process to specially protect only those fundamental rights and liberties which are deemed as being "deeply rooted in this Nation's history and tradition," *e.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 503 (plurality opinion), or personal interests which have been deemed "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In addition, courts require a "careful description" of the asserted fundamental liberty interest, *e.g.*, *Reno v. Flores*, 507 U. S. 292, 302 (1993), which is an engraved invitation to an orgy of judicial discretion. While this process is on the whole more faithful to the Framers' intent and consonant with the Supreme Court's existing unenumerated rights jurisprudence, it has the net effect of elevating

⁷ Michael McConnell, (Judge, Tenth Circuit Court of Appeals), Natural Rights, Enumerated Rights, and the Ninth Amendment, The Sumner Canary Lecture (Case Western U., Oct. 28, 2008), available for viewing at <http://www.youtube.com/watch?v=bLANRrZPm-k> (hereinafter, (Sumner Canary Lecture)).

some unenumerated rights to the exalted status of ‘fundamental’ while disparaging and denying others, thereby doing violence to the plain meaning of the Ninth Amendment. Barnett, *Restoring the Lost Constitution* at 254.

To be kind, the Footnote Four approach has made a complete mess of unenumerated rights jurisprudence. It has bent, folded, spindled, and mutilated the Due Process Clause beyond recognition, consigning the Ninth Amendment to practical oblivion. It creates no principled rule of decision, as the outcome of litigation is more a function of the judge’s personal predilections than anything else. It describes the law as it is, but not why it is as it should be.

4. Justice Thomas’ View and The Presumption Of Liberty

In a laconic concurrence in a case involving the fundamental -- and, unenumerated -- right of parents to direct the upbringing of their children, Justice Thomas states simply: “I would apply strict scrutiny to infringements of fundamental rights.” *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring). We could stop here and safely place Thomas in the modern Footnote Four camp, but for his own curious explanation of that concurrence in *Meadwestvaco Corp. v. Illinois Dep’t of Revenue*, 128 S.Ct. 1498 (U.S. 2008): “*Cf. Troxel v. Granville*, 530 U. S. 57, 80 (2000) (Thomas, J., concurring in judgment) (leaving open the question whether “our substantive due process cases were wrongly decided and ... the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights”).” *Meadwestvaco*, 2008.SCT.0000044 at ¶ 67 (Versuslaw) (Thomas, J., concurring).

In *Troxel*, Justice Thomas lamented that neither party saw fit to even raise the issue, *Troxel*, 530 U.S. at 80 (Thomas, J., concurring), which naturally begs the question of why they wouldn’t have bothered to do so if the question was still “open.” Technically speaking, it is still open, as the Supreme Court has consistently treated the Ninth Amendment as a legal nullity. Particularly in light of his explanation of his approach toward constitutional jurisprudence in the *Imprimis* interview, Thomas would probably be receptive to Professor Barnett’s argument that the Ninth Amendment pretty much means what it says.

Barnett contends that the Tenth Amendment only gave the federal government certain enumerated powers, and no others. It would logically follow that the rights retained by the people remained as the property of individual citizens and therefore, were entitled to the same protections they would have enjoyed had they been enumerated in an exhaustive declaration of rights added to the Constitution. Accordingly, the Ninth Amendment is a mandatory rule of judicial construction, requiring courts to place unenumerated rights like a parent’s right to direct the upbringing of his or her children on the same legal plane as more familiar enumerated rights, such as the right to worship God as you see fit. In turn, this creates a simple rule of decision that Barnett describes as a “presumption of liberty.” Instead of presuming that a statute under challenge is constitutional, a court would require the government to establish that it does not unlawfully infringe upon a citizen’s protected rights. Courts would still have to apply strict scrutiny to infringements of fundamental rights, but the dichotomy between enumerated and unenumerated rights would disappear.

The Barnett paradigm is more faithful to Congressional intent, as expressed in House deliberations, than the current adaptation of Footnote Four. It directly addresses the mischief Madison intended to avoid: that an inadvertent failure to enumerate a right might be construed by future courts as an affirmative intention to relinquish that right to the federal government. By any objective measure, it is the correct answer to the puzzle of the Ninth and Tenth Amendments -- but that and a dollar won't get you a latté at Starbucks.

