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The Ninth Amendment: Guidepost to Fundamental Rights

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THE NINTH AMENDMENT: GUIDEPOST TO FUNDAMENTAL RIGHTS

> Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . .[1]
>
> THOMAS JEFFERSON

INTRODUCTION

In the long history of the United States Constitution and the Bill of Rights, the Supreme Court and the lower courts of competent jurisdiction, acting upon the grant of judicial power vested in them by virtue of Article III of the Constitution, have acted as the ultimate and supreme arbiters of its provisions.[2] In this capacity, the Supreme Court has been diligent in filling its many and varied provisions with substantive content.

However, in the almost two centuries of Constitutional adjudication, the Court has been virtually silent on one of the basic and fundamental charter members of this venerable document. Either it has been purposely ignored or it was ultimately forgotten soon after its inception in 1789. Consequently, the Ninth Amendment entered into this century virtually unscathed and utterly void of any attempt by the courts to define and apply it.

The Ninth Amendment simply states:

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

Surely, this Amendment must have had some meaning because the members of the First Congress had felt it imperative that it be included within the Bill of Rights. Mr. Chief Justice John Marshall indicated this when he stated that "it cannot be presumed that any clause in the constitution is intended to be without effect".[3] Therefore, if we presume, as Marshall stated generally, that the Ninth Amendment has

1. 4 JEFFERSON, WRITINGS 506 (Washington ed. 1859).

2. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 176 (1803). See, Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800). In Albeman v. Booth, 62 U.S. (21 How.) 506, 520 (1859), it was stated that "by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress."

3. Marbury v. Madison, *id.*, at 174. See, Ogden v. Saunders, 25 U.S. (12 Wheat.) 212 (1827) and Knowlton v. Moore, 178 U.S. 41 (1900).

meaning and effect, what is that effect and meaning that has evaded a proper judicial interpretation for almost two centuries of Constitutional history? Does it contain rights which have not been infringed upon to date; or is it a statement of policy; or, further, is it a rule of construction; or does it contain some other underlying meaning which has escaped proper judicial interpretation and application throughout the years?

Legal scholars and eminent jurists have been equally puzzled as to the ultimate meaning of this nebulous article.[4] This confusion has resulted in the present dilemma concerning the interpretation and true meaning of the Ninth Amendment. The purpose of this discussion will be an attempt to cast a little light upon the darkness that has surrounded this Amendment from its inception down through the present day and to define it and to show how the Ninth Amendment can be applied to the protection of fundamental rights.

In attempting to analyze and dissect this Amendment to determine its ultimate meaning, it is essential first to decipher what its drafters meant when they included it among the other amendments comprising the Bill of Rights. Historical precedent is then one of the paths to a further understanding as to why the drafters included it, what meaning they meant to convey, and what ultimate purpose they hoped to accomplish by its inclusion.

History and Background of the Ninth Amendment

In delving into the language and background of the Ninth Amend-

4. See generally the following: Jackson, The Supreme Court in the American System of Government 74-75 (1955) in which Mr. Justice Jackson stated that "the Ninth Amendment rights, which are not to be disturbed by the Federal Government are still a mystery to me"; Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 871 (1960) in which Mr. Justice Black stated that it was included merely to "emphasize the limited nature of the Federal Government"; Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627, 641 (1956) in which Professor Dunbar felt that it was simply a "principle of construction"; Dumbauld, The Bill of Rights and What It Means Today 63-65 (1st ed. 1957) in which the author felt that it was "a dead letter in practice" and, therefore "destitute of substantive effect"; Hamlin, *The Bill of Rights or the First Ten Amendments to the U.S. Constitution*, 68 Com. L. J. 233, 235-236 (1963) in which Mr. Justice Hamlin of the Supreme Court of Louisiana found that "(t)he Ninth Amendment is a basic statement of and protects the inherent natural rights of the individual"; and Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 Ind. L. J. 309, 320 (1936) in which the author found that "(i)t must be a positive declaration of the existing though unnamed rights, which may be vindicated under the authority of the Amendment".

ment, it should not be considered apart from the other nine amendments commonly referred to as the Bill of Rights. Rather it should be considered in its historical perspective among the other amendments drafted by James Madison and submitted to the First Congress. The original incentive for a bill of retained rights stemmed from the fact that the Constitution, as originally drafted, contained no such declaration but rather created a strong, central government of express and implied powers. Many of the states favored such a declaration but relented, upon adoption of the Constitution, until a later date when it could be amended to it.

