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# THE NINTH AMENDMENT AND THE UNWRITTEN CONSTITUTION: THE PROBLEMS OF CONSTITUTIONAL INTERPRETATION

ANDRZEJ RAPACZYNSKI\*

## INTRODUCTION

This article is about two things; one general, the other specific. The general point is about the nature of interpretation and of the constraints that the text places on interpretation. The specific is about the ninth amendment.<sup>1</sup>

My general claim about interpretation is that no textual provision *by itself* seriously constrains how it is going to be interpreted. This, I argue, is true not just about the open-ended provisions like the ninth amendment, but quite generally, about all textual provisions. The fact that no text by itself constrains interpretation, however, does not mean that interpretation is unconstrained; only that constraints operate within a particular context in which the text is interpreted. In this context, there is always a number of easy interpretive questions which, under particular circumstances, are answered exactly *as if* the text by itself controlled the process of interpretation.

But easy questions are easy, I argue, only because others are not, and there is no way of either avoiding complex questions or reducing them to the simple ones. Hence, the open-ended provisions (and, in the struggle about interpretation, all controversial provisions are bound to become open-ended, even if they did not start as such), will never be decisive for resolving controversial issues of interpretation. The ninth amendment is no exception here, and I begin by arguing that for every interpretation that sees it as support for judicial activism there is another, respectable one, that does not.

Much of the recent theory of constitutional interpretation has been focused on the problem of "interpretivism" versus "noninterpretivism," and the ninth amendment is sometimes thought to legitimize the latter. I argue at some length that the dispute is dominated by what I view as

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1. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

mistaken assumptions about the role of the text in constitutional interpretation and that expansive judicial review need neither devalue the role of the text nor go beyond its interpretation.

Good interpretations of open-ended constitutional provisions do not rely on dictionary-like reading of words, but rather on overall theories concerning the nature and functions of the institutions set up by the document and the values the political system is designed to implement. Placing too much reliance on the mere words of a single constitutional provision can in fact only confuse the task of constitutional interpretation. Similarly, a number of very important constitutional provisions could be absent from the text altogether, and yet the norms they state would be enforced anyway by any fair-minded reading of the text. While many provisions of the Bill of Rights have this character (and the founding fathers initially thought they were unnecessary), some have it to a greater degree than others, and none equals the ninth amendment.

The ninth amendment is void of any substantive content; instead, it states a rule of construction which, even if assumed to entitle a court to engage in expansive judicial review, not only does not add anything to what we would know without it, but is also incapable of doing any real work in the process of actual interpretation. If an unenumerated right is capable of being derived from the overall scheme endorsed by the Constitution, the whole weight of that derivation (its legitimacy) will rest on its own argument, rather than the ninth amendment. If, on the other hand, the right cannot be otherwise convincingly derived, the ninth amendment will not help us either. The only (if any) thing the ninth amendment can do, I conclude, is to lead us astray by changing the discourse of constitutional law from the one shaped by political theory to one dominated by morality and ultimately religion.

### I. THE IMPORT OF THE NINTH AMENDMENT

There has been by now a lot of scholarly writing on the ninth amendment.<sup>2</sup> Much of it is quite repetitious, and it is important to begin by establishing what is and what is not controversial about the ninth amendment.

I take it to be quite uncontroversial, both on logical and historical grounds, that the amendment says or implies the following:

1. It is not the case that all rights derive from a constitutional *fiat*; on the contrary, at least some rights antecede both the 1787

2. See Bibliography of Ninth Amendment Scholarship in *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (R. Barnett ed. forthcoming).

### Constitution and the Bill of Rights.<sup>3</sup>

2. The Constitution does not list all of the rights that may exist independently of it; on the contrary, it and the Bill of Rights leave some rights unenumerated.
3. The unenumerated rights are not negatively affected by the listing of the enumerated rights; on the contrary, they continue to exist in full force, and are "retained by the people."

But the moment we begin to unpack any of these statements in order to derive from them some guidelines for the resolution of issues that otherwise occupy our attention, their uncontroversial character disappears. Thus, for example, despite the uncontroversial nature of the statement that the founding fathers believed the Bill of Rights to have in part codified some preexisting rights, there is much less agreement on what such preexisting rights were, not just in terms of their content, but also (and above all) in terms of their nature and origin.

It seems indubitable that the founding fathers believed in some form of "natural law" and in some basic, unchanging standards of morality and political justice. Nevertheless, the status of this belief in their overall world-view is quite unclear. For although the founding fathers were revolutionaries, inspired by the rationalistic theories of the Enlightenment, they were also lawyers, for whom rights had always been something that existed within a particular legal system. Thus, while their revolutionary rhetoric inclined them to speak in terms of values conceived as universal and pertaining to man as such, their legal training made them uncomfortable with references to natural law, inasmuch as the latter could be incompatible with the law of the land.

Not that the tradition of common law did not have its own way of affirming the fundamentality of certain basic principles of individual and political morality. Some parts of the "English Constitution" were clearly conceived as rooted in something more fundamental than a simple judicial or legislative *fiat*. The basic "rights of Englishmen," for example, were thought of as an immemorial, unalterable, and inalienable part of the English tradition,<sup>4</sup> and, at least prior to the eighteenth century, there had been a strand of common-law thinking that affirmed the supremacy

3. This is not to say that the Constitution "merely" recognized those preexisting rights, without changing anything about their status or content. Nor does the statement in the text imply that all the rights listed in the Constitution had preexisted it; some may have been indeed created by the Constitution.

4. For the revolutionary generation's understanding of the "rights of Englishmen," see generally J.P. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986).

of judge-declared fundamental law over parliamentary enactments.<sup>5</sup> But there was no room in the common-law jurisprudence for an argument appealing to a right deriving from some universal "law of nature," unknown among the immemorial, judicially enforced common-law "rights of Englishmen." On the contrary, to the extent that the common law admitted of the existence of some "fundamental" or "natural" law, it was to be revealed in and through the traditions and legal institutions of a people, and not through a "scientific" or "philosophical" investigation.<sup>6</sup>

When the founding fathers acted in their capacity as revolutionaries, they had been forced to emphasize their rationalistic, Enlightenment rhetoric in order to justify the ultimate break with England: their rights *as Englishmen*, which they claimed had been repeatedly violated by the British authorities, were ultimately not enough to justify a separation from England. But when they came to write a constitution for their new country, they were establishing a new legal order, and insofar as this order was to be based on the principles familiar to the common law, it is not likely that, even to the extent they believed in a purely universal law of nature, the founding fathers intended to include the possibility of an appeal to it among the ordinarily admissible legal arguments.<sup>7</sup>

In practice, the difference made by this distinction affects the possibility of discovering "new" rights, i.e., rights previously unknown to the common law. If the rights retained by the people were to be those which a student of the common law would consider "fundamental," then the ninth amendment allows at most for a "closed list" of rights, known to the eighteenth-century system.<sup>8</sup> Common-law fundamental rights were, as I said, viewed as having existed immutably since time immemorial, so that even the Magna Carta had not established them for the first time, but only codified them after they had been attacked by a "bad" monarch.<sup>9</sup> To be sure, the common law had *de facto* evolved historically, but such was not its self-understanding. Insofar as the rights referred to in the ninth amendment were supposed to be the common-law types of fundamental rights, therefore, the idea of bringing in, at some point in the

5. See Grey, *Origin of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854-56 (1978) and the sources cited therein. See also 1 J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, 50-95 (1971).

6. For a claim that "natural rights based on the authority of nature only, and not also said to be positive, were not a factor in the revolutionary debates," see J.P. REID, *supra* note 4, at 91.

7. All this assumes that the founding fathers contemplated the possibility that the meaning of the ninth amendment may be determined and implemented in judicial proceedings—something far from uncontroversial.

8. That the list has been "closed" as of 1791 is suggested by Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 367 (1981).

9. See J.P. REID, *supra* note 4, at 69, 71.

future, new rights, not previously enforced at common law, was unlikely to have been in the minds of the framers. If, on the other hand, the rights retained by the people were to be conceived as the laws of nature to be discovered by the application of human reason, the matters stood quite differently. The law of nature was also thought of as eternal and unchanging by most of its eighteenth-century exponents. But the knowledge of this law certainly was not: as the human reason progressed (and the belief in progress, rather than tradition, was the hallmark of reason for the men of the Enlightenment), new "discoveries" could be made in the area of the rights of man as much as in any other area.

This is not to say that the framers had a clear vision of the ninth amendment as affirming either the unenumerated fundamental rights recognized at common law or the natural rights spoken about by Grotius, Locke, Pufendorf, or their eighteenth-century followers. Most likely they did not in fact see clearly the distinction itself, believing, along with a number of their contemporaries, that there was no conflict between the two, and that the common law and the Englishmen's traditions were, in their fundamental features, merely specific manifestations of reason and natural law in human history.<sup>10</sup> But if they did have such a vision, then it is quite likely that it contained a number of elements pulling in different directions.