The problem, of course, is a practical one. Unfortunately, when people acquire power, their attitude towards the rights of others tends to change, as respecting them can at times be really, really inconvenient. Professor Barnett cites the example of James Iredell, who advanced this brilliant argument against the adoption of a bill of rights during the North Carolina Ratifying Convention:

[I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

James Iredell, Speech Before the North Carolina Ratifying Convention (no date given), as quoted in, Randy E. Barnett, *Who's Afraid Of Unenumerated Rights?*, Paper No. 880715, G'town Law Ctr. Public Law and Legal Theory Research Paper Series (Nov. 15, 2006) at 4, at <http://ssrn.com/abstract=880715>.

Ten years later, after ascending to the Supreme Court, *Justice* Iredell wrote:

If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J., concurring).

Professor Barnett's analysis of this inconsistency is, if anything, unduly kind:

By opposing the enactment of a bill of rights on [the grounds he used before the Ratifying Convention], Iredell is ... contending that all rights should remain unenumerated. He further contends that impairing such unenumerated rights would be a usurpation. Nowhere in this speech does he suggest that only

enumerated limitations on legislative power would be enforceable, as he later did in *Calder*. (Imagine the effect of his argument on the North Carolina debate if he had!)

One or the other of these claims by Iredell cast him in a poor light. At the North Carolina convention, he could have been concealing his skepticism about the effectiveness of unenumerated rights in service of his opposition to a bill of rights that would expressly limit federal power. Or in *Calder*, he could have been concealing his belief that violations of unenumerated rights are usurpations in favor of assertions of state and federal legislative power. Of course, he could also have simply changed his mind.

Barnett, Who's Afraid Of Unenumerated Rights at 4-5.

The Cabots speak only to the Lodges, and the Lodges speak only to God. Power will do that to you, Professor. Despite the soundness of Barnett's arguments and scholarship, most conservative judges would rather gnaw their arms off than faithfully implement this reasonable reading of the Ninth Amendment.

5. Where No Court Has Gone Before: The McConnell Gambit

Judge McConnell's solution to the problem probably wouldn't be worthy of mention -- scholars such as Barnett and Kurt Lash tend to ignore him entirely -- but for the fact that he is a judge on the Tenth Circuit Court of Appeals, has been on everyone's short list of Republican candidates for elevation to the Supreme Court, and is a darling of the powerful Federalist Society.⁸ There has been no discernible scholarly attention to McConnell's approach, which in essence is a rehash of Justice Iredell's concurrence in *Calder*.

In short, McConnell proposes that we extend full constitutional protection to those rights that have been enumerated in the Constitution, while extending only common law protections to their unenumerated counterparts. As the common law almost always yields to statutory enactments, McConnell has managed to achieve under a cloak of scholarship what Federalists and Anti-Federalists alike feared: relinquishment of all of our "unenumerated rights" to the General Government. This is demonstrated by the pre-constitutional case of *Rutgers v. Waddington* (N.Y.C. Mayor's Ct., 1784) that McConnell invokes as an example of what unenumerated rights jurisprudence would look like under his proposal, and an application of that rule to the Good Behavior Clause of Article III.

⁸ The Society's use of its moniker and choice of James Madison as its mascot borders on the fraudulent, as the bulk of its prevailing views are decidedly Anti-Federalist. Whereas the Society is in the forefront in the advocacy of states' rights, James Madison was the first to propose the incorporation doctrine. 1 *Annals* at 783. Whereas the Society is besotted by laissez-faire capitalism and the theories of von Mises, Alexander Hamilton's 1791 Report on Manufactures to Congress was unabashedly protectionist. Whereas the Society is incensed by suggestions that international law should have an influence upon our domestic jurisprudence, the real Federalists believed that it trumped our domestic law.

a. *Rutgers v. Waddington: McConnell's Prototype*

Rutgers v. Waddington is the first recorded Colonial application of what we have come to know as "the Rule of Charming Betsy." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) (act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains). It is also a pristine example of what modern American jurisprudence would look like if the Constitution did not contain a bill of rights and in all likelihood, the genesis of New Yorker Robert "Brutus" Yates' concerns, ably expressed in Anti-Federalist No. 84.