However, upon ratification of the Constitution by the required number of states,[5] strong opposition to a Bill of Rights formed and those opponents were led by Alexander Hamilton of New York and James Wilson of Pennsylvania. They felt that it was not only unnecessary but that such inclusion could prove to be dangerous.[6]

Hamilton best stated the arguments for the opponents and restated Wilson's position[7] when he wrote:

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?[8]

Madison, for the proponents of a Bill of Rights, felt that the new government was one of delegated and enumerated powers, limited in extent. Thus, he did not feel it to be an absolute necessity. He was, however, agreeable to its inclusion in order to insure the whole-hearted support of all the states toward the new government and to further insure that, in certain areas, the federal government would be precluded from acting and in others, it would act only in a particular manner.[9]

5. In accordance with the U.S. Const. art. VII, which states that "(t)he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same", New Hampshire, on June 21, 1788, became the ninth state to ratify the Constitution.

6. 2 JEFFERSON, WORKS 329, 358. See also 3 JEFFERSON, *op. cit. supra* at 4, 13, and 101.

7. See, 2 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 436-437 (2d ed. 1836).

8. THE FEDERALIST No. 84 at 537 (Lodge ed. 1888) (Hamilton).

9. See generally, Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 792 (1959).

Upon ratification by the states of the Constitution in their respective conventions, several adopted certain resolutions to be affixed to their ratifications. These resolutions formed the basis for Madison when he drafted the amendments for submission to the First Congress. One of these resolutions, adopted initially by Virginia and New York,[10] formed the nucleus for what was later to become the Ninth Amendment. This resolution adopted by Virginia stated:

> 17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case or otherwise, as inserted merely for greater caution.[11]

In drafting these amendments, Madison wanted them to contain "guarantees of procedural decency and a declaration of the rights of conscience. What he further propose(d).... in the Ninth Amendment, was an affirmation of the principle that, as rights in the United States are not created by government, so they are not to be diminished by government, unless by the appropriate exercise of an express power". [12] Upon completion of these amendments, he introduced them into the First Congress for consideration.

In presenting his proposals to the Congress, Madison read the last part of his fourth proposition which was, in essence, the earlier proposal adopted by Virginia and New York[13] and which was, as it was stated previously, the embryo of the Ninth Amendment. It read:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge

10. 1 ELLIOT, *supra* note 7 at 327. It was stated that "those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution".

11. 3 ELLIOT, *supra* note 7 at 661.

12. Dunbar, *supra* note 4 at 637. See, Robertson v. Baldwin, 165 U.S. 275, 281 (1897) in which the Court stated: "The first ten amendments .... were not meant to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions".

13. *Supra* notes 10 and 11.

> the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[14]

Further along in his presentation, Madison proceeded to answer his critics, namely Hamilton and Wilson, when he stated:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.[15]

In essence, Madison answered his critics and also showed that his resolution would obviate the possibility of applying the maxim *expressio unius est exclusio alterius*[16] in interpreting the Bill of Rights. Thus, it appears that one of the paramount reasons for the inclusion of the Ninth Amendment into the Bill of Rights was to obviate the effect of this maxim.[17] However, the key to its ultimate meaning was never voiced by its author.

In summation to this cursory history of the Ninth Amendment and the Bill of Rights, it can be said that their adoption was a condition precedent to ratification by the states of the Constitution[18] and this

14. 1 ANNALS OF CONG. 435 (1789) (1789-1824).

15. *Id.*, at 439.

16. Rep. James Jackson of Georgia best defined this term when, in objecting to Madison's proposal for including a Bill of Rights into the Constitution, he stated: "There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the Government." *Id.*, at 442.

17. See, 2 STORY ON THE CONSTITUTION 651 (5th ed. 1891). Mr. Justice Story felt that the Ninth Amendment was included merely to obviate this maxim of law. In stating his position, he wrote:

> This clause was manifestly introduced to prevent any perverse or ingenius misapplication of the well-known maxim, that an affirmation in particular cases implied a negation in all others, and *e converso* that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood is perfectly sound and safe, but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies.

See also, 2 STORY, *op. cit. supra* at 626-627.

18. O'Neil v. Vermont, 144 U.S. 323, 370 (1892).

is verified by the wording of the preamble to the joint resolution of Congress submitting these amendments to the states.[19]

The adoption of the Bill of Rights, however, left many unanswered questions which had to await judicial interpretation. One such question concerned whether the first ten amendments granted the rights enumerated therein to the people or did it merely act as a shield in the protection of rights which the people already possessed? Judge Cooley answered this question when he held that bills of rights were meant to protect preexisting rights.[20] Assuming this to be true, what are these rights and how far can they be infringed upon by government before they come into conflict with the Constitution? Obviously, the rights protected are too numerous for compilation, but the courts have endeavored, since the inception of the Constitution, to fill its various provisions with substantive content and to delineate those rights reserved and protected from infringement. Judge Learned Hand, without delineating these rights, defined them as those "arising out of 'Natural Laws', inherent in the structure of any society or at least any civilized society".[21]