With all due respect to the founding fathers, our veneration of them should not make us assume that they had a ready answer to every problem that *we* may have with their views, even if the same problem was not one to which they perceived any need to give much thought. Moreover, even if we assume that an objective answer could be given to the question of what were in fact their views, it might be improper to make any such answer decisive with respect to resolving some of the most important normative problems of *contemporary* constitutional interpretation (which many feel lie at the bottom of the debate about the ninth amendment). The perspective of making constitutional interpretation crucially dependent on the outcome of what, if it is to carry any authority, must be an arcane discussion among professional historians is not something that we should lightly contemplate. I am very far from underestimating the need that lawyers have for the collaboration of their colleagues from the other branches of the academe, and from historians in particular, but I would

10. See *id.* at 87-95. A similar view is argued for at length in Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983). Caplan draws from it the strange conclusion that the rights referred to in the ninth amendment, which had been protected by state law and state constitutions, were never intended to be secured against the federal government by the amendment, but only protected against an inadvertent repeal *qua* state rights.

find it strange if their conclusions were to serve as more than a starting point in a proper constitutional analysis.

It is also unclear that all the rights referred to in the ninth amendment would be viewed by an eighteenth-century observer of common law as equally "fundamental" as the rights enumerated in the first eight amendments. One of the uncontroversial things about the ninth amendment is that it was motivated by a fear that the enumeration of certain federal constitutional rights might amount to an implicit repeal or renunciation of the other, unenumerated rights. But if the most fundamental common-law "rights of Englishmen" (as well as at least some of the natural rights in the idiom of the Enlightenment ideology) had been viewed as inalienable, then it is not clear that they *could* have been renounced or repealed. We cannot exclude, therefore, that the amendment refers not to the most basic rights (the most important of which were, after all, enumerated, while others may have been thought of as secure enough without the protection of a ninth amendment type of saving clause), but to a panoply of legal practices that were considered to exist as a matter of some form of social agreement between the governors and the governed, rather than as an immutable principle.<sup>11</sup>

Part of the reason why any enumeration of rights had to be necessarily incomplete<sup>12</sup> may have been that the totality of the existing rights in the relatively complex society of the time included a very large number of diffused common-law rights, particular guarantees contained in the state constitutions, as well as perhaps some more amorphous traditions. But if this is so, then it is not clear that the rights "retained by the people" were intended to become constitutional rights in the full modern sense of the term (entailing immunity from legislative repeal). Some of them, even though quite important, could have been conceived as less than unchangeable—perhaps the people themselves, acting through their representatives in legislature, could renounce or revoke them, without requiring the supermajorities necessary for a constitutional amendment.<sup>13</sup> It in no way "denies" or "disparages" these unenumerated rights that the Constitution leaves them in exactly the same status relative to the enumerated rights as they had prior to the enactment of the

11. See *id.* at 75-76 for a distinction between those laws that were "fundamental" (and thus immutable) and those parts of constitutional law which the sovereign legally could, though should not, change.

12. For statements to the effect that it was impossible to enumerate all the rights of men, see 2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 454 (2d ed. 1836) (Wilson); 4 *id.* at 166-67 (James Iredell).

13. There might even be something slightly bizarre about an amendment that revoked an unenumerated right.

## Bill of Rights.<sup>14</sup>

A somewhat more serious problem of possible "disparagement" of the unenumerated rights would perhaps arise if the very fact of nonenumeration were to confer on them an inferior relative status, in comparison with the enumerated rights, even if their absolute status were to remain unchanged. Thus, for example, were the enumerated rights to be singled out for special protection—say, if they were to become judicially enforceable against otherwise properly enacted statutes—simply by being included in the first eight amendments, while the others remained only morally binding on the legislature, then the unenumerated rights could conceivably have been viewed as being "demoted" or branded as "unimportant."

It is unlikely, however, that this line of argument would lead us very far, especially if made in abstraction from a discussion of the concrete rights in question. First of all, it is doubtful that a right is being denied or disparaged if another right is promoted. For example, the Supreme Court jurisprudence of the last few decades has clearly conferred a somewhat privileged position on the guarantee of free speech, as compared with many other enumerated rights.<sup>15</sup> Does this entitle one to say that the right to counsel guaranteed by the sixth amendment has been ipso facto either denied or disparaged? Most people would say, I suppose, that the right to counsel was in fact enhanced in the same period,<sup>16</sup> although perhaps not as much as the right to free speech.

Furthermore, certain unenumerated rights may not be capable of

14. Professor Black argues that if the unenumerated rights are not treated in every respect the same as the enumerated ones, then they are denied or disparaged. Black, *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUESTION OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* 187 (M. McDougal & W.N. Reisman eds. 1985). But the injunction against denial and disparagement does not have to mean that the unenumerated rights must be of the same nature as the enumerated ones—if they were less fundamental than some of the enumerated rights to begin with, and could have been legislatively repealed prior to the enactment of the Constitution (while the enumerated rights, such as the right to free speech, for example, could not), then their not being given constitutional status (in the sense of immunity from legislative repeal) does not amount to denial or disparagement, just because the enumerated rights *preserve* their superior status (or perhaps even have their status somewhat enhanced by the enumeration). All that the ninth amendment guarantees is that there is no implied (partial or total) repeal.

15. Not only are the protections of free speech interpreted very broadly to cover such areas as commercial speech, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), or libel, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but also a number of techniques for attacking laws burdening freedom of speech, such as the "overbreadth" doctrine, see, e.g., *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), have been made available to those who make first amendment claims, even though the same techniques are usually not available when infringements on other rights are involved.

16. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (police cannot question a suspect without fully informing him about, among other things, his right to counsel); *Douglas v. California*, 372 U.S. 353 (1963) (the state cannot deny appointed counsel to an indigent defendant in an appellate proceeding).



the same kind of enhancement as some of the enumerated rights, and that may be another reason why they remained unenumerated. Suppose, for example, that the fact of inclusion among the enumerated rights indeed made the rights so included judicially enforceable against legislative enactments, while the unenumerated rights remain only morally binding. Suppose further (quite plausibly, we might add) that among the unenumerated rights are to be found rights such as the right to rebel against an unjust government.<sup>17</sup> Clearly, rights of this kind could not, by their very nature, be transformed into full-fledged *legal rights*. Nevertheless, the founding fathers considered the right to rebel to be, from a moral point of view, at least as important as any of the enumerated rights; indeed, the right had been crucially implicated in their own separation from Great Britain. Moreover, unlike some other rights, such as the right to life, for example, the right to rebel is not necessarily unwaivable. It is predicated on the assumption that government is instituted for certain purposes and that a breach of trust by the governors justifies disobedience. But a written constitution might perhaps be reasonably interpreted as a contract superseding all previous arrangements and promising obedience to any constitutionally established government. Should then, perhaps by a series of imprudently adopted amendments, an otherwise tyrannical government be established, the right to revolt might be unavailing, unless it is understood to have been retained.

Finally, the very notion of denial or disparagement may have had a different meaning for the founding fathers than we tend to attribute to it today. The Constitution seems to be predominantly the preserve of the legal profession in America. The reason for this may lie partly in the importance of judicial review (which makes the legal analysis of the Constitution a necessity for the legal profession) and partly in the fact that lawyers play such a predominant role in our political life. Be that as it may, most of the discussion of the Constitution, and of the Bill of Rights in particular, centers on its significance as a *legal* document. Thus, the meaning of such broad provisions as the guarantee of free speech, the free

17. The right to rebel against a tyrannical government was commonly affirmed in the eighteenth century. See, e.g., article 3 of the Virginia Declaration of Rights of 1776, which states that "when any government shall be found inadequate or contrary to these purposes (i.e., common benefit, protection and security of the people), a majority of the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." See also sources (including Wilson, Adams, and Paine) cited in B.L. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 79-99 (1931). The right to rebel was commonly thought to have been affirmed by Locke, J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 119-39 (J. Peardon ed. 1986), though Locke's text is somewhat ambiguous. For other antecedents in English political thought, see C.F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* 60-61 (1933).

exercise of religion, or equal protection is most often analyzed in terms of their legal significance, to be determined in the process of adjudication, and expressed in the form of clearly stated, practically applicable legal rules. But the constitutional precepts could also be understood as basic norms of a more *political* nature—as necessarily vague statements of the aspirations of the American Republic. To be sure, we are not entirely forgetful of this, but whenever the question of such a broader understanding of the Constitution arises, we tend to think of it as conferring on our *judges* (and the Supreme Court Justices in particular) a somewhat broader role of moral arbiters, in addition to their more mundane function of bureaucrats trained to resolve technical legal disputes.<sup>18</sup> Only rarely, if ever, do we consider that the primary task of interpreting the Constitution could, as it does in some other countries, such as France, belong to political scientists, philosophers, and professional (rather than lawyers-turned-) politicians.

While many of the founding fathers were indeed lawyers (turned-politicians), their understanding of the Constitution may in some respects have been closer to the “political” rather than “legal” interpretation, since their views on the subject of judicial review were probably still quite unformed. There has been a lot of dispute about whether judicial review had or had not been practiced on the state level prior to the enactment of the federal Constitution, and about whether it was contemplated by the framers or the ratifiers.<sup>19</sup> I do not have any new evidence to present on this, but the whole issue may be largely irrelevant if we assume it is at least not outlandish to believe that the founding fathers did not view the Constitution as *primarily* a legal document.<sup>20</sup>

18. For examples of the advocacy of judicial leadership in giving meaning to constitutional values, see Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 573 (1985).

19. See, e.g., C. BEARD, *SUPREME COURT AND THE CONSTITUTION* (1912); R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969); E. CORWIN, *THE “HIGHER LAW” ORIGINS OF AMERICAN CONSTITUTIONAL LAW* (1950); C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1914); L. LEVY, *Judicial Review, History, and Democracy*, in *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 24 (1972).

20. It may be objected here that my argument that the founding fathers understood the Constitution as a primarily political, rather than legal, document contradicts my earlier argument that the founding fathers were writing the Constitution primarily to establish a legal order based on the common law, rather than as a document expressing their rationalistic, revolutionary, Enlightenment ideas. In the first place, I would not be overly worried if the objection were true: it is not my intention here to present a single coherent argument, but rather to give a series of unrelated, and possibly mutually incompatible, arguments tending to show that the meaning of the ninth amendment is very problematic (so that very little additional mileage can be derived in citing it in support of expanded judicial interpretations of the Constitution). But the two arguments made in the text do not seem in fact to contradict each other. The founding fathers may have intended the Constitution (and especially the Bill of Rights) to express the common-law philosophical perspective on the rights

To begin with, the founding fathers' initial idea that a bill of rights was unnecessary is, in this context, significant in several respects. The explanation, widely given at the time, that the federal government would not possess the powers necessary to violate the basic rights seems to make little sense, unless we assume that the constitutional guarantees of these basic rights were conceived as primarily political, related to the governmental structure and processes established by the Constitution. The natural inclination of a twentieth-century lawyer, to be sure, is to understand the claims about no need for a bill of rights as implying that an interpretation of the main text of the Constitution would allow one (read: a judge interpreting the text in the process of adjudication) to "deduce" the guarantees of the basic rights from the structural provisions of articles I-VI by an ordinary process of legal reasoning, much as the right of an indigent criminal defendant to have an attorney paid by the state is interstitially derived from the sixth amendment right to the assistance of counsel.

But if we think about it for a moment, it would be a very strange idea that all of the guarantees of the Bill of Rights are derivable in this way. Even in the case of the first amendment guarantee of free speech, which one of the most "strict constructionist" scholars thought to be so derivable,<sup>21</sup> it is not self-evident that the derivation would be uncontroversial, at least to the founding fathers themselves. After all, many state governments at the time had all kinds of laws regulating freedom of speech (and the founding fathers did not seem hostile to them).<sup>22</sup> Furthermore, Congress does not seem to be reasonably precluded by the enumeration of its powers in article I, section 8, from introducing a censorship law, at least with respect to some matters, such as national defense. But suppose we grant that freedom of speech would have to be guaranteed even without the first amendment, what about the right to a jury trial? I take it that "deriving" this right, especially in civil cases, from the structure of the government set up under the Constitution would be, in most circumstances, an act of breathtaking legerdemain on the part of even the most activist judge. It seems to me quite self-evident that without the seventh amendment, the United States would need no constitutional amendment to introduce a system resembling, say, the

of men, and yet not to contemplate that the constitutional principles were directly enforceable in court as against ordinary legislation. It was quite compatible with the common-law-based English tradition of political theory to say that something could be legal (i.e., not subject to judicial change) and yet "unconstitutional" precisely in the sense of violative of a traditional right underlying the legitimacy of the political system. See J.P. REID, *supra* note 4, at 75-76.

21. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971).

22. See, e.g., L. LEVY, *LEGACY OF SUPPRESSION* (1960).

German one.<sup>23</sup>

To be sure, it may be said that the founding fathers believed that a bill of rights was unnecessary because even in the absence of a constitution, judges had an obligation to enforce basic rights, even against legislative enactments. But to say this is to assume a lot: among other things, that the rights guaranteed against the United States were also guaranteed against state governments, without any state or federal statutory or constitutional enactments (and without the fourteenth amendment in particular), since the same argument would apply to the states. It is to assume, in other words, that the basic rights did not in *any* way derive from the Constitution, but rather bound the United States regardless of how the new Republic chose to organize its affairs. That the founding fathers subscribed to some such strong affirmation of the independent validity of basic rights (natural or otherwise) we have no reason to doubt, but that they believed that the basic rights so understood were legally self-executing, to the point of not needing any further support as authority in the courts of law, I at least would find extremely surprising.

The founding fathers' position on the Bill of Rights becomes much more plausible, however, if we suppose that they did not think of the constitutional guarantees as primarily legal. To be sure, they did think that the rights enumerated in the Bill of Rights would in fact be enforceable in the courts of law, but there was nothing new in this: most of them had been similarly enforceable in England. What was to make the United States different was not that the American judges would be given the power to invalidate legislation inconsistent with the Bill of Rights, but that the American Constitution would set up a system of government in which the respect for the basic precepts of natural justice would be more secure, and the legislature and the executive would be less likely to be able to violate them. In this sense, by specifying its system of limited government, the Constitution implicitly spells out a whole system of values and a commitment to a system of rights. Because of this, as well as because these basic rights express the principles of natural justice which are binding on all governments, and only a corrupt ruler, breaching the trust of the people, can violate them, their separate listing might be unnecessary, in the same way as it might be unnecessary to list the Ten Commandments to a Christian prince. On the other hand, the mere decision so to list them does not necessarily have any additional *legal* conse-

23. I doubt that the due process clause of the fifth amendment would change much here. After all, the right to a jury trial in civil cases has not been incorporated in the fourteenth amendment guarantee of due process. See G. HAZARD, JR., *CIVIL PROCEDURE* 452 (1985).

quences, such as making the courts able to enforce them in preference to statutes enacted by a popularly chosen legislature.

Assume then, at least for the moment, that the founding fathers did not, indeed, foresee the kind of judicial review which we have come to take for granted, and that they thought of the significance of the Bill of Rights as primarily a specification of rights that might otherwise be subject to debate or as a restatement of political truths "inserted for greater caution." That the basic rights of man in a *legal* sense cannot be properly enumerated is a proposition difficult to accept, since legal rules are by their very nature supposed to be articulated. But the proposition that rights in this modified, political sense cannot be fully articulated is another matter; in fact, many of the things traditionally embraced under the rubric of "natural rights" had been rather vague and amounted to a basic guarantee of a decent government, responsive to the needs of the people.<sup>24</sup> In this context, whatever "disparagement" might have been feared to result from the nonenumeration of the more amorphous rights included in the ninth amendment disclaimer, it could not have had very much to do with any of the issues relating to the so-called "noninterpretive judicial review" that the ninth amendment came to be used to justify. Judicial review was simply not at issue.

## II. THE NINTH AMENDMENT AS A RULE OF CONSTRUCTION

It has not been my purpose in the foregoing discussion to convince the reader that the ninth amendment should be understood as indeed referring to a closed list of common-law rights, rather than as enshrining the rationalistic concept of natural law, or as dealing with rights less fundamental or more vague and resisting definition than the rights enumerated in the first eight amendments, or as a repository of political and "inspirational," rather than legal, principles. In fact, it has not been my purpose to convince the reader that the ninth amendment should be understood in one particular way rather than another. On the contrary, I merely wanted to show that the hope of using the ninth amendment as a decisive trump in the main contemporary disputes concerning the nature of the rights guaranteed by the Constitution, or the scope of judicial re-

24. It is in this spirit, rather than as some very precise legal rules, that we must understand such precepts as "no taxation without representation" (for clearly no universal taxpayer suffrage was meant), the already mentioned right to rebel, or the general principle of "republican form of government" ultimately enshrined in the Constitution. Indeed, both the English Declaration of Rights of 1869 and the English Bill of Rights contained many provisions, such as guarantees against executive lawmaking, or a prohibition against marrying a "papist" by any member of the royal family, which did not sound like *individual* rights at all. For an analysis of the rights contained in one of these documents, see L. SCHWOERER, *THE DECLARATION OF RIGHTS, 1869*, at 58-101 (1981).

view, or the particular constitutional controversies, such as the one surrounding the concept of privacy, is by and large illusory. The amendment might be (and often is) taken to mean that there are rights not specified in the first eight amendments that the courts are obligated to enforce, but it might also be (and often is) explained away as having no such import at all. It might be (and often is) read as a license for judicial development of constitutional doctrine in response to our developing moral knowledge and the changing historical circumstances, but it might also be read as referring to the limited arsenal of eighteenth-century rights. Both interpretations seem to me to have respectable historical and logical evidence behind them and, as is the case with most genuinely important disputes, there seems to be no good way of deciding between them.

Like every important "open-ended" provision, dealing with a problem that has *no* easy solution, the ninth amendment fails to provide such a solution. But the ninth amendment is not only different from the so-called "specific" provisions of the Constitution, such as the requirement that the President must be at least thirty-five years of age,<sup>25</sup> or that there will be two Senators from each State.<sup>26</sup> It is also arguably different from the other "open-ended" provisions, such as that no one shall be deprived of life, liberty, or property without due process of law,<sup>27</sup> or that no state shall deny the equal protection of the laws to any person within its jurisdiction.<sup>28</sup> The amendment seems to have *no* substantive content at all, stating instead a second-order rule of construction. The amendment refers to some rights that are supposed to exist independently from the amendment itself; it indeed presupposes that they *are* valid. Possibly, they are rights implicit in the structural provisions of the Constitution, in which case the amendment states a rule of construction concerning the relation between the explicit and the implicit provisions of the Constitution. Or the unenumerated rights derive their validity from some sources outside the Constitution, in which case the amendment states a rule of construction concerning the relation between some constitutional provisions (or the mere fact of their inclusion in the Constitution) and something outside the constitutional text altogether. One way or the other, it does not say what rights we have, but only how the Constitution is to be interpreted.