When considering *Rutgers*, it is important to recall that the New York Constitution of 1777 did not contain a bill of rights. As there was no protection of individual rights incorporated into its paramount law, New York's legislature enjoyed unfettered legal authority to abridge those rights, as positive statutory law invariably trumps the common law. As Blackstone explains at length in his *Commentaries*, the English model of law at the time rested on the concept of parliamentary sovereignty: Citing Coke, he declares that its power and jurisdiction is so "transcendent and absolute" in scope that it cannot be confined "within any bounds." 1 Blackstone, *Commentaries* (11th ed. 1791) at 160. The only limits on legislative power imposed by New York's constitution were procedural, and the only protections afforded individual rights were those afforded at common law.

As there was no paramount law of individual rights upon which to draw, the Rutgers Court had no warrant to invoke it. The court's decision tree followed the Federalist view of law: the common law was inferior to state statutes which, in turn, were subordinate to the law of nations. In (conveniently) "finding" that the New York legislature could not have intended to have revoked "the law of nations," the court elided the central question raised by the case.

By contrast, if New York had a Declaration of Rights incorporated into its paramount law akin to Massachusetts', and the authority to resolve property disputes was reserved to the states by operation of the Tenth Amendment, the Rutgers decision would have been plain error. The right to own and dispose of property would thus have been protected, and any undue impairment of that right by the legislature would be null and void. Some consideration might have been given to the law of nations, but it would not have been controlling.

Now, let us fast-forward to 2009. The International Covenant on Civil and Political Rights ("ICCPR") is an international bill of rights which has attained *jus cogens* status and thus, is a part of the "law of nations" -- as it is now legally enforceable throughout the Commonwealth, the European Union, and such non-aligned nations such as Belarus, Bulgaria, and Burkina Faso by virtue of its First Optional Protocol. For the most part, it is written in a style similar to our own state constitutions, and serves the same basic purpose. The United States has ratified this treaty and thus, at least nominally, it constitutes a part of the paramount law of the land. U.S. Const. art. VI, cl. 2. But that and a dollar

won't even get you a latte at Starbucks in America, as federal judges have interpreted it out of existence.

The ICCPR is almost indistinguishable from its predecessor, the Universal Declaration of Human Rights (UDHR), with one crucial distinction: The ICCPR has teeth. While the UDHR was aspirational and unenforceable, the ICCPR affirmatively abolishes official and sovereign immunities. But despite the fact that the creation of effective remedies for rights violations was the sole *raison d'être* of the ICCPR, in a staggeringly mindless decision styled *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001), the Sixth Circuit held that "the ICCPR is not binding on the federal courts," and the Tenth Circuit unthinkingly followed *Buell* in *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002).⁹

How would *Rutgers* be decided today under modern American law under the McConnell paradigm, assuming that the right to hold, own, and dispose of property as you saw fit was not enumerated in the Constitution? The right to hold property would only enjoy common law protection, and any written statute conflicting with international law would be interpreted as not intending to override the law of nations. In addition, as the right to hold and own property does not enjoy *jus cogens* status, *see*, Carol Devine, et al., *Human Rights: The Essential Reference* (Oryx Press 1999) at 97 ("The drafters did not attempt to include property rights in the ICCPR..."), international law would work against her, and she would still lose.

b. Ibi Jus, Ubi Remedium (Where There Is Law, There Is a Remedy)

The principle of the Rule of Law requires not only that the law should apply to everyone -- citizen and state, rich and poor, powerful and weak -- but that there should be effective legal remedies for use where there is a breach of the law. The Rule of Law does not cease to operate merely because the law is broken -- crime exists in all societies -- but it is violated if someone is able to break the law with impunity because legal remedies do not exist or because he is too powerful for them to be applied to him.

R.C. Simpson, *Gouriet: The Constitutional Issue*, 41 Mod. L. Rev. 58, 58 (Jan. 1978).

By way of review, the purpose of the Ninth Amendment, as stated by Madison, was to address criticisms that the Constitution did not contain provisions that would prevent the federal government from encroaching on individual rights or preserve effective common law safeguards against the abuse of power by its agents. 1 Annals at 450 (statement of Rep. Madison). Also, judges have a duty to interpret written law in such a way as to give life to the legislature's true intent. *Heydon's Case*, *supra*.

⁹ As the international law arguments raised in the federal appeal were procedurally defaulted in *Buell*, 274 F.3d at ____, 2001.C06.0000425 at 130, the court's conclusions were mere dictum.

The lowest British commoner enjoyed an array of effectual safeguards against abuse of authority by the magistracy. Apart from the writs we are familiar with today (e.g., habeas corpus; mandamus), they had the legal equivalent of a nuclear weapon: the *scire facias*.

Although most agents of the Crown served "at the pleasure of the King," public officials were often given a freehold in their offices. See e.g., 4 Coke, *Inst. of the Laws of England* 117 (Baron of the Exchequer). Lesser lords were also given authority to bestow freeholds, creating an effective multi-tiered political patronage system, wherein everyone from paymasters to judges to parish clerks enjoyed job security. See e.g., *Harcourt v. Fox* [1692], 1 Show. 426 (K.B.) (clerk of the peace). But these freeholds, called patents, were invariably conditioned on "good behaviour." The Act of Settlement [1701] bestowed this protection upon English judges; before that, they served at the pleasure of the King.

Implicit in good behavior tenure is the condition that the officeholder actually stay on his good behavior. Coke listed three grounds for forfeiture: abuse of office, nonuse of office, and the refusal to exercise an office. Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge*, 116 *Yale L.J.* 72, 90 (2006) (citing Coke's Institutes). Blackstone adds, "the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office [could be prosecuted] either by impeachment in parliament, or by information in the court of king's bench." 4 Blackstone, *Commentaries* 140-41. To kick a judge off the bench when he is two years from retirement and has made no other provision for his golden years is strong medicine and thus, a powerful disincentive to judicial free-lancing.

Of course, the writ of *scire facias* is not mentioned in the Constitution. Neither is the right to initiate a private prosecution. But the Framers were familiar with both rights, and their essential efficacy. See generally, Allen Steinberg, "The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia, 20 *J. Social History* 231 (1986). It is both axiomatic and incorrigible that, "[i]f a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." *Ashby v. White*, 92 *Eng.Rep.* at 136. The actual rights themselves are, as Justice Iredell contended, limited only by our imagination -- here, the citizen's intangible right to the honest services of federal employees, expressly recognized by statute, and protected by the potential criminal sanction of mail fraud, as well -- but without procedural remedies capable of enforcing them, they cease to be rights. Rather, we are left with but a tenancy-at-will in what are no more than mere liberties.

Article III judges are the only federal officials who enjoy a freehold in their offices: life tenure, subject to their maintenance of "good Behaviour." U.S. Const. art, III, § 1. In turn, this necessarily implies that the sovereign, acting *ex relatione* by and through one of its subjects, would be able to remove a federal judge from the bench through issuance of (in modern-day America, relief in the nature of) the writ of *scire facias*, and a subsequent civil trial on the merits. But if the right of the citizen to invoke the *scire facias* is not an

enumerated right and therefore, extinguishable by passage of a mere statute, the Good Behavior Clause can be rendered nugatory without amending the Constitution.

c. Truth Be Told, It's All About Roe v. Wade

There may be a method to McConnell's madness. He is reputed to be a deeply religious man, who "has not merely expressed abstract reservations about the *Roe v. Wade* ruling, but has also actively crusaded against it." Judging Michael McConnell, *N.Y. Times*, Sept. 29, 2002. And like most judges -- who decide the outcome of a case, search for a justification for the decision in the law, and invent one where needed -- he appears to be on a personal quest to find a "right to privacy" that is too small to encompass the right to have an abortion.

As a matter of pure legal theory -- wherein you don't care about the outcome, but how you get there -- *Roe* [410 U.S. 113 (1973)] is a ghastly decision. It exposes the inherent bankruptcy of the Footnote Four approach: penumbras and emanations don't masquerade very well as coherent legal reasoning. Judge McConnell writes:

The reasoning of *Roe v. Wade* is an embarrassment to those who take constitutional law seriously, even to many scholars who heartily support the outcome of the case. As John Hart Ely, former dean of Stanford Law School and a supporter of abortion rights, has written, *Roe* "is not constitutional law and gives almost no sense of an obligation to try to be."

The court's reasoning proceeded in two steps. First, it found that a "right of privacy" exists under the Constitution, and that this right is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Since this meant that the right to abortion is constitutionally protected, a state could interfere with the right only if it has a "compelling state interest" for doing so.

But the right of privacy is nowhere mentioned in the Constitution. Various judges, according to the court, had found "at least the roots of that right" in the First Amendment, in the "penumbras of the Bill of Rights," in the Ninth Amendment or in the "concept of liberty guaranteed by the first section of the Fourteenth Amendment." This vague statement is tantamount to confessing the court did not much care where in the Constitution this supposed right might be found. All that mattered was it be "broad enough" to encompass abortion.

Michael W. McConnell, *Roe v. Wade* at 25: Still Illegitimate, *Wall St. J.*, Jan. 22, 1998, reprinted at <http://www.opinionjournal.com/extra/?id=110002285>.

To not be able to find a right to privacy, you almost have to be consciously not looking. Justice Brandeis wrote: "The makers of our Constitution understood the need to secure conditions favorable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality -- the right to be left alone -- the most comprehensive of rights and the right most valued by

civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J, dissenting). In a rare moment of judicial clarity, Justice Goldberg found it in the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J.. concurring), dredging up much of the same legislative history as presented here. But at the end of the day, where you find the right is not as important as that you find it.

Even assuming a right of privacy can be excavated from somewhere, anywhere, in the Constitution, what does it mean? The court avoided defining the term, except by giving examples from previous cases. The trouble is, counterexamples abound. The federal "right of privacy" has never been held to protect against laws banning drug use, assisted suicide or even consensual sodomy--just to mention a few examples of crimes that are no less "private" than abortion. It is impossible to know what does and does not fall within this nebulous category.

McConnell, *Still Illegitimate*, supra.

The fact that judges haven't done their job properly heretofore -- a distressingly common occurrence, to be blunt -- does not mean that they should not do so today. While illegal drugs usually have to be grown, harvested, or purchased and therefore, constitute "commerce," see, *Wickard v. Filburn*, 317 U.S. 111 (1942), a very credible argument can be made for existence of a right to commit suicide, and the matter of consensual sodomy has been resolved in favor of the generalized right to privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003). That rogue judges like Michael McConnell routinely force themselves upon the law with all the subtlety of a rapist should not defeat the plain meaning of the Constitution.

Even assuming that there is a right of privacy, and that its contours can be discerned from the court's examples, surely it must be confined to activities that affect no one else. It would be an odd kind of privacy that confers the power to inflict injury on nonconsenting third parties. Yet the entire rationale for anti-abortion laws is that an abortion does inflict injury on a nonconsenting third party, the fetus. It is not possible to describe abortion as a "privacy right" without first concluding that the fetus does not count as a third party with protectable interests.

McConnell, *Still Illegitimate*, supra.

The problem (if it exists¹⁰) is not so much in the interpretation as it is the Constitution itself. The Bill of Rights only protects persons, and this is the same Constitution that did not even recognize a forty-year-old black man as a "person." *Dred Scott v. Sandford*, 60 U.S. 393 (1857). For Judge McConnell to credibly extend the protections of personhood to fetal life, at bare minimum, he would have to find sufficient evidence in the legislative

¹⁰ As there is no pressing need for me to take a position on the underlying moral question, a neutral position is taken here.

history of either the Bill of Rights or the Fourteenth Amendment to establish that they intended to extend them to fetal life. As one would presume that, after thirty-five years and so much passion expended, some enterprising lawyer would have found that proof if it were expressed with requisite clarity, it is safe to conclude that it doesn't exist.

Conclusion

On the one hand, the Barnett-Lash "presumption of liberty" is the only theory consistent with the intent of the Framers. On the other hand, it is the one theory that judges will move heaven and earth to avoid, inasmuch as it takes too much discretion out of judging. They would prefer that we not keep our Republic.