

*Symposium: The Bill of Rights Yesterday and Today: A Bicentennial  
Celebration*

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## A NINTH AMENDMENT FOR TODAY'S CONSTITUTION

RANDY E. BARNETT\*

On the first day of his Supreme Court confirmation testimony, Robert Bork described teaching a constitutional theory seminar at Yale Law School in which he tried to justify what he called "a general right of freedom"<sup>1</sup> from the various provisions of the Constitution. He recalled that Alexander Bickel, with whom he taught the course, "fought me every step of the way; said it was not possible. At the end of six or seven years, I decided he was right."<sup>2</sup> The next day, Bork testified:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.<sup>3</sup>

In taking these two positions, former Judge Bork was, unfortunately, well within the mainstream of constitutional thought. For two hundred years the Supreme Court of the United States has never seriously considered a general constitutional right to liberty; at the same time it has, with few exceptions, treated the Ninth Amendment as though it were an ink blot. I suggest that the failure to find a "general right of freedom" in the Constitution is connected to a general inability to understand the Ninth Amendment's declaration that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>4</sup>

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1. 1 NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY 117 (1989) (testimony of Robert Bork)[hereinafter NOMINATION HEARINGS].

2. *Id.*

3. *Id.* at 249.

4. U.S. CONST. amend. IX.

The bicentennial of the ratification of the Bill of Rights—including the Ninth Amendment—is an appropriate time to consider the important role that the Ninth Amendment can play in protecting our liberties under the Constitution. Indeed, in this essay I shall explain how an interpretation ignoring the Ninth Amendment makes the Constitution look entirely different from one that takes the Ninth Amendment seriously. Any understanding of how the Ninth Amendment can work harmoniously with the rest of the Constitution, however, requires a brief examination of the origins of this intriguing and pregnant passage.

### THE ORIGINS OF THE NINTH AMENDMENT

The origins of the Ninth Amendment can be traced to the debate surrounding the ratification of the Constitution. The Antifederalists, who opposed ratification, concentrated much of their attack on the absence of a bill of rights. Although many Antifederalists were probably more concerned with defeating the Constitution than with obtaining a bill of rights, they repeatedly pressed this charge because it struck a responsive cord with the people. The Federalists who supported ratification, such as Alexander Hamilton and James Wilson, gave two answers to this complaint.

First, they said that a bill of rights was *unnecessary*. Because the federal government was one of enumerated and limited powers, it would have no power to violate the rights of the people. “Why, for instance,” asked Hamilton, “should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?”<sup>5</sup> Second, they argued that a bill of rights would be *dangerous*. Enumerating *any* rights might suggest to later interpreters of the Constitution that the rights not specified had been surrendered. An enumeration of rights could thereby lead to an unwarranted expansion of federal power and a corresponding erosion of individual rights.

Neither argument against a bill of rights carried the day. Antifederalists responded tellingly by turning these Federalist arguments against the Constitution itself. They noted that the Constitution already enumerated some of the rights of the people—such as the protections against *ex post facto* laws and bills of attainder in Article I, Section 9, and the right to a jury trial in criminal cases in Article III, Section 2. If an incomplete enumeration was dangerous as the Federalists had so strenuously argued, then the severely incomplete list of rights already in the Constitution was dangerous indeed. No further harm could be done by expanding the list.

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5. THE FEDERALIST NO. 84, at 631 (Alexander Hamilton) (John Hamilton ed., 1873).

When it became clear that the Constitution was headed for defeat, the Federalists turned the political tide by promising to support a bill of rights after ratification. Several state conventions accompanied their ratification of the Constitution with lengthy lists of rights and other provisions they wanted added at the first opportunity. By this maneuver, the proponents of the Constitution deprived the Antifederalists of their principal argument against ratification.

However, getting Congress to consider a bill of rights turned out to be no easy feat. The congressional record shows Representative James Madison repeatedly urging the House to take up the matter only to be told by various congressmen that enacting the first tax bill was far more important than enacting a bill of rights. Eventually, in a lengthy and revealing speech, Madison proposed a series of amendments to the Constitution. He explained that a bill of rights was needed, not only to quiet the fears and suspicions of those who still doubted the new Constitution and to induce those states who had not ratified the Constitution to do so, but also to better protect the liberties of the people. As Madison observed:

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.<sup>6</sup>

In his speech, Madison took up the Federalist argument he himself had made during the ratification debates that any effort to enumerate rights would be dangerous:

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 the enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.<sup>7</sup>

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6. 1 ANNALS OF CONG. 457 (Joseph Gales & William Seaton eds., 1834) (statement of Rep. Madison).

7. *Id.* at 456.

The passage Madison referred to was the precursor of the Ninth Amendment which 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.<sup>8</sup>

Madison's proposals were referred to a Select Committee of the House which was created to consider what amendments to the Constitution might be appropriate.

Although there is much that is controversial about the Ninth Amendment, the story of its enactment that I have just summarized is not. In light of this history, the original meaning of the Ninth Amendment is clear: When forming a government the people retained rights in addition to those listed in the Bill of Rights. But while the meaning of the Ninth Amendment may be clear, its implications for constitutional adjudication are not. Are the unenumerated rights judicially enforceable as the enumerated rights have come to be? If so, what exactly are these rights? For most, the answer to the first of these questions hinges on our ability to answer the second. As Robert Bork observed: "Senator, if anybody shows me historical evidence about what they meant, I would be delighted to do it. I just do not know."<sup>9</sup> Most would agree with Bork that, *if* the uncertainty surrounding their content can be resolved, unenumerated rights should be enforceable. Otherwise, although the Congress and the Executive could be prevented from violating enumerated rights, both could violate the unenumerated rights with impunity. Surely this would disparage, if not entirely deny, the unenumerated rights.

There is little question that the rights retained by the people refer, at least in part, to what are called "natural rights"—that is, the rights people have independent of those they are granted by a government and by which the justice of governmental action is to be judged. Despite their many differences, the Framers of the Constitution shared a common belief that although the people may delegate certain powers to their agents in government, they still retain their natural rights. This belief is illustrated by one provision of a recently discovered draft of a bill of rights written by Representative Roger Sherman, who served with Madison on the House Select Committee that drafted the Bill of Rights:

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8. *Id.* at 452.

9. NOMINATION HEARINGS, *supra* note 1, at 249.

The people have certain *natural rights* which are *retained* by them when they enter into Society, Such are the rights of Conscience in matters of religion; of acquiring property, and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the Government of the united States.<sup>10</sup>

This list, which was not intended to be exhaustive, includes some rights that were eventually enumerated in the Bill of Rights. Others, such as the rights to acquire property and pursue happiness and safety, were left unenumerated. The Ninth Amendment establishes that no one should conclude that, because some powers had been delegated to government and some rights had been singled out, the other unenumerated retained rights were, in Madison's words, "assigned into the hands of the General Government, and were consequently insecure."<sup>11</sup>

The problem with putting the Ninth Amendment into effect today is that many no longer appreciate the natural rights that the Constitution's Framers took for granted. Yet if the Framers had anticipated the modern philosophical skepticism about natural rights, they would never have settled for the few rights that were enumerated. Fortunately, there is a practical method of interpreting unenumerated rights that does not require us to agree on a comprehensive list of unenumerated rights. Before considering this method, let me briefly describe what I have elsewhere called the "originalist method" of identifying unenumerated rights.<sup>12</sup>

#### THE ORIGINALIST METHOD AND ITS LIMITS

To discern those unenumerated rights the Framers had in mind, we might begin, as Robert Bork suggested, by examining the written records of the

10. See, *Roger Sherman's Draft of the Bill of Rights*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 351, app. A (Randy E. Barnett ed., 1989) (emphasis added) [hereinafter R. BARNETT]. Along the same lines, Madison had proposed to Congress that the following be added as a prefix to the Constitution, "The Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally pursuing and obtaining happiness and safety." *ANNALS OF CONG.*, *supra* note 5, at 451.

11. *Id.* at 456.

12. See Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 *CORNELL L. REV.* 1, 30 (1988) [hereinafter Barnett].

period, including the numerous rights proposed by the ratification conventions,<sup>13</sup> and the theoretical writings of the Framers.<sup>14</sup> No ink blot prevents us from reading these materials. I have already mentioned the right to acquire property as one that the Framers unquestionably believed to be a natural and inalienable right which was retained by the people when forming a government. Freedom of conscience is another. Although a list of rights developed by using an originalist method of interpretation may be viewed as truncated—even from the Framers' perspective—a truncated list is better than none.

The originalist method will hardly suffice, however. The Framers believed it was dangerous to enumerate any rights because the rights of the people are boundless. As James Wilson, a natural-rights theorist explained, "there are very few who understand the whole of these rights."<sup>15</sup> None of the classic political writers claim to provide "a complete enumeration of rights appertaining to the people as men and as citizens. . . . Enumerate all the rights of men! I am sure, sirs, that no gentleman in the late Convention would have attempted such a thing."<sup>16</sup> This is the reason why Wilson and others thought any attempt to enumerate rights would be dangerous. "In all societies," Wilson observed:

there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete.<sup>17</sup>

It is important that we understand exactly *why* rights cannot exhaustively be enumerated if we are to devise a way of protecting these retained rights without specifically enumerating each and every one.

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13. Eight of the state ratification conventions officially accompanied their ratification with scores of amendments or revisions to the Constitution. Some of these were eventually included in the Bill of Rights. Others were not. For these proposals see THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 338 (Jonathan Elliot ed., 2d ed. 1836). They have been reprinted in R. BARNETT, *supra* note 10, at 353-85.

14. See e.g. Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 307 (J.D. Andrews ed., 1896).

15. 2 J. ELLIOT, *supra* note 13, at 454 (remarks of James Wilson).

16. *Id.*

17. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 388 (Merrill Jensen ed., 1976) (statement of James Wilson to the Pennsylvania Ratifying Convention, Nov. 28, 1787).

Rights are unenumerable because rights define a private domain within which persons have a right to do as they wish, provided their conduct does not encroach upon the rightful domains of others. As long as their actions remain within this rightful domain, other persons—including the government—should not interfere. Because people have a right to do whatever they please within the boundaries defined by natural rights, this means that the rights retained by the people *are limited only by their imagination* and could never be completely specified or enumerated.

This open-ended conception of rights is illustrated by a fascinating exchange that occurred during the debate in the House over the wording of what eventually became the First Amendment proposed by the House Select Committee. At one juncture in the debate, Representative Theodore Sedgwick criticized the committee's inclusion of the right of assembly on the grounds that "it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called into question; it is derogatory to the dignity of the House to descend to such minutiae. . . ."18 Representative Egbert Benson replied to Sedgwick that: "The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government."19 Sedgwick then responded that:

if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper. . . .20

Notice that Sedgwick was not denying that one had a right to wear one's hat or go to bed when one pleased. To the contrary, he equated these inherent rights with the right of assembly which he characterized as "self-evident" and "unalienable."21 Indeed, Representative John Page's reply to Sedgwick made this explicit. "[L]et me observe to him," said Page:

that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of

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18. 1 ANNALS OF CONG., *supra* note 5, at 759 (statement of Rep. Sedgwick).

19. *Id.* at 759 (statement of Rep. Benson).

20. *Id.* at 759-60 (statement of Rep. Sedgwick).

21. 1 ANNALS OF CONG., *supra* note 5, at 759 (statement of Rep. Sedgwick).

authority, by inserting the privilege in the declaration of rights.<sup>22</sup>

Sedgwick's point was that the Constitution should not be cluttered with a potentially endless list of trifling rights that "would never be called in[to] question"<sup>23</sup> and were not "intended to be infringed."<sup>24</sup> Sedgwick's argument implicitly assumes that the "self-evident, unalienable," and inherent liberty rights retained by the people are unenumerable because the human imagination is limitless. It includes the right to wear a hat, to get up when one pleases and go to bed when one pleases, to scratch one's nose when it itches (and even when it doesn't), and to take a sip of Diet Coke when one is thirsty.

But this returns us to the most controversial aspect of the Ninth Amendment: How can such unenumerable rights find legal protection without empowering judges simply to make up whatever rights may appeal to them? Raoul Berger, for one, has charged that any effort to protect the unenumerated rights referred to in the Ninth Amendment would provide "a bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion. . . ."<sup>25</sup> The answer to this concern lies in something like the "general right to liberty" that Robert Bork once searched for—only it is more accurate to call it a *presumption of liberty*.

#### THE PRESUMPTION OF LIBERTY

As long as they do not violate the rights of others (as defined by the common law of property, contract and tort), persons are presumed to be "immune" from interference by government. This presumption means that citizens may challenge any government action that restricts their otherwise rightful conduct, and the burden is on the government to show that its action is within its proper powers or scope. At the national level, the government would bear the burden of showing that its acts were both "necessary and proper" to accomplish an enumerated function, rather than, as now, forcing the citizen to prove why it is he or she should be left alone. At the state level, the burden would fall upon state government to show that legislation infringing the liberty of its citizens was a necessary exercise of its "police power"—that is, the state's power to protect the rights of its citizens.

Any society such as ours that purports to be based on a theory of limited government already assumes that legislation must be a proper exercise of government power. The presumption of liberty simply requires that when

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22. *Id.* at 760 (statement of Rep. Page).

23. *Id.* at 759 (statement of Rep. Sedgwick).

24. *Id.* at 760 (statement of Rep. Sedgwick).

25. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2 (1980).

legislation or executive actions encroach upon the liberties of the people, they may be challenged on the grounds that they lack the requisite justification. And a neutral magistrate must decide the dispute. As Madison observed in *The Federalist* No. 10:

No man is allowed to be the judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; *yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?* and what are the different classes of legislators but advocates and parties to the causes which they determine? . . . Justice ought to hold the balance between them.<sup>26</sup>

When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can ensure that the rights of citizens are protected and that justice holds the balance between the legislature or executive and the people.

Lest anyone think this point is obvious let me hasten to note that today the presumption used by the Supreme Court is precisely the reverse. According to what the Court calls the "presumption of constitutionality," legislation will be upheld if any "rational basis" for its passage can be imagined, unless it violates a "fundamental" right—and liberty has not been deemed by the Court to be a fundamental right. As the Court stated in *United States v. Carolene Products Co.*:<sup>27</sup> "There may be a 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. . . ." <sup>28</sup> In other words, the enumerated rights may narrow the presumption of constitutionality, but one of the unenumerated rights retained by the people will have no such power-limiting effect.

While the presumption of liberty is not the only implication of the Ninth Amendment, it provides a practical and powerful method of protecting unenumerated rights. As lawyers well know, the outcome of legal disputes is

26. THE FEDERALIST NO. 10, at 107 (James Madison) (John Hamilton ed., 1873) (emphasis added).

27. 304 U.S. 144 (1938).

28. *Id.* at 152 n.4. In this case, the Court also suggested that the presumption may be rebutted by showing that discrete and insular minorities are adversely affected or that the political process is being impeded.

often determined by the burden of proof. For example, the First Amendment has been held to impose a serious burden on the government to justify any of its actions that restrict the natural right of free speech. In countless cases, this "presumption of free speech" has effectively protected this retained but enumerated right. The Ninth Amendment simply extends the same protective presumption to all other exercises of liberty.

Although originally the Ninth Amendment, like the rest of the Bill of Rights, was most likely intended by the Framers to be enforced only against the federal government, this was not because it was thought that the people had surrendered all their rights to state governments—a suggestion belied by the swift incorporation into most state constitutions of provisions identical to the Ninth Amendment. Indeed, many rights—such as the right of conscience or the right to acquire property—were thought to be unalienable, which means that the people could not surrender them to any government even if they wanted to. Rather, the Congress and the federal courts originally lacked *jurisdiction* to protect the retained "privileges or immunities" of citizens from abuses by their states. As we all know, this arrangement was fundamentally changed by the enactment of the Fourteenth Amendment after the civil war. Today, if a state government infringes upon a right the people retained against their respective states, there is no jurisdictional barrier preventing Federal protection of this right.

#### APPLYING THE PRESUMPTION OF LIBERTY TODAY

To see how a presumption of liberty might operate today, consider Congress's power under Article I, Section 8 to "establish post offices." Having exercised this establishment power, Congress is free under the Necessary and Proper clause to regulate the operation of its post offices in any manner it sees fit. However, what happens when Congress, allegedly pursuant to its postal powers, goes beyond its power to administer its own offices and claims the further power to establish a postal monopoly, as it has? According to the now prevailing presumption of constitutionality, Congress would be free to establish a monopoly unless either potential competitors or consumers of postal services could prove that this claimed government power violates a fundamental right. For example, competitors might allege a fundamental right to carry first class mail, while recipients of mail could claim they had a fundamental right to send first class mail by any means they chose. Because these rights sound trivial rather than fundamental they are easy to disparage—almost as easy to disparage as the trifling right to wear a hat or go to bed when one pleases. Consequently, courts have not barred the Congress from establishing its monopoly or even inquired very seriously as to whether such laws are truly necessary or proper. With judges lacking a proper view of the Ninth Amendment, today the outcome of such a lawsuit would be virtually pre-determined: the government wins and

the citizen loses.

A presumption of liberty, however, would shift the burden of proof from the citizen to the government. Instead of imposing the burden on the citizen to establish the violation of a "fundamental" right, a burden would be imposed on the government, in this case upon Congress, to show a compelling reason why it is both necessary and proper to grant its own post office a legal monopoly. In enacting the Constitution, the people retained their unenumerated right to establish their own private post offices if they so chose. They neither expressly nor impliedly surrendered this right up to the general government. The Ninth Amendment serves as an ever-present reminder that the mere fact that such a right is left out of the Bill of Rights ought not to suggest otherwise.

In a speech before the second House of Representatives, the author of the Ninth Amendment, James Madison himself, used it in a strikingly similar fashion to object to the pending bill to establish a single national bank on the grounds that the bill was unconstitutional. His usage also helps clarify the relationship between the Ninth Amendment's protection of the rights retained by the people and the Tenth Amendment's injunction that: "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."

Madison examined the Constitution at length to see if the power to create such a bank could be found among any of those delegated to the government and he concluded that "it is not possible to discover in [the Constitution] the power to incorporate a Bank."<sup>29</sup> He then considered whether the proposed bank might be justified under the Necessary and Proper Clause<sup>30</sup> as a means of executing the Borrowing Power.<sup>31</sup> "Whatever meaning this clause may have," Madison began, "none can be admitted, that would give unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers."<sup>32</sup>

Madison's argument here reflects one of the reasons he had offered for adopting a bill of rights during his speech the year before to the first House of Representatives in which he proposed amendments to the Constitution:

29. 1 ANNALS OF CONG., *supra* note 6, at 1896 (statement of Rep. Madison).

30. See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . .").

31. See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To borrow Money on the credit of the United States . . .").

32. 1 ANNALS OF CONG., *supra* note 6, at 1898.

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department thereof.<sup>33</sup>

Madison contended that a bill of rights was one way to police abuses of this lawmaking discretion.

In evaluating whether the Necessary and Proper Clause justified the claimed power to create a national bank, Madison contrasted the requirement of necessity with that of mere convenience or expediency. "But the proposed bank," he said:

could not even be called necessary to the Government; at most it could be but convenient. Its uses to the Government could be supplied by keeping the taxes a little in advance; by loans from individuals; by the other Banks, over which the Government would have equal command; nay greater, as it might grant or refuse to these the privilege (a free and irrevocable gift to the proposed Bank) of using their notes in the Federal revenues.<sup>34</sup>

Notice that Madison was not simply making what would now be called a "policy" choice. Earlier in his address to the House, Madison did address the policy issues raised by the proposal when he "began with a general review of the advantages and disadvantages of Banks."<sup>35</sup> However, "[i]n making these remarks on the merits of the bill, he had reserved to himself the right to deny the authority of Congress to pass it."<sup>36</sup> Rather, in the passage I quoted, Madison is making the *constitutional* argument that these other means of accomplishing an enumerated object or end are superior precisely because they do not entail the violation of the rights retained by the people and are therefore to be preferred in principle. In particular, these measures do not involve the grant of a monopoly, "which," in Madison's words, "*affects the equal rights of every citizen.*"<sup>37</sup>

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33. *Id.* at 455 (statement of Rep. Madison).

34. *Id.* at 1901 (remarks of Rep. Madison).

35. *Id.* at 1894.

36. 1 ANNALS OF CONG., *supra* note 6, at 1896.

37. *Id.* at 1900 (emphasis added).

In other words, there is a difference *in principle* between these alternative means; just as there is a difference in principle, not merely policy, between drafting citizens and paying volunteers as the means of exercising the congressional power to "raise and support Armies. . . ." <sup>38</sup> Although Article I, Section 8 delegates this power to Congress, when it chooses a means of accomplishing this end that intrudes upon the liberties of the people, as a military draft does, then it must justify this rights infringement by showing that its acts are genuinely necessary and proper. The government must show that it cannot accomplish its constitutionally delegated end by means that do not trespass upon the rights retained by the people.

Finally, in his bank speech Madison also questioned the proposed exercise of the Necessary and Proper Clause on the grounds that the power claimed was highly remote from any enumerated power. "Mark the reasoning on which the validity of the bill depends," he observes:

To borrow money is made the end, and the accumulation of capitals implied as the means. The accumulation of capitals is then the end, and a Bank implied as the means. The Bank is then the end, and a charter of incorporation, a monopoly, capital punishments, &c., implied as the means.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.

The *latitude of interpretation* required by the bill is condemned by the rule furnished by the Constitution itself.<sup>39</sup>

As authority for this "rule" of interpretation, Madison cited the Ninth Amendment:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. . . . He read several of the articles proposed, remarking particularly on the 11th [the Ninth Amendment] and 12th [the Tenth Amendment], *the former, as guarding against a latitude of interpretation*; the latter, as excluding every source of power not

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38. U.S. CONST. art. 1, § 8.

39. 1 ANNALS OF CONG., *supra* note 6, at 1899 (statement of Rep. Madison) (emphasis added).

within the Constitution itself.<sup>40</sup>

Thus, Madison viewed the Ninth and Tenth Amendments as playing distinct roles. Madison viewed the Tenth Amendment (“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”) as authority for the rule that the Congress could only exercise a delegated power. For example, in the illustrations I have used, Congress could not establish a post office or raise and support armies without a delegation of power to pursue these ends. In contrast, Madison viewed the Ninth Amendment as providing authority for a rule against the loose construction of these powers—especially the Necessary and Proper Clause—when legislation affects the rights retained by the people. As Madison concluded in his bank speech: “In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation. . . .”<sup>41</sup>

In my examples, because a postal monopoly and a military draft infringe upon the rightful liberties of the people, these are suspect means for pursuing delegated ends. Those claiming that legislation restricting the rightful liberties of the people falls under a delegated power have the burden of showing that it is a genuinely necessary and proper exercise of such a power. As I have argued elsewhere, constitutional rights—including unenumerated rights—operate both as “means-constraints” and as “ends-constraints.”<sup>42</sup>

Once the Ninth Amendment is viewed as establishing a presumption of liberty thereby placing a burden of justification on the government, every action of government that infringes upon the rightful liberties of the people can be called into question. Is it really necessary that persons—particularly poor persons—obtain licenses requiring extensive testing in such subjects as chemistry before they may work as beauticians? Is it really necessary that government limit the number of taxicabs it licenses so that the price of taxicab medallions in some cities reaches \$10-20,000 or even higher? Or are all these and other similar measures really ways by which a privileged few seek to eliminate lower-priced competition? Is it really necessary to criminalize the sale and use of intoxicating substances, or is a “drug-free” society better achieved in ways that do not infringe upon the liberties of the people—perhaps by the sort of education and social pressure that is currently being used so effectively to combat the use of nicotine in cigarettes and the abuse of alcohol. Even the current government

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40. *Id.* at 1901. The numbering of the amendments changed because the first two amendments proposed by Congress were not ratified by the states. At the time Madison spoke, this outcome was not yet known.

41. *Id.* at 1902 (statement of Rep. Madison).

42. See Barnett, *supra* note 13, at 11-16.

restrictions that limit the practice of law to those who have attended three years of law school would not be beyond challenge and scrutiny.

None of these or any other Ninth Amendment claim can be decided in the abstract—by which I mean without taking into account the specifics of particular legislation and the factual context in which it is applied. What the Ninth Amendment requires, however, is that such claims as these be evaluated when liberty-restricting legislation is challenged by a citizen. Adopting the presumption of liberty would make this requirement effective.

This is not to say that the government would never be able to meet its burden. I fully expect that if a presumption of liberty is established, the courts would find that government has met its burden far more often than they should. We must never forget that the Supreme Court once upheld the government's power to imprison American citizens of Japanese descent in prison camps because of the threat to national security these citizens allegedly posed.<sup>43</sup> Judicial review is not a panacea for protecting liberty.

Nor does the presumption of liberty establish a license to do whatever one wishes. Liberal political theorist John Locke put the matter as follows:

But though this be a *State of Liberty*, yet it is *not a State of License* . . . . The *State of Nature* has a Law of Nature to govern it, which obliges everyone: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.<sup>44</sup>

As I mentioned earlier, justice, which is to say rights, defines the boundaries within which one may do as one wishes. According to this conception of liberty, one cannot permissibly infringe upon the rightful domains of others. According to Locke, in the state of nature, "all Men may be restrained from invading others Rights, and from doing hurt to one another."<sup>45</sup> The common law of property, contracts, and torts has traditionally defined the extent and nature of these boundaries. Tortious conduct is not a "rightful" exercise of one's liberty; one has no constitutional right to commit trespass upon the land of another. Provided that one is acting rightfully in this sense, however, a presumption of liberty would require government to justify any interference with such conduct.

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43. *Korematsu v. U.S.*, 323 U.S. 214 (1944).

44. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 288-89 (Peter Laslett ed., 1967) (2d ed. 1970).

45. *Id.* at 289.

Finally, a presumption of liberty does not authorize judges to usurp either legislative or executive functions. Protecting the rights of individuals and associations to act or refrain from acting in ways that do not violate the common-law rights of others, neither empowers judges to create new "positive rights" nor authorizes them to enact taxes to pay for such rights. Judges may only strike down offending legislation—and *judicial negation is not legislation*. Assuming they have the political will, the other branches of government have more than enough power to defend themselves from judicial encroachment.

CONCLUSION: THE EQUAL PROTECTION OF LIBERTIES AND THE FUTURE OF  
THE NINTH AMENDMENT

What is the future of the Ninth Amendment? In law, as in most areas of life, betting that the future is going to be pretty much like the past is usually the safest wager. If this turns out to be true, then the Ninth Amendment, which has been so tragically neglected by the Supreme Court over the past two centuries, is doomed to remain in a state of desuetude. But while betting against change may be the most conservative gamble, it is often a losing one. The past twenty years has witnessed a trend in the direction of a revived Ninth Amendment. In particular, a renewed interest in the views of the Framers of the Constitution and of the Civil War amendments has caused those who favor an expansive judicial protection of fundamental rights to focus attention on the original intent of the Ninth Amendment. Moreover, the Framers' concept of natural rights is no longer in disrepute. If the Senate confirmation hearings of Judge Robert Bork to the Supreme Court of the United States was a watershed development in the legitimation of the Ninth Amendment, the confirmation hearings of Justice Clarence Thomas may prove to have a similar effect on the legitimacy of natural rights.<sup>46</sup>

Although, with the addition of Justices Scalia, Kennedy, Souter, and Thomas to the Supreme Court and the elevation of William Rehnquist to Chief Justice, "conservatives" appear now to be in firm control of the Court, the type of "judicial conservatism" that will eventually emerge in the third century of the Bill of Rights is still very much in doubt. Will it be a majoritarian conservatism of judicial deference to majority will as expressed in legislation? Or will it be a more libertarian conservatism that views the courts as neutral magistrates

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46. History may well mark the turning point for natural rights theory in the United States to be Senate Judiciary Committee Chairman Joseph Biden's opening round of questioning during the Thomas confirmation hearings in which he openly embraced natural rights and stated that the issue for him was *which* version of natural rights the nominee favored.

empowered to protect the individual from the government?<sup>47</sup> Which of these conservatisms comes eventually to prevail will depend, perhaps in principal part, upon whether a majority of the Court can be persuaded to take James Madison's Ninth Amendment and its pivotal role in constitutional interpretation to heart.

Which judicial philosophy prevails will also depend upon whether proponents of the Ninth Amendment will take a more principled stance towards so-called fundamental liberties. The liberties each person holds "fundamental" are imperiled when advocates of some liberties they hold dear are more than willing to deny or disparage the liberties thought fundamental by others. For example, many if not most of those favoring a fundamental right of privacy that includes a woman's "right to chose" to terminate a pregnancy offer no support to and indeed would actively oppose those who favor a fundamental "right to choose" to engage in a lawful occupation—such as driving a taxi cab—free from protectionist economic regulations. And few seem at all concerned with the fundamental "right to choose" whether or not to own a gun or to alter one's mental state by means of substances as alcohol, nicotine, peyote, or heroin. According to this discriminatory methodology, if some choices are deemed fundamental, other rights-respecting choices are vilified and ridiculed.

However, by picking and choosing among all the unenumerable liberties of the people to determine which choices are fundamental and which are not, those who would limit judicial protection to those liberties deemed fundamental are putting courts in the difficult position of establishing a hierarchy of liberties. This contributes to the longstanding fear that any revival of the Ninth Amendment would place courts in the role of a "super-legislature" usurping the functions of other branches. When interpreted as justifying a presumption of liberty, however, I think this fear of the Ninth Amendment is unfounded precisely because such a presumption provides a principled defense of *all* liberties of the people and removes the courts from having to decide which liberty is truly fundamental and which is not.

In sum, adopting the presumption of liberty would enable us finally to acknowledge the Ninth Amendment's unique constitutional function by resisting legislative or executive usurpation of the unenumerated rights "retained by the people" while, at the same time, avoiding unfettered judicial discretion. The presumption of liberty would permit us finally to remove the ink blot from the Ninth Amendment. I can think of no better way to celebrate its two hundredth birthday.

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47. For the record, I emphatically refuse to equate libertarianism and conservatism. Nonetheless, it is true that both modern "conservatives" and "liberals" can be more or less "libertarian" and more or less "majoritarian." I maintain that we cannot analyze the present or future course of the Court without taking into account these decidedly different strains of judicial philosophy.