It is the second of the two mentioned possibilities that interests

25. U.S. CONST. art. II, § 1, cl. 5.

26. *Id.* at art. I, § 3, cl. 1.

27. *Id.* at amend. V and XIV.

28. *Id.* at amend. XIV.

many commentators today. If one understands the amendment as concerning the relation between the Constitution and other sources of authority, and if one accepts (as by now one must) that the Constitution is a legal document, then the ninth amendment states that something more than the written language of the document is to be taken into consideration in the process of constitutional interpretation. Read in this way, the ninth amendment seems to provide textual support for perceived departures from the constitutional text that came to be known as "noninterpretive"<sup>29</sup> or "supplemental"<sup>30</sup> judicial review.<sup>31</sup> What I want to argue is that even if it is admitted that the amendment does indeed authorize a more open process of review, it does not add much, if anything, to an argument that could be made in favor of "supplemental" review independently of the ninth amendment, and that its effect in some contexts may in fact be deleterious to the quality of such review.

#### A. "Noninterpretivism" and Constitutional Interpretation

The general dispute about the nature of constitutional interpretation centers around a problem formulated by Thomas Grey in his by now famous article *Do We Have an Unwritten Constitution?*<sup>32</sup> and analyzed by him and others in a number of other publications.<sup>33</sup> The problem, as posed by Grey, focuses around the legitimacy of judicial review that is

29. The term probably originated with Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), even though Grey himself later abandoned it in Grey, *supra* note 5. Others who supported the idea of "noninterpretive" review include J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982) (Perry abandoned his allegiance to noninterpretivism in Perry, *supra* note 18.)

30. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1985).

31. See J. ELY, *supra* note 29, at 34-41; Grey, *supra* note 29, at 709. While I shall be most interested in the methodological problems raised by the idea that the ninth amendment authorizes textual departures from the Constitution, there is by now quite a substantial literature inquiring into what kinds of concrete rights could be supported in this way. See, e.g., C. BLACK, *DECISION ACCORDING TO LAW* 43-83 (1981); Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CINN. L. REV. 777 (1968); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Kent, *Under the Ninth Amendment What Rights Are the Others Retained by the People?*, 29 FED. B.J. 219 (1970); Kirven, *Under the Ninth Amendment, What Rights Are The "Others Retained by the People?"*, 14 S.D.L. REV. 80 (1969); Kutner, *The Neglected Ninth Amendment: The "Other Rights Retained by the People,"* 51 MARQ. L. REV. 121 (1968); Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1 (1972).

32. Grey, *supra* note 29.

33. See Grey, *supra* note 30; sources cited *supra* note 29. The following are just some of the other studies on the same subject: Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1983); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

not, or is not primarily, based on an interpretation of the text of the Constitution, but rather draws from other sources, such as judicial precedent, tradition, prevailing morality, natural law, or the personal predispositions of judges. A number of analogies between constitutional adjudication and literary interpretation or religious exegesis have been drawn by various scholars,<sup>34</sup> the most popular among them being the analogy between the legal disputes concerning the role of the constitutional text and the theological dispute between the Protestants and the Catholics concerning the role of the Bible in discovering the divine truth. But what seems to be at the bottom of most of these disputes is the fundamental question of what constraints are placed on judges in their exercise of judicial-review power. Those who argue that the constitutional text is the only authority under which judges can invalidate the outcomes of a legislative process are the most likely to believe that otherwise judges would enforce their personal or class preferences and destroy the objectivity of the process of constitutional adjudication. The proponents of "supplemental" review respond, in turn, that the Supreme Court has been engaging in "noninterpretive" review for many decades and that most of our constitutional law would have to be thrown out if we suddenly decided to go back to no more than what the constitutional text by itself would legitimately allow. The fact that we would not want to take such a drastic step means that, by and large, we approve of what the courts have been doing and, by implication, would like them to continue. The problem of subjectivism could not, then, be as serious as the textualists imagine.

There is undoubtedly considerable strength to the noninterpretivist position. There are, however, also a number of problems with it, and we should look at two among them. The first is that, whatever they actually do, judges never *say* they engage in a noninterpretive review, and the "supplementers" have no satisfactory explanation of why it is or must be so. Second, the supplementers make their job too easy: they simply take over from the textualists the latter's narrow concept of interpretation and claim that judges do not engage in *that* when they exercise judicial review. Under a more expansive concept of interpretation, however, it might very well be that judges' own descriptions of what they are do-

34. See R. DWORKIN, A MATTER OF PRINCIPLE, 146-66 (1985); Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 POETICS TODAY 23 (1979). See generally Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1983); Grey, *supra* note 30; Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123; *Symposium: Law and Literature*, 60 TEX. L. REV. 373, 373-586 (1982).



ing—i.e., their claim that they are actually interpreting the text of the Constitution—may turn out to be true (or at least defensible).

Concerning the first problem, judges sometimes admit that constitutional interpretation is sensitive to historical evolution and that history adds a “gloss” on the text. But they never admit to deriving the authority for their decisions from outside the constitutional text and they never say, as one scholar did, that the text is “important but not determinative” and that “[l]ike an established line of precedent at common law,” it creates “a strong presumption, but one which is defeasible in the light of changing public values.”<sup>35</sup> Instead, any new result is unfailingly presented as a new and better *interpretation* of the text itself. It is precisely because judicial precedents, including those in constitutional law, do not have the ultimately infallible status of the constitutional text that they are occasionally said to have been *wrong*, but the Constitution itself stands on an entirely different footing. This behavior of judges is very significant because it expresses their belief that purely noninterpretive review would constitute an abuse of their power and undermine the legitimacy of judicial review. In this belief, moreover, they are very likely to be right, and the supplementers reveal their own partial adherence to it by devoting a considerable amount of energy to showing that noninterpretive review is simply another mandate of the Constitution.<sup>36</sup>

Still more serious is the second of the two mentioned problems of noninterpretivism, concerning its narrow concept of interpretation. It is not surprising that the textualists subscribe to a narrow concept of inter-

35. Brest, *supra* note 33, at 229. It must be noted, however, that Brest may have used the word “text” in a rather restricted sense referring to the meaning that the text had for the 18th century speakers. Whether or not Brest should be read as intending to restrict the meaning of his claim in this way depends on what we make of the possibility of an “evolutionary textualism.” *See id.* at 208 n.22, 236 n.122.

An interesting exception to the rule stated in the text may be found in the recent case of *Taylor v. Illinois*, 108 S. Ct. 646, 651-52 (1988):

The State’s argument is supported by the plain language of the [Compulsory Process] Clause . . . by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law, by some scholarly comment, and by a brief excerpt from the legislative history of the Clause. We have, however, consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions. (citations omitted).

Even here, however, (as well as in some other contexts) the constitutional provision is extended rather than contradicted. For other references concerning the relationship between the constitutional text and judicial precedents, see Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 767-72 (1988).

36. Much of the literature on the ninth amendment belongs in this category. *See* works of Grey and Ely cited *supra* note 29. But there exists also a number of studies which argue for the same conclusion by examining the founders’ theories of constitutionalism and interpretation, rather than the words of the Constitution. Grey, *supra* note 5; Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

pretation. The dispute between the textualists and the supplementers is not a mere philosophical quarrel. Underlying it (and conferring on it more reality than philosophical disputes usually possess) is a quarrel about the proper role of the judiciary in our system, and in particular about its ability to interfere with the wishes of the legislature.<sup>37</sup> In *this* quarrel, the textualists usually occupy the more pro-legislative position and their insistence on judges' staying within the four corners of the constitutional text is a weapon in their struggle against judicial supremacy. It is thus very important to keep a little sense of political realism in assessing the textualist position. Textualism is born out of opposition to certain decisions. The first step in the struggle against them is to delegitimize them by showing that they are not derivable from the constitutional text, and this is done by proposing a narrow or "strict constructionist" concept of textual interpretation. The next step is to delegitimize any form of judicial review not based on the constitutional text.<sup>38</sup>

There is no reason, however, for those who do not share the textualists' narrow view of the judicial role to accept their narrow view of interpretation. The dispute concerning the role of judges in our system is a genuine one, and the textualists' preference for legislative supremacy (whether one agrees with it or not) is a respectable and defensible political position. Their desire to argue that, in view of the political position which they consider to be right, judges should read the constitutional text narrowly is also defensible. But the textualists do not simply defend their view of constitutional interpretation as a matter of political theory ("judges would have too much power if they could exercise expansive review"); they defend it as a matter of philosophy: a narrow reading of the text, they argue, is capable of providing meaningful guidelines and curbing judicial discretion, while a more expansive reading necessarily ends in judicial subjectivism. The philosophical presupposition of this view is that it is the text itself that controls the process of interpretation, so that a more expansive reading, which brings in other authorities, such as morality or tradition, leads *in principle* to an absence of controls on judicial discretion.

This last claim is, from a philosophical point of view, quite unfounded. This is not the place to argue the issue in detail. But the idea that the text controls its own interpretation, that it is a closed world

37. The textualists usually also identify the wishes of legislatures with the wishes of the people themselves. That this is often quite a heroic assumption much of modern political theory believes to have established.

38. This at least is the most common source of textualism, as in Bork, *supra* note 21.

which can be read without recourse to anything outside of itself, is out of tune with any respectable philosophy of language or theory of interpretation. And so is the idea that if the text cannot control its own interpretation, it can be firmly controlled by a finite number of rules, a comprehensive methodology, which makes the process of interpretation into something "truly objective."<sup>39</sup> There are reasons to be concerned about the scope of judicial discretion, of course, and this makes the issue of constraints to be imposed on judges very serious. But the textualists' (and not only textualists) impulse is to ask too much of those constraints and, in the process, to misunderstand their nature.

When interpreting a given text, there are nearly always some things that are simple and obvious. For example, a person who is thirty-four years old cannot, under the United States Constitution, be elected President of the United States.<sup>40</sup> But with regard to many other issues, especially in the context of actual adjudication, interpretation is a complex and frustrating task. And it is frustrating precisely because it is complex. The temptation is to try to reduce the complex to the simple, thus making, say, the abortion issue as simple as the issue of the already mentioned presidential qualification. But the question is: why are the simple issues so simple? One (and, I believe, correct) answer is: because neither the issues themselves nor the rules and authorities used to resolve them are seriously contested in those contexts. If we adopt this answer then it follows that while every interpretive practice in which people regularly engage and which they find useful will surely have a number of such simple issues, there is nothing *inherently* or *a priori* simple about them, and each such simple issue can suddenly or gradually become more problematic.

Thus, to go back to the example of presidential qualifications, imagine that, as a result of a number of factors, such as demographic imbalances, the extremely heavy burden of supporting the nonworking part of the population, and changing public morality, the United States gradually becomes polarized along generational lines, to the point at which generational conflicts become one of the most important political issues of the time. Imagine a big movement to rejuvenate in a radical fashion the whole of the federal government, including the election of Congressmen and the President who are below what we now consider the constitutionally mandated age. Imagine further that the "young party" is in a

39. Some forms of textualist objectivism do not come from the politically conservative end of the spectrum. For example, Fiss argues for the objectivist position in order to defend the legitimacy of Warren Court judicial activism. See Fiss, *supra* note 33.

40. U.S. CONST. art. II, cl. 5.

position to build a majority coalition, but it is not strong enough to push through a constitutional amendment. Over time, a mounting pressure, backed by large financial resources and great political influence, is staged to reinterpret the constitutional provisions in the light of changing beliefs. Literalism, as a mode of interpretation is severely criticized by scholars. A great number of studies appear to show that the founding fathers meant only that the leading public figures were to be mature people, that the custom of counting the age of a person was very different (and less accurate) in their day, that they never intended for the Constitution to be read in the originalist fashion, that the average person, according to all available psychological and medical research, matures much earlier today than in the eighteenth century, that the new modes of communication and new educational methods make the young much more suited for holding office than was the case two centuries ago, etc., etc. Those who have doubts that the issue of age qualifications, first for Congressmen and then for the President, would become clouded, problematic, and very difficult would be well advised to try to look at the Supreme Court case of *Daniel v. Paul*<sup>41</sup> with the eyes of a nineteenth-century expert on the commerce clause or (perhaps more appropriately, in the light of our hypothetical) at the case of *Carey v. Population Services International*<sup>42</sup> with the eyes of a specialist on state police power of the last century.<sup>43</sup>

Simple issues are thus simple only relative to the context in which they arise; they are simple because any time we want to question something in a productive fashion, we must always take something else for granted, or else conduct our inquiry in a vacuum. Starting from this pragmatic answer to the question of simple issues, it becomes clear that it is a vain hope to make all interpretive issues simple; in fact, some issues are simple only because *others* are contested. It also becomes clear that the constraints imposed on the process of interpretation can never provide an ironclad guarantee that a given text will be read in the same way at all times and under any circumstances. Constraints always act in less

41. 395 U.S. 298 (1969) (commerce clause allows the federal government to apply its antidiscrimination laws to a remote 232 acre recreation area in Arkansas because some of the food served in the snack bar had moved in interstate commerce).

42. 431 U.S. 678 (1977) (the state cannot prohibit sale or distribution of contraceptives to minors under 16).

43. That the reader may not agree with either of the decisions cited in the text is beside the point. All that is claimed here is that it would be hard to argue that both of these cases are *obviously, uncontroversially* wrong, as a holding that a 34-year-old may become President would be wrong. (That the presidential age qualification could be made controversial is observed independently in Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-87 (1985)).

than an absolute fashion and there always exists the possibility that they themselves may be interpreted in such a way that the interpreter will acquire a certain amount of freedom, greater, perhaps, than was intended by the author of the text himself.<sup>44</sup> For interpretation always proceeds against a set of background assumptions which might themselves become open for questioning, and there is no way of purifying it of all such influences.

But this pragmatic view of interpretation is precisely the one that the textualists reject. What they seek is a foolproof foundationalist method of constraining judicial discretion through a set of basic rules that leave no room for controversy. Simple cases are simple, according to a textualist, because in resolving them the interpreter applies clear rules of interpretation. The word "applies" is important: the interpreter is basically passive and the rules are basically responsible for the result. The more complex problems, the textualist wants to affirm, either involve a reiteration of a number of simple steps (so that the task may be difficult, but it always has *the* right solution, much in the same way as a mathematical theorem that happens to be difficult to prove) or they are not really problems of interpretation at all. If the interpreter has to use his discretion, then he is legislating, and not interpreting.

Whatever the reasons that make the textualists adhere to this strong view of interpretation, the view itself is quite implausible and the supplementers should not feel bound to accept it. The constraints on judicial discretion, they might respond, are not in the nature of guarantees that transform the process of interpretation into a more or less mechanical process of applying some external and objective rules. Interpretation is a complex task, not reducible to a determinate set of rules, and that is why judging (and lawyering in general) is something for which we have a considerable amount of respect. The more contested the problems we ask judges to resolve, the less likely they are to be subject to unique solutions, whether in the form of a mere application of a constitutional formula, a precedent, or any other authority. Discretion is thus the essence of lawyering, and of constitutional adjudication in particular. If it is to be controlled, it can only be by a set of pragmatic constraints, linking a set of general principles with particular outcomes not so much by infallible rules of logical deduction as by the amorphous and concrete rules of *craft*, existing, elaborated, and enforced within the context of the profession and the political system.

44. But what the author himself intended is also a matter of interpretation, and can always become problematic.

If we conceive of interpretation in this (pragmatic) manner, then not only do we have no iron guarantees that the same text will always be read in the same way, but there is also no need to view the very *concept* of the text too narrowly. The textualist wants to restrict the constitutional text to the words of the document, because he thinks that it is the words of the document that constrain judicial discretion. But we see that it is more plausible to view the text as being always interpreted against the background of existing social relations and read in the light of all kinds of contestable theories concerning the meaning and the function of the text. To be sure, for one reason or another, we may want to limit or expand the background in a variety of ways. We may, for example, tell judges to observe (or not to observe) precedent, to look (or not to look) into tradition, to consult (or not to consult) their sense of public opinion, to try to read the text as the founders intended it to be read, or to read it in the light of changing circumstances and as reflecting a dialogue in which the present generation engages with the past.<sup>45</sup> All of these "methodological" injunctions might make a real difference as to how given positions are argued for and, to some extent, what the ultimate outcomes of certain disputes might be. But no set of background rules by itself controls the process of interpretation and no particular set is a priori indispensable. Moreover, there is no a priori reason to believe that adopting one or another set of such rules makes the activity engaged in by judges and scholars any more or less an *interpretation of the constitutional text itself*. To be sure, it may very well be that one or another set is de facto (and for good practical reasons) preferred by the profession (so that using another may be unacceptable<sup>46</sup>), but neither the text by itself,

45. It must be noted, however, that it is always the *present* generation that does the reading and its own perspective (be it merely its own perspective on what the framers had in mind) can never be eliminated. This is not just a theoretical proposition, but a statement with weighty practical consequence as well: with enough pressure of our own interests on the process of constitutional interpretation, most political controversies can be (and are) pretty quickly reconstructed in the form of differing interpretations of the framers intent. Compare, e.g., Sherry and Powell cited *supra* note 36 (arguing that the framers intended to allow broad nontextualist interpretations) with Bork, *supra* note 21; Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); and Monaghan, *supra* note 35 (arguing that following original intent is incompatible with most modern extensions of the Bill of Rights). But this does not make the injunction that judges should stick to the original intent meaningless: the dispute between the competing sides will be significantly transformed by the fact that some things which are very easily argued for under a system in which the Constitution is read in light of changing circumstances (say, that the first amendment applies to more than prior restraints) may now suddenly become quite hard to argue for, and *vice versa* (it would be much easier to argue for capital punishment under the originalist view than under the present system).

46. It may be "unacceptable" in a number of senses: a person who does not conform may lose cases, earn less money, lose the respect of his colleagues, fail to be promoted, be ridiculed, adjudged incompetent (with all that this judgment entails, such as malpractice liability or exclusion from the

nor the general rules of interpretation uniquely determine what background information is to be used in the process of interpretation.

It is thus surprising that the "supplementers" indeed call themselves such, rather than "true interpreters"—i.e., admit that the type of review they recommend is, at least in part, "*noninterpretive*." The dispute about what background materials judges are to use in interpreting the Constitution is a legitimate and important one; many issues may indeed depend on it, so that in purely professional terms, the question of whether or not we should adopt, say, the originalist position, even if it does not yield any unique answer to most contested problems, may cut in favor of (give a rhetorical advantage to) one or another solution. But whether or not one adopts the originalist stand or some other one (such as reading the Constitution in the light of changing circumstances or the enduring national tradition) does not by itself exclude a reading from being an interpretation. The pure textualist position (only the text itself should be looked at in reading the Constitution) is an impossibility; the interpreter must, *inter alia*, be an English speaker, he must be able to consult dictionaries and common usage, and he must probably (for the textualists' purposes) be a lawyer (with all that this involves in terms of training, having read certain cases, books, and articles, as well as having imbibed a plethora of norms of professional behavior bearing on the activity of interpretation). What exactly to use from this and other repertoire of tools may be the subject of a legitimate dispute about a (socially or professionally) approved mode of interpretation of a particular text (in this case, the Constitution), but a general *philosophical* theory of the nature of interpretation does not provide any answer to these kinds of questions.

I see a number of reasons why the supplementers may concede that their view of judicial review is (at least in part) not "*interpretive*." The main of these reasons is that the supplementers do indeed share with the textualists their fear that a broadening of the very concept of interpretation along the lines suggested here might lead to an erosion of the accepted standards of legal reasoning, and distort the proper role of judges in the process of constitutional review. One version of this view, which I am not sure can be safely ascribed to any particular representative of noninterpretivism, would be to say that the pragmatic conception presented here implies that the meaning of any text is so fluid as to make no difference between there being a text and no text at all. Unless we stick with the textualist conception of interpretation, the argument

bar, etc.). Judgment of this kind, while never possessing the certainty of mathematical propositions, can be viewed as quite objective and uncontroversial.

would run, we might just as well give up on the idea that it is a text that judges are interpreting. It is better therefore to accept the textualist view of interpretation and defend what judges actually do when they are engaging in activist judicial review by appeal to some other practices.

The first thing to say about this view is that it is simply another side of the same philosophical confusion of which we have been speaking all along. The textualist, after all, adheres to his foundationalist views precisely because he claims that a more expansive view of interpretation necessarily leads to unbridled judicial subjectivism. The textualist must in part be forgiven for his confusion, since a number of followers of what I called the pragmatic view of interpretation might have indeed presented the claim that the text by itself does not constrain interpretation as a form of relativism which undermines the very concept of constraints.<sup>47</sup> But the pragmatic theory entails nothing of the kind. To say that there are no absolute constraints, or that the text *by itself* does not constrain, does not mean that "anything goes." On the contrary, interpretation is a practice that takes place in some social context, and in that context there are always some more or less definite limits on what can pass as a competent move within that practice. All that the pragmatist affirms is that no set of general principles can constrain the process of interpretation independently of the context within which interpretation occurs, and that at least some part of what constrains the interpreter is a matter of craft rather than a general rule. Thus, the pragmatist maintains that the constitutional requirement that the President must be at least thirty-five years old cannot be fixed in such a way that it will always, under any circumstances, yield exactly the same result. But he does not deny, indeed he thinks it absolutely normal, that anyone who would propose that *today* a thirty-four-year-old could be constitutionally elected President would be legitimately declared incompetent to interpret the Constitution. That this proposition is not guaranteed to hold true in every possible world does not mean that it is any less certain, true, or predictable in the world in which we do live. Under normal circumstances, there is thus nothing relative or arbitrary about interpretation, according to the pragmatist; it is just that the guarantees against arbitrariness demanded by the textualist are unrealistic and unnecessary.

47. Much of the fear of "nihilism" or "relativism" comes from reading the fashionable but perniciously vague works of the so called "deconstructionist" school of philosophy and literary interpretation. For example, Fiss, *supra* note 33, at 741 n.9, seems to be fending off H. BLOOM, P. DE MAN, J. DERRIDA, G. HARTMANN, & J.H. MILLER, *DECONSTRUCTION AND CRITICISM* (1979), and J. DERRIDA, *OF GRAMMATOLOGY* (1976). For a sociological explanation of the strange career of J. Derrida, see Lamont, *How to Become a Dominant French Philosopher: The Case of Jacques Derrida*, 93 AM. J. SOC. 584 (1987).



But a sophisticated supplementer might still resist. He might accept that from a purely philosophical point of view, the Constitution could be read against a very broad background of tradition, public opinion, precedent, and so forth, and that there is nothing that would a priori disqualify such a reading from being an interpretation of the constitutional *text*. But still, there are, as we have seen, various pragmatic concerns, specific to the practices of the legal profession, that mitigate against conceiving of what judges do when they engage in expansive judicial review as a species of textual interpretation. Basically, what is at stake here is not a philosophical but a legal problem: that of a danger of blurring the distinction between what passes for textual interpretation in most legal contexts other than constitutional review and what would have to be accepted as faithfulness to the text in the Supreme Court's constitutional jurisprudence.<sup>48</sup>

Something like this argument lies, I take it, at the bottom of Grey's opposition to what he calls the "rejectionist" theories of interpretation. Following Levinson,<sup>49</sup> Grey likens the dispute between the textualists and the supplementers to the controversy between the Protestants and the Catholics concerning the role of the Bible as a source of divine revelation. While the Protestants adhered to the view that only the Bible (*sola scriptura*) is the authoritative voice of God, the Catholics believed that tradition was an independent source of theological knowledge. Recently, however, a number of theologians have adopted a "hermeneutical" approach,<sup>50</sup> which, like the approach described here, rethinks the very concept of interpretation and represents both the Protestant and the Catholic views as essentially converging in the more modern view of reading the Biblical text. It is this approach that Grey calls "rejectionism."

The hermeneutical approach may be appropriate in the domain of theology, says Grey, but not in constitutional law. The Constitution is not *quite* like scripture, according to Grey, in that the new hermeneutical theories make scripture into a text that attempts to interpret the ineffable and mysterious, while the Constitution simply "puts in writing" an agreement on the nature of a human artefact: the institutions that make up our political system. Judicial review *could* be justified as a priestly

48. Outside of the context of the dispute about the nature of interpretation, N. Redlich had argued that using the ninth amendment to anchor certain broad rulings, such as those involved in the privacy area, would preserve a narrower interpretation of the first eight amendments. Redlich, *Are There "Certain Rights . . . Retained by The People?"*, 37 N.Y.U. L. REV. 787 (1962).

49. Levinson, *supra* note 34.

50. See sources cited in Grey, *supra* note 30, at 9-13.

rite in our civil religion of the Constitution, but this would be undesirable; it is better to view judges as bureaucrats solving complex legal problems. In this context, it is better to admit freely that the text is not always the sole source of their decisions. Grey admits, of course, that the Constitution cannot be read as a statute,<sup>51</sup> but the fact of its "writtenness" and the precision that this was supposed to confer on it as a *legal* document cannot be dissolved in a purely symbolic representation. While Grey knows that "literal" interpretation cannot mean a reading that excludes reference to the function and purpose of the document,<sup>52</sup> he nevertheless wants to preserve a somewhat more limited, professional sense of the notion of literal interpretation.

I sympathize with Grey's opposition to blurring the distinction between the Constitution as a legal text and as an object of religious veneration. I also agree that the existence of a written text must be seen as making some difference in terms of pragmatically constraining legitimate judicial discretion. But all of these things are still perfectly compatible with the fact that the text is interpreted according to professional legal standards—that its interpretation, while less literal than that of a statute, contract, or a will, is nevertheless more constrained than would be a mandate to spell out *de novo* a set of moral values for the nation or even a simple injunction to follow what seems to be the best solution compatible with the background (common law) of the existing judicial decisions.

To give a simple example, the Constitution mandates a jury trial in civil cases arising at the common law. While this is one of the more specific provisions, it is still very vague, and the prevailing interpretation (that the clause gives a right to trial by jury in cases which gave rise to an action at law, rather than equity, at the time of the adoption of the Constitution<sup>53</sup>) is certainly not the only possible one. It is quite conceivable that under a series of pressures, threatening the collapse of the judicial system, the civil jury system could, for most practical purposes, be "interpreted out of existence."<sup>54</sup> In this sense, the Constitution is quite dif-

51. Grey, *supra* note 30, at 16.

52. *Id.* at 14. *But see infra* note 58 and accompanying text.

53. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore & C. Line v. Redman*, 295 U.S. 654, 657 (1935).

54. This could occur in part by substituting alternative modes of dispute resolution (analogous to workers' compensation or compulsory no-fault insurance) for the traditional causes of action (*but cf.*, e.g., *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917)) in part by manipulating the distinction between law and equity (for the unclear boundaries between law and equity in the 18th century, see G. HAZARD, *supra* note 23, at 413-21) and in part by exploiting the fact that neither the meaning of the "jury" nor the number of jurors required are specified in the seventh amendment. For this last possibility, see *Apodaca v. Oregon*, 406 U.S. 404 (1972) (nonunanimous jury verdicts in *criminal* cases in state courts are compatible with the Constitution); *Williams v. Florida*, 399 U.S. 78

ferent from some statutes (but not others, such as the Sherman Act), which, even if often quite elastic as well, could not according to the existing standards be manipulated quite to the same extent. But this is only because the *function* of statutory interpretation is quite different. Statutes are easy (or at least easier) to amend, and clarity and predictability are considered more important than flexibility in their interpretation. Still, the fact that the interpretation of the Constitution is more flexible, does not mean that the text does not make a difference. Vague as the seventh amendment may be, every lawyer knows that a judiciary reform akin to that adopted in Britain,<sup>55</sup> which for all practical purposes abolished the jury in civil cases, could not pass muster in the United States, even in the face of very strong evidence that the present system is less accurate or more wasteful than the alternative. In fact, it is rather easy to picture a situation in which the existence of the seventh amendment would be *the decisive reason* why the civil jury system would not be reformed. It is *this* kind of difference that the writtenness of the text makes, and I am not sure why one could realistically want it to make any more of a difference.

Moreover, if Grey is right that the constitutional text must be read more literally than what I described (say as literally as some strict constructionists or some originalists would want it to be read) or else the value of the writtenness of the text is debased, then the idea of a genuinely external supplementation of the constitutional text, which Grey proposes as an alternative, leads to a no less problematic situation. The picture one might get from Grey is that when judges interpret the Constitution they should function as scribes; when supplementing it, on the other hand, they should suddenly be transformed into something else. This something else involves certainly more than looking into precedent: judicial innovation in constitutional law cannot stop at any given point.

(1970) ("the twelve-man panel is not a necessary ingredient of 'trial by jury' " in a *criminal* case). Even the meaning of "twenty dollars" might be subject to manipulation.

Some scholars have in fact claimed that the development of the modern administrative state has largely undermined the seventh amendment right to jury through the expansion of the adjudicatory jurisdiction of administrative agencies. See Monaghan, *supra* note 35, at 735 and the sources cited therein.

55. The British story is in itself instructive. Section 6 of The Administration of Justice (Miscellaneous Provisions) Act of 1933 gave judges discretion as to whether civil cases, except for a few specified categories (involving fraud, libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise to marry), would be tried with or without a jury. In the course of the interpretation of the Act, the Court of Appeals initially thought it to have given "absolute discretion" to the trial judge, *Hope v. Great Western Ry.*, 1 All E.R. 625, 629 (1937), then issued guidelines which instructed trial judges not to try to a jury "except in special circumstances," *Sims v. William Howard & Son, Ltd.*, 1 All E.R. 918 (1964), and ultimately abolished the civil jury "save in exceptional circumstances." *Ward v. James*, 1 All E.R. 563, 576 (1965).

The background into which judges look must involve such things as a theory of the constitutional design, tradition, a set of values to which they commit us, and so on. Nothing short of this will correspond to that "professional and . . . popular culture" that Grey thinks<sup>56</sup> judges should consult. But if judges can look to these sources, is there something that constrains them in the outcomes with which they come up? If the answer is no, then supplementation is indeed more problematic than expanded interpretation: it comes close to the textualist's nightmare. If, on the other hand, there are some professional constraints that make supplementation tolerable, and indeed useful, then the same constraints will only operate more effectively as brakes on the arbitrariness of expanded textual reading. For it seems to me that an acceptably broad interpretation of the constitutional text is by far preferable to the *prima facie* illegitimate use of extraconstitutional authorities.<sup>57</sup>

Thus, while Grey is certainly right that judicial inquiry should be a secular enterprise, his tying the concept of secular professionalism to a narrow interpretive literalism (to be supplemented by other extraconstitutional authorities) seems without foundation.<sup>58</sup> It is a very good question, of course, why judges, by virtue of their professional legal training, have any special expertise in either the secular or the sacred constitutional matters. But it is not much less a question for Grey than for the rejectionists he criticizes.

56. Grey, *supra* note 30, at 25.

57. This illegitimacy may, of course, be lessened by arguments that using extraconstitutional sources of authority is itself constitutionally permitted or even mandated, and thus not extraconstitutional after all. See sources cited *supra* note 36.

58. This may be seen as unfair to Grey who states at one point that his idea of interpretation "should not be confused with *literalism* . . . particularly with 'narrow' or 'crabbed' literalism." Grey, *supra* note 29, at 706 n.9. In fact, he believes that there is nothing in his view of interpretation that would make structural and functional arguments illegitimate. All that he requires is that the norms derived from the text be "demonstrably expressed or implied by the framers." *Id.* But, like most texts alone, this is a very ambiguous phrase, incomprehensible without interpretation. Does he mean that constitutional interpretation must accept originalism as its premise or should we understand "expressed . . . by the framers" merely as an alternative locution for "found in the text of the Constitution"? And at what point does an argument show that a norm is "demonstrably" expressed or implied in the text? Is it enough that the argument is good and persuasive in the context in which it is made, or is some firmer sense of "demonstration" intended? If Grey believes that any non-originalist reading is not an interpretation of the text, then his view is very far from *literalism*, for originalism demands at times significant departures from what the text would otherwise be taken to mean. And if his notion of demonstration implies something more than the usual contextual acceptability of an argument, he is closer to "narrow literalism" than most judges are even in the context of statutory interpretation. If, on the other hand, he really means that a good structural argument tied to the text by the professionally acceptable standards of constitutional interpretation is all that is required, then his claim that judges actually supplement the text more often than not, Grey, *supra* note 30, at 25, is unfounded. In sum, then, I believe that Grey's insistence on the literalism of constitutional interpretation must be taken quite literally.

### B. *Do We Need the Ninth Amendment?*

It is time to return to our main subject, the ninth amendment. As I said already, the supplementers sometimes view this provision as an explicit constitutional statement that there are some extraconstitutional commands that the Constitution itself acknowledges and sanctions.<sup>59</sup> The amendment states, the argument goes, that something more than the written language of the Constitution is to be considered in the process of constitutional interpretation and specifically authorizes judicial departures from the text itself.

Let us assume that the ninth amendment does indeed say something of this kind (although we have seen that this interpretation is anything but uncontroversial). Does the fact of its saying so make any difference?

Our assumption contains a number of threads and we need to take them one at a time. Insofar as the amendment is taken to mean that the words of the Constitution are not by themselves controlling, and that we must go beyond them to understand the totality of the system of rights that the Constitution in fact recognizes, the amendment does not say anything we would not know without it. This is nothing more than rejection of the textualist philosophical confusion concerning the nature of constraints on interpretation. With or without the ninth amendment, we would have to approach the task of constitutional interpretation with some basic understanding of the sources from which the document derives (i.e., both the history of the American Revolution and the liberal and republican philosophies which had inspired the founders), its overall purpose and design (i.e., the political philosophy of the founding generation), and its view of the relation of the government to the individual (i.e., a more general philosophical view of the meaning of life and the place of the political community within it). It is quite important to note that the reason why the amendment is unnecessary to tell us all this is that it is not a matter of choice; it would be simply impossible to read the Constitution without an "extrinsic" background of some sort.<sup>60</sup> Should we go no further than originalism, all this would still be true. Should we treat the Constitution no different from an ordinary statute, it would be true as well.

This, however, cannot be all. The amendment is also taken to mean that we should not be niggardly in interpreting the guarantees of rights. Granted that every, even the most restrictive, interpretation of the Con-

59. See sources cited *supra* note 31.

60. This is not to say that *what* background we should consider relevant could not be a subject of legitimate debate.

stitution that would see it as no better than a statute must read it against some background, or else the words will not make any sense. But it might perhaps be possible to read it as literally or as narrowly as the accepted canons of legal interpretation would allow, and the amendment seems to say we should not do that. But I think that the view that the Constitution should be read in such an extremely narrow fashion, while not theoretically impossible, would be extremely implausible even in the absence of the ninth amendment. After all, Chief Justice Marshall did not quote the ninth amendment (or any other explicit provision) when he said that "we must never forget that it is a *constitution* we are expounding."<sup>61</sup> Given that this extremely short document was conceived as a blueprint for a government that was supposed to endure for "ages to come," it seems extremely unlikely that it was meant to be read very narrowly. Moreover, since the preservation of the benefits of freedom for themselves and their posterity was the main object of the framers, since they had justified their revolt against the British chiefly with reference to the violation of their basic rights, and since they were widely known for their liberal beliefs, it would seem inconceivable that they meant to mandate, or even allow, a narrow interpretation of the rights recognized by them and guaranteed by the Constitution.<sup>62</sup>

The ninth amendment also seems unnecessary to point out that there exist implicit or peripheral rights, derivable either from the rights enumerated or from the structure of the government set up under the Constitution. In fact, the framers original claim that a bill of rights was unnecessary, even if it cannot be taken to mean that a *judicial* derivation of exactly the same configuration of liberties as is listed in the first eight amendments could be taken for granted, must mean that the implications of the Constitution with respect to individual freedoms involve a possible derivation of at least *some* rights.

It might be objected at this point that the same kind of argument could be used to claim that the first amendment is also unnecessary. To an extent this is true; after all, the framers did think so at first. But the situation is not exactly parallel. The first amendment, even if it did no more, specified a substantive right that otherwise would have to be derived from the rest of the document (or some other sources). This made it, at least in some obvious cases, unnecessary to go beyond the explicit

61. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

62. This does not say very much about whether the courts or the Congress were meant to be the main interpreters of the Constitution or about whether the founders meant for the courts to police the Congress through judicial review. But there seems to be no doubt that whoever was meant to do the authoritative reading should not give a narrow view to the role of rights.

provision.<sup>63</sup> The ninth amendment on the other hand, because it has no substantive content, did not do even that; it simply negated a possible inference that the listing of some rights had made it no longer legitimate to infer others (in the same way as, say, freedom of speech would have had to be inferred if there had been no first amendment). But the same process of inference must be still gone through in each case in which the existence of an unenumerated right is being claimed. The ninth amendment is thus a second-order specification, the need for which arises only because some rights are indeed specified in the first place. If, instead of listing some rights explicitly, the clamor for a bill of rights had been dealt with by a unique amendment, saying that "[t]he absence of a bill of rights in this Constitution shall not be construed to deny that the people have rights or to disparage the rights retained by them," then the position of this amendment would indeed have been similar to that of the ninth.

But assume that without the ninth amendment we would indeed be disposed to read the constitutional guarantees of rights in a niggardly fashion, and that it was only the presence of the amendment that admonished us not to do that. Even then I believe the amendment would be very close to vacuous. For to say that we should not be niggardly, without specifying either *how* generous we should be or how we should go about finding the appropriate level of generosity, would not tell us much of anything. There is nothing in the abstract theory of interpretation (as an activity of being capable of reading symbols) that imposes any limits on what results an interpretation may yield. It can be as broad as to make the text of hardly any relevance at all, as in the case of the recent ecumenical dissolution of the Bible that Grey feared would spread into constitutional law, or as narrow as the American courts' probate jurisprudence. Any limits must come from an appropriate practice (professional, political, or whatever), and if those limits are to be expressed in terms usually acceptable to the legal profession, they must be framed in terms of a set of principles based on theories governing the role of judges in regulating the concrete subject at hand.

Thus, even if the ninth amendment were to be read as empowering judges to develop some kind of constitutional common law of rights, that law would most appropriately be based on a theory of the relation between the individual and the government set up under the Constitution. But any such theory would have to be implicit in the Constitution, and

63. It is also clear that some amendments did more. I argue above that the seventh amendment did. See *supra* text accompanying notes 12 and 23. The same is true about all those instances (particularly amendments five and six) in which the Constitution commits us to the peculiar institutions of the common law, as opposed to arguably equally good arrangements in the civil law system.

we must assume that the document would support a reading of itself that accords best with the goals it sets out to accomplish. But this, in turn, negates our initial assumption that, but for the ninth amendment, we would be disposed to interpret the constitutional guarantees in a niggardly way. If the Constitution in fact provides us with a set of ideas which may appropriately serve as guidelines for a broad interpretation of rights (including inferences to unenumerated rights), then the ninth amendment does nothing to facilitate such an interpretation; the whole burden of deriving new rights would rest on the defensibility of the interpretation itself. If, on the other hand, the Constitution did not support an expansive interpretation, the amendment would be nothing but an invitation to go beyond what could be made reasonably consistent with the Constitution—surely a supposition not to be indulged in.<sup>64</sup>

There is only one reading of the ninth amendment that could go beyond what is obvious and make some difference. That is if the amendment were to be understood, somewhat along the “noninterpretivist” lines, as inviting not an expansive reading of the Constitution (i.e., allowing for inferences to unenumerated rights on the basis of the text read in the light of a broad background of history and political theory), but a reading which would derive the unenumerated rights from sources that could not otherwise (given the repertoire of interpretive tools sanctioned by the relevant professional community) be legitimately tied to the document itself.

It is difficult to give examples here that are uncontroversial and at the same time not ludicrously unrealistic. But then what matters is more the mode of justification than the result itself. Take the contraception cases, for instance. One way of justifying them would be to ask whether or not using contraceptives is morally permissible, where “morality” stands for what most of us refer to when we say it is wrong to lie or to cheat (whether it be a religious morality, or some set of eternal norms we believe in, or just a class of social conventions). Another would be to argue that regardless of the moral rightness or wrongness of contraception, the system set up by the Constitution is based on the liberal idea that, except for special areas in which paternalism is justified (something that must be separately established), governmental prohibitions must al-

64. It might be objected here that the Constitution could be indifferent with respect to some matters, not favoring one solution or another. I would think, however, that in such a case judges should leave the ultimate decision to the political process. Thus, if without the seventh amendment the Constitution were to be interpreted as indifferent with respect to using the judge or the jury to find facts in civil cases, it would seem to me wrong (inconsistent with the Constitution) to constitutionalize the issue beyond the elements basic to the concept of a fair trial.



ways be justified in terms of the prohibited action's impact on third parties, other than its mere offensiveness, and that the prohibition on contraception is not justified on such grounds.

Neither of these arguments need persuade us (and there may be other, better ones), but there are obvious differences between them. The second argument begins with a basic idea that is claimed to underlie the whole constitutional arrangement, and appeals to (what it claims is) the fact that the privacy violated by a prohibition on contraceptives, while not mentioned explicitly in the document, is akin to a number of other rights explicitly guaranteed, and is itself essential to the maintenance of the proper limits on the state's natural propensity to shrink the individual's zone of personal freedom. The first argument, on the other hand, does not make any such elaborate connections to the aims that can legitimately be ascribed to the constitutional design, but rather assumes that the ninth amendment makes unconstitutional every governmental action which but for the amendment would not violate any constitutional principle, but is wrong for some otherwise important reasons.

Now, I believe that it would be quite dangerous to understand the ninth amendment in this way. The danger is not so much that judges will suddenly start inventing all kinds of rights that the society at large would not be prepared to recognize; the normal restraints on judicial willfulness would still continue to operate. The danger would rather be that the nature of the constitutional discourse would change quite dramatically. Instead of concentrating on legal, institutional, and political kinds of arguments, which are backed by technical legal expertise, political theory, and political philosophy, the language of constitutional law would gravitate toward morality and religion. Without overly indulging in the usual truisms about the absence of any special competence on the part of judges in matters of general morality, it is proper to keep in mind the grain of truth in these clichés, as well as the cost in terms of the legitimacy of having judges resolve general ethical controversies.

But there are also other very important reasons why such a shift of emphasis in constitutional law would be undesirable, and they have something to do with the possibility of relative dispassion and progress in matters of morality and in political science or constitutional theory. This judgment may in part be merely a reflection of my own prejudices, but I believe that it is easier, among contemporary Americans, to achieve a higher degree of consensus about the basic values underlying our political system and its institutional commitments than to come to an agreement in matters of morality, especially those concerning religiously inspired ethical convictions (such as may be at stake in the controversy

about abortion or contraceptives). Moreover, it may well be that the field of political theory is generally somewhat more conducive than ethics to disciplined thinking, cumulative theoretical elaboration, and the use of empirical information.<sup>65</sup> And most importantly, even if, objectively speaking, political theory is otherwise no less subject to disagreements than other areas, the special professional training and socialization of lawyers may produce a degree of consensus among them that would allow for a smoother functioning of the review process, and that would not exist if lawyers were invited to engage in disputes over purely moral questions.

### III. CONCLUSION

It is my view that much of the attention on the ninth amendment has been misplaced. Not because judicial review should be confined to crabbed literalism, but because there is no substitute for the hard work of deriving concrete decisions from the text of the Constitution and the political vision which it expresses. "Substantive due process" became a dirty word at some point and it was thought that giving it a new name would magically save the old trick. But substantive due process had been bad law only when it resulted in decisions that were perceived as insufficiently grounded in a legitimate constitutional discourse. At other times, when its outcomes had firmly resonated with what was thought to have been the political values of the document, substantive due process produced decisions of surprising durability.<sup>66</sup> Some people will be unavoidably disappointed by some Supreme Court decisions, regardless of whether the Court follows an activist or a passivist road—it is an illusion that leaving a homosexual open to criminal prosecution<sup>67</sup> is any less controversial than giving a woman a right to abortion.<sup>68</sup> Those who believe that the Constitution does not guarantee a basic individual immunity

65. This, of course, is a claim that many will dispute. But I think that recent advances in social choice theory, decision theory (which has also obvious applications in ethics, to be sure), and empirical political science have made the subject of political theory advance at a much brisker pace than ethics. While political theory is basically a domain of experts about which laymen are woefully uninformed, it is still by and large true, despite an increasing sophistication of philosophical arguments about the nature of ethical judgments, that a person's moral sense, his ability to work his way to the "right" moral solution, is basically unrelated to special education. It may be also worth noting that a number of theorists of judicial review, representing quite diverse segments on the political spectrum, but unified in their hostility to judicial subjectivism, have in fact advocated nonliteral judicial review based on the structure of the Constitution and a political theory of the institutions it established. Compare Bork, *supra* note 21 with J. ELY, *supra* note 29.

66. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

67. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

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

against the states' regulating decisions about procreation,<sup>69</sup> or that it does not give parents the right to send their children to private schools or have them instructed in foreign languages<sup>70</sup> will be no more persuaded by references to the ninth amendment than they were by the invocation of the due process clause. Those who can be persuaded that these decisions are rooted in the Constitution will remain so, without the amendment. And those in-between, I have argued, are simply confused.

69. *Id.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. *See* cases cited *supra* note 66. By giving these cases (as well as the others cited in the three preceding notes) as examples, I do not want to express an opinion as to whether they were rightly or wrongly decided.