Consequently, it appears that the Bill of Rights was meant to protect natural, inherent, and fundamental rights. This is precisely how the courts have applied the first eight amendments. However, the courts have either forgotten or purposely ignored the Ninth Amendment. This might be due to the fact that the first eight amendments contain virtually all specific provisions whereas the Ninth Amendment is general and broad in scope. Surely the Amendment must have had some meaning pertinent to the protection of those fundamental rights but that meaning, contained only within the mind of Madison and the other drafters, has so far eluded a proper judicial interpretation and application.

19. 1 Stat. 97 (1789). "The conventions of a number of States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution."

20. In Weimer v. Bunbury, 30 Mich. 201, 214 (1874), Judge Cooley stated that "(t)he Bills of Rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation". See COOLEY, CONSTITUTIONAL LIMITATIONS 47 (5th ed. 1883).

21. L. HAND, THE BILL OF RIGHTS 2 (1958).

One view has been that the Ninth Amendment was included because the drafters felt that it was impossible to supply every detail of our national existence. Therefore, any rights not included among the first eight amendments were to be found in the Ninth. These rights were not excluded because they were different but because words were considered inadequate to express all the rights found in a free society.[22]

Madison, himself, expressed a similar position; *i.e.*, that words were incapable of expressing complex ideas with complete accuracy, when he stated in *The Federalist No. 37* that "no language is so copious as to supply words and phrases for every complex idea".[23] It appears then that "the fear that certain rights may have been omitted, and that the vagaries of language might adversely affect other rights intended to be included, led Madison to the Ninth Amendment".[24] From this, it might be deduced that Madison meant to protect all rights within the first eight amendments but due to the fear that the words used might not be sufficient to express the desired meaning, he inserted the Ninth Amendment to serve as a "declaration, should the need for it arise, that the people had other rights than those enumerated in the first eight amendments"[25] to the Constitution.

With this idea firmly in mind, it would next be imperative to examine the few opinions handed down by the courts during the almost two centuries since its adoption to determine their interpretation of it and what significance, if any, they have found contained therein.

Judicial Interpretation of the Ninth Amendment

Early in the 19th Century, the Supreme Court, without specifically ruling upon the Ninth Amendment, handed down their momentous decision in *Barron v. Baltimore*[26] in which they stated that the first ten amendments were applicable only as to the federal government and

22. Redlich, *Are There Certain Rights. . . . Retained By The People?*, 37 N.Y.U.L. Rev. 787, 810-811 (1962). See Kelsey, *supra* note 4 at 320.

23. The Federalist No. 37 at 236 (Cooke ed. 1961) (Madison).

24. Redlich, *supra* note 22 at 798.

25. See generally, Rogge, *supra* note 9 at 793.

26. 32 U.S. (7 Pet.) 242, 250 (1833). This was a claim by an individual that city officials had taken his property for a public use without just compensation in violation of the Fifth Amendment. Mr. Chief Justice John Marshall, speaking for the Court, and referring to the first ten amendments, ruled: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

did not act as restraints upon the state governments. In a later case[27] during the same term, the Supreme Court held that in light of the earlier *Barron* case, the Ninth Amendment could not extend its protection as a restraint upon the states. Thus, early in its history, the Ninth Amendment lost what little vitality it might have had by being restricted in use only to the federal government and not as a limitation upon the states. The Court, however, did not shed any light on the possible interpretation of this amendment or what rights were to be protected by it.

Later in the 19th Century, without ruling directly upon it, the Court in *Loan Association v. Topeka*[28] viewed the Amendment as speaking of a government of limited and defined powers and "implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." [29] Without specifically defining it, the Court seemed to be holding that the Ninth Amendment was not only a statement of policy but also an acknowledgment that certain individual rights, fundamental in a free society, could be exonerated by virtue of this Amendment.

By and large, however, the courts were virtually silent on the implications of the Ninth Amendment throughout all of the 19th Century and the early part of the 20th Century. Then, as the power of government began to expand into the sphere of what had previously been considered to be the exclusive domain of private individuals, a few litigants cited the Ninth Amendment to support their claim that government had encroached upon those rights which were meant to be "retained by the people". The government countered by stating that when an implied right is advanced, one must look to see whether there is an express or implied power given by the Constitution to the federal government to do the alleged act. If there is, then the government should prevail.

This position was best stated by Chief Justice Hughes in *Ashwander v. Tennessee Valley Authority*[30] when he said in reply to the plaintiff's contention that the government, by engaging in the business of selling

27. Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 468 (1833). See, *e.g.*, Ohio v. Dollison, 194 U.S. 445 (1904); Brown v. New Jersey, 175 U.S. 172 (1899); Elvaine v. Brush, 142 U.S. 155 (1891); and Spies v. Illinois, 123 U.S. 131 (1887).

28. 87 U.S. (20 Wall.) 655 (1874).

29. *Id.*, at 662-663. See generally, the language of Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

30. 297 U.S. 288 (1936).

electrical power in competition with private concerns, was encroaching upon a retained right:

> To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. And the Ninth Amendment, in insuring the maintenance of the rights retained by the people, does not withdraw the rights which are expressly granted to the Federal Government.[31]

At this point, the courts had still failed to either apply the Ninth Amendment or to show when and how it might be appropriate to invoke it. In fact, the courts seemed to be taking a negative approach toward the amendment and to show only what it did not protect. In 1939, for instance, a district court held that the right of asylum[32] was not one of the rights retained by the people. Also, the right of an enlisted man to be tried before a court martial composed of enlisted men was not a right protected by this Amendment.[33] The absolute use of the mails was also held not to be one of those rights retained.[34]

Litigation contesting the extent of federal regulation has also caused several litigants to cite the Ninth Amendment in support of their claim of federal encroachment upon their "retained" rights.[35] However, the courts have always managed to parry this thrust by simply pointing to

31. *Id.*, at 330-331. See also, United States v. Gearhart, 7 F. Supp. 712, 716 (D.C. Colorado 1934), *appeal dismissed,* 77 F. 2d 1017 (10th Cir. 1935) and Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939).

32. *Ex parte* Kurth, 28 F. Supp. 258 (D.C.S.D. Cal.), *appeal dismissed sub nom.* Kurth v. Carr, 106 F. 2d 1003 (9th Cir. 1939).

33. Whelchel v. McDonald, 176 F.2d 260 (5th Cir. 1949), *aff'd,* 340 U.S. 122, *rehearing denied,* 340 U.S. 923 (1950).

34. Roth v. United States, 354 U.S. 476, *rehearing denied,* 355 U.S. 852 (1957). The Court held, in ruling upon the constitutionality of a federal obscenity statute which punished the using of the mails to send obscene material, that obscenity is not within the area of constitutionally protected press and speech. Therefore, the statute does not unconstitutionally encroach upon the rights and powers reserved by the Ninth and Tenth Amendments to the states and to the people to punish speech and press where it is found to be offensive to decency and morality. The statute, in question, was found to be a proper exercise of the postal power delegated to Congress by U.S. Const. art. I, sec. 8.

35. Woods v. Miller Co., 333 U.S. 138, 144 (1948). The Court found that a continuance of wartime rent controls was necessary even, for a short time, after the war was over until the economy could be stabilized on a peacetime basis. Thus, this was a proper exercise of the war power delegated by the U.S. Const. art. I, sec. 8 and did not infringe upon Ninth and Tenth Amendment rights. See also, Commonwealth and Southern Corp. v. SEC, 134 F. 2d 747 (3rd Cir. 1943) (SEC order directing a change in corporate structure was a valid exercise of the commerce power and did not violate the Ninth Amendment).

an appropriate power, either express or implied, which was delegated to the federal government by the Constitution.

Consequently, until 1947, the courts had not successfully applied the Ninth Amendment in the protection of one fundamental right. At this point, 158 years after the adoption of this Amendment, it remained virtually undisturbed from its original state and utterly void of substantive content. But in 1947, the Supreme Court in *United Public Workers v. Mitchell*[36] found that the Ninth Amendment protected the fundamental and inherent "right of a citizen to act as a party official or worker to further his own political views".[37] However, in this case, in which appellants were contesting the constitutionality of the Hatch Act's prohibitions of political activity by government employees, the Court admitted that these were fundamental rights retained by the people under the Ninth Amendment but countered by showing that here, also, was a valid exercise by the Federal Government of a delegated power and that its was therefore justified.[38] As a result, from the inception of the Ninth Amendment through 1947, the only right which had been judicially recognized was the right to engage in political activity and that right was subject to reasonable regulation by Congress.

Then, in 1965, Mr. Justice Goldberg, in concurring with the Supreme Court's decision in *Griswold v. Connecticut*[39] in which the

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For some interesting state cases in this area, see generally, Kape v. Home Bank & Trust Co., 370 Ill. 170, 18 N.E. 2d 170 (1938) (Federal Bankruptcy power is not limited by the Ninth Amendment); Gernatt v. Huiet, 192 Ga. 729, 16 S.E.2d 587 (1941) (Georgia Unemployment Compensation Act did not violate this Amendment); and State v. Sprague, 105 New Hamp. 355, 200 A.2d 206 (1964) (The Ninth Amendment does not preclude a state under its police power from implementing racial equality).

36. 330 U.S. 75 (1947).

37. *Id.*, at 94, 95-96.

38. *Id.*, at 95-96. The Court stated: "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes . . . Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." See also, United States v. Painters Union, 79 F. Supp. 516 (D.C. Conn. 1948, *rev'd on other grounds*, 172 F. 2d 854 (2d Cir. 1949) (The Ninth Amendment doesn't protect labor unions seeking to engage in political activity which is forbidden by statute).

For an interesting state court decision, see generally, Colorado Anti-Discrimination Comm. v. Case, 151 Colo. 235, 380 P.2d 34 (1962) in which the court recognized, as one of the unenumerated rights protected by the Ninth Amendment, the right of a man to acquire a home for himself and his dependents.

39. 85 S. Ct. 1678 (1965).

Court declared Connecticut's birth-control law unconstitutional, found that the right to marital privacy was one of the fundamental and basic rights "retained by the people" within the meaning of the Ninth Amendment. However, he reached this result by a far different interpretation than had ever been used previous to this time concerning the Amendment when he stated:

> (T)he Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.[40]

Thus, Mr. Justice Goldberg is not holding that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, he feels that it "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be exhausted".[41] In effect, he is saying that these fundamental, unenumerated rights should not be denied the appropriate safeguards simply because they were not expressly provided for in the first eight amendments. In fact, in this instance, he simply used the Ninth Amendment to show that the intent was present to protect the right of marital privacy and then declared that, since it was meant to be protected, a state could not encroach upon this right without depriving the individual of his liberty without the "due process of law" guaranteed by the Fourteenth Amendment to the Constitution.

Therefore, it appears from this last decision that a proper interpretation of the Ninth Amendment is that it is a statement of intent; an intent that these fundamental, inherent, but unenumerated rights not specifically listed should nevertheless be protected.

However, this in turn poses two basic questions. First, what kind of rights are these unenumerated rights; and, second, in what provision in the first eight amendments should they find appropriate protection if the Ninth Amendment offers none?

To answer the first question, it must be first determined as to what kind of rights the first eight amendments were intended to protect. Mr. Justice Brown in *Brown v. Walker*[42] defined them as follows:

40. *Id.*, at 1686.
41. *Ibid.*
42. 161 U.S. 591 (1896).

> (T)he object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice.[43]

Therefore, these amendments were intended to protect natural or fundamental rights. Applying to this concept the *ejusdem generis* rule,[44] the only conclusion to be reached is that the Ninth Amendment was meant to protect those fundamental or natural rights not specifically enumerated in the first eight amendments.[45]

In answer to the second question as to where these rights should be protected if the Ninth Amendment only shows an intent to protect them, a closer look at the first eight amendments will show that all those amendments contain specific provisions. But to protect fundamental unenumerated rights, a general provision applying to this class of rights must be found. In the Fifth Amendment, the only possible phrase which has a general import is the "due process provision," for there is none other that could cover this general class of fundamental rights. The Fourteenth Amendment contains a similar provision which applies to the states whereas the Fifth Amendment applies strictly to the Federal Government.

It was stated earlier that, by interpretation, it appears that Madison meant, when he drafted the Bill of Rights, that all fundamental and inherent rights were to be protected by virtue of the first eight amendments. If this is so, then it would follow that the only logical provision for the protection of those unenumerated rights would be the "due process of law" provisions of the Fifth and later the Fourteenth Amendments. However, before this conclusion is reached, it would be appropriate to look back to the history and judicial interpretation of this historic phrase.

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43. *Id.*, at 600.

44. "In the construction of laws, wills, and other instruments, the '*ejusdem generis rule*' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." BLACK, LAW DICTIONARY (4th ed. 1957).

45. For a brief discussion of the Ninth Amendment, see generally, Hamlin, *The Bill of Rights or the First Ten Amendments to the U. S. Constitution,* 68 COM. L. J. 233, 235-236 (1963).

THE NINTH AMENDMENT AND "DUE PROCESS OF LAW"

The definitive and substantive term "due process of law" is traceable back to that ancient English declaration of rights, Magna Carta. However, it did not appear in its present form in that venerable document but rather as another general phrase, "law of the land." Chapter 39 of Magna Carta stated the guarantee in its entirety as follows:

> No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.[46]

Although at that time it was meant as a procedural safeguard, it began immediately to expand in scope and importance. In 1354, this protection was reiterated in the Statute of Westminster of the Liberties of London[47] but an important and far-reaching substitution was made in which the phrase "due process of the law" replaced the older and more ambiguous phrase "law of the land." We are doubtless indebted to this misconception between the two phrases for the cross-fertilization of them made possible a hybrid concept, which, under the skillful nurturing of Lord Coke, gathered so much of the concepts of liberty and order that it became the simplest and most far-reaching of constitutional phrases.[48] Thus, side by side with the idea of the common law as an element in the English Constitution, there arose the conception of natural law and natural rights.

Lord Coke furthered this theory by pressing the idea of judicial control through the interpretation of Magna Carta. He laid the foundations for this idea in *Calvin's Case*[49] and stated it more clearly the following year in *Dr. Bonham's Case*.[50] In spite of his decisions, how-

46. MCKECHNIE, MAGNA CARTA 375 (Glascow 1914).

47. The Statute of Westminster of the Liberties of London, 1354, 28 Edw. 3, c. 3. "Item, that no man of what estate or condition that he be, shall be put out of Land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."

48. For a good discussion on this point, see generally, HANNIS TAYLOR, DUE PROCESS OF LAW 8-12 (Chicago 1917).

49. 7 Co. Rep. 1 (1608). Coke's decision was to the effect that Parliament might not take away certain fundamental rights of a citizen. If it did, then it was the duty of the King to step in and aid the injured party.

50. 8 Co. Rep. 114a (1610). Coke, in his opinion for the court, stated: "And it appears in our books that in many cases the common law will controul Acts of Parliament, and sometimes adjudge them utterly void, for when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such act to be void."

ever, by the middle of the 18th Century, it was firmly established that Parliament was supreme and the courts, in contrast to Coke's philosophy, had no power of judicial review over Acts of Parliament.[51] English opinion was not unanimously behind this theory and Coke's philosophy, which stressed the importance of "due process of law" and its fundamental character in the English Constitution as a norm for the determination of the validity of statutes, persisted and continued to influence opinion in the subject.

It was probably this original feeling on the part of the Commons that led to a transcription of Chapter 39 of Magna Carta into the Petition of Right[52] in 1627 rather than a mere paraphrase of it. It was considered that this section protected the people from arbitrary action of any kind, while others thought that it summed up the rights of Englishmen with regard to life, liberty and property.

This thought, concerning the meaning of "due process of law," also permeated the English Colonies in America through two channels. In the first place, many colonists ventured to England to study in the Inns of Court of London. There they studied the old classics of the law and it was but natural that they should gain a reverence for Coke and his school of thought. Therefore Coke had a great influence on legal thought in the Colonies prior to the Revolution. Also, the due process provision (Chapter 39) of Magna Carta, in the century and three-quarters prior to the Revolution, had been cited and its protection invoked more often than any other provision of the document. It becomes evident, therefore, that the colonists would view "due process of law" as a guarantee which had a wide, varied, and indefinite scope. Since there had never been a serious attempt to define it, it was note-

51. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 91 (17th ed. Christian 1830).

52. Petition of Right, 1627, 3 Car. 1, c. 1, s. 3. "And where alsoe by the Statute called the Great Charter of the liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawful judgment of his peeres or by the law of the land."

In section 4 of this Act, 28 Edw. 3, c. 3, *supra* note 47, was also included in which it stated: "And in the eight and twentieth yeere of the raigne of King Edward the Third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his land or tenements nor taken nor imprisoned nor disinherited nor put to death without being brought to aunswere by due processe of lawe."

The inclusion of these two provisions, one following the other, gave impetus to those contending that the two clauses "law of the land" and "due process of law" were equivalents of one another.

worthy that they should seize upon it. Although it seems that they did not realize all that this provision encompassed, it is certain that they realized that it had a more far-reaching aspect than merely guaranteeing proper procedure in criminal cases.[53]

In conclusion, in reviewing the importance of this provision in our Constitutional jurisprudence, it matters little whether the colonists were historically correct in their interpretation of it. The important consideration in the development of "due process of law" is not so much its original meaning but what the colonists considered the content of the phrase to be for it was this meaning which they transferred into the first state constitutions[54] and the Federal Constitution in the Fifth Amendment[55] and later into the Fourteenth Amendment.[56]

In adopting the "due process" provision into these two amendments, the drafters also incorporated into it the natural rights of life, liberty, and property which Blackstone considered to be the fundamental rights of Englishmen.[57] Thus, it appears that the drafters intended that the general scope of this provision was to insure to every person those fundamental and inalienable rights of life, liberty, and property, which are inherent in every man, and to protect all men against the arbitrary exercise of governmental powers in violation and disregard of established principles of justice.

It has also been said that the "due process" provision bore a close relationship to the doctrine of natural rights which was embodied

53. See generally, MOTT, DUE PROCESS OF LAW 87-90, 111, 123 (1926).

54. Virginia was the first colony to draft a Bill of Rights. It was drafted by George Mason and adopted by the Virginia Convention on June 12, 1776. The "law of the land" provision was included as a postscript to Article VIII of this document.

55. U.S. Const. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

56. U.S. Const. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

57. 1 BLACKSTONE, *supra* note 51 at 129-144. See also, Kelsey, *The Ninth Amendment of the Federal Constitution,* 11 IND. L. J. 309, 313 (1936).

in the Declaration of Independence.[58] This same generalization has also been stated concerning the Ninth Amendment.[59] Thus, it begins to appear that the same kind and class of rights inferred in the Ninth Amendment were also meant to be protected under the "due process of law" provisions of the Constitution.

At this point it would be appropriate to turn to the courts to examine the manner in which they have defined and applied this provision to the protection of fundamental, natural and unenumerated rights. Possibly the most famous definition of "due process" was given by Daniel Webster when, in the *Dartmouth College*[60] case, he correlated it to the older "law of the land" provision and stated:

> By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.[61]

It appears then that this provision, meant to secure person and property from arbitrary action, should be liberally construed.[62] Therefore, the courts have found it necessary to expand the "liberty" provision contained in the amendments to include many of the fundamental, unenumerated rights which were, as Mr. Justice Cardozo stated, "implicit in the concept of ordered liberty". [63]

Liberty was best defined when in *Allgeyer v. Louisiana*,[64] it was held:

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58. MOTT, *supra* note 53, at 273.

59. Hamlin, *The Bill of Rights or the First Ten Amendments to the U. S. Constitution*, 68 COM. L. J. 233, 236 (1963). Mr. Justice Hamlin stated that "(t)he Declaration of Independence mentions rights to which the laws of nature and nature's God entitle all men, among these being life, liberty, and the pursuit of happiness. The Declaration of Independence was a forerunner of the Ninth Amendment, and when it used the words "nature's God" and "among these", it purposely did not enumerate the rights. It was careful to state that liberties and human rights were not man made, and could not be enumerated."

60. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

61. This statement was quoted with approval in Hovey v. Elliot, 167 U.S. 409, 418 (1897).

62. See the language of Mr. Justice Bradley in Boyd v. United States, 116 U.S. 616, 635 (1886). See generally, Hurtado v. California, 110 U.S. 516, 529 (1884); Holden v. Hardy, 169 U.S. 366, 389 (1898); and Wolf v. Colorado, 338 U.S. 25 (1949), *rev'd on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961).

63. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

64. 165 U.S. 578 (1897).

> The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[65]

In light of this historical and judicial precedent, one would naturally feel that the "due process of law" provisions were intended to protect basic, inherent, and fundamental rights. In relation to the Fifth Amendment provision, the courts have so held. However, in relation to the Fourteenth Amendment provision, a massive judicial conflict has resulted. This was pointed out in *Adamson v. California*[66] in which Mr. Justice Frankfurter, concurring with the majority, advocated a flexible standard of due process in the protection of individual liberties while Mr. Justice Black, speaking with the minority, advocated a belief that the Fourteenth Amendment was intended to incorporate the Bill of Rights and make them applicable against the states. The majority, however, have continued to prevail and, since that time, have held that the Fourteenth Amendment absorbs and applies to the States those specific protections of the first eight amendments which express fundamental personal rights.[67]

As far as the fundamental and basic rights of individuals which were not specifically enumerated, the Supreme Court, in adopting a more flexible standard of "due process," has been equally active in their protection. In a number of decisions, the Court has recognized the

65. *Id.*, at 589. See, *e.g.*, New State Ice Co. v. Liebman, 285 U.S. 262 (1932) and Grosjean v. American Press Co., 297 U.S. 233 (1936).

66. 332 U.S. 46 (1947). See also, Palko v. Connecticut, *supra* note 63; Reynolds v. Cochran, 365 U.S. 525 (1961); McNeal v. Culver, 365 U.S. 109 (1961); and Rochin v. California, 342 U.S. 165 (1952).

67. See, Engel v. Vitale, 370 U.S. 421 (1962) and Wood v. Georgia, 370 U.S. 375 (1962) (First Amendment); Wolf v. Colorado, 338 U.S. 25 (1949), *rev'd on other grounds*, Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897), Malloy v. Hogan, 378 U.S. 1. (1964) (Fifth Amendment); Snyder v. Massachusetts, 291 U.S. 97 (1934), Gideon v. Wainwright, 372 U.S. 335 (1963), and Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment); and Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment).

right of an individual to be let alone,[68] the right to engage in political activity and the right to political privacy,[69] the right to travel,[70] the right to educate one's children,[71] the right to marry, establish a home, and bring up children,[72] the freedom of inquiry, thought, and to teach freely,[73] and the right to marital privacy.[74] In other words, as Mr. Justice Cardozo stated many years ago, the due process clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental". [75]

At this point, it would be well to turn back to the Ninth Amendment for a closer analysis. Earlier in this discussion, it was interpreted that Madison intended for all rights both procedural and substantive, to be protected by the first eight amendments. As it was shown previously, this is in effect what the courts have done. Through judicial interpretation, it was shown that the Ninth Amendment was meant to be a statement of intent; an intention that those fundamental, unenumerated rights were nevertheless meant to be protected and also to show that the enumerated rights were not meant to exclude others nor to be exhaustive. Then, it was shown that since all rights were meant to be protected, there had to be some general provision within the first eight amendments which might possibly serve this end. By close analysis, the "due process of law" clause was found to be such a provision and this was supported by historical analysis and judicial precedent. It was also discovered that the courts had been protecting fundamental but unenumerated rights by virtue of this clause. In ad-

68. Olmstead v. United States, 277 U.S. 438 (1928).

69. Sweezy v. New Hampshire, 354 U.S. 234 (1957), *reversing*, 121 A.2d 783 (1956). See also, United Public Workers, CIO v. Mitchell, 330 U.S. 75 (1947).

70. See, Williams v. Fears, 179 U.S. 270 (1900); Edwards v. California, 314 U.S. 160 (1941); Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116, 125-126 (1958); and Aptheker v. Secretary of State, 378 U.S. 505 (1964).

71. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

72. Meyer v. State of Nebraska, 262 U.S. 390, 399 (1922). See, the opinion of Mr. Justice McReynolds in defining the liberty guaranteed under the due process clause. See also, Skinner v. Oklahoma, 316 U.S. 535 (1942).

73. Wieman v. Updegraff, 344 U.S. 183 (1952).

74. Griswold v. Connecticut, 85 S. Ct. 1678 (1965). See also, Mr. Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497, 542 (1961).

75. Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105 (1934).

For an interesting proposal concerning the invalidation of compulsory unionism on the grounds that the right to work free from the compulsion of joining a union is a basic and fundamental right, see generally, Everett McKinley Dirksen, *Individual Freedom Versus Compulsory Unionism: A Constitutional Problem*, 15 DEPAUL L. REV. 259 (1966).

dition, it was determined that both the Ninth Amendment and the "due process" clause were found to contain that doctrine of natural rights which was embodied in the Declaration of Independence.[76]

In looking at the Ninth Amendment in its entirety, it simply states:

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

When the words "shall not be construed" are analyzed, it is apparent that the Amendment was directed specifically to the courts for long ago it was held that the Supreme Court was the ultimate and supreme arbiter of the Constitution and upon that Court lay the task of interpreting or construing it.[77] In further dissecting this Amendment, Mr. Justice Black stated that (t)he use of the words, 'the people' in both these Amendments (Ninth and Tenth) strongly emphasizes the desire of the Framers to protect individual liberty".[78] Thus, the Ninth Amendment was a direction to the judiciary to use great latitude and discretion in the protection of individual liberty and not simply to construe the Constitution strictly in favor of those rights specifically enumerated.

Conclusion

In conclusion, it appears that the Ninth Amendment was meant to possess two primary functions. First, it was to be a statement of intent; an intention that the enumeration of certain rights in the first eight amendments was not to be exhaustive but that those fundamenal though unenumerated rights were nevertheless meant to be protected. Secondly, it was meant to be a statement of direction; directing the judiciary back to the "due process of law" clause of the Fifth Amendment and later toward the same clause in the Fourteenth Amendment and imploring them for a broad interpretation of that clause in the protection of those fundamental, unenumerated rights inherent in all individuals in a free society. In other words, it was to serve as a guidepost toward that provision which was specifically and historically conceived and purposely included by the framers for the protection of the individual from arbitrary and unreasonable action by government. Therefore, to advocate a strict interpretation of the Constitution and the several amendments and to limit its protection only to those rights

76. *Supra* notes 58 and 59.

77. Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

78. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865, 871 (1960).

specifically enumerated would be to completely disregard and ignore the Ninth Amendment and to misinterpret completely the broad protection afforded by "due process of law."

However, this is not to say that the Ninth Amendment contains an independent source of rights which should be applied against the states by virtue of the Fourteenth Amendment or that it should be applied in toto against the Federal Government. It merely gives to the judiciary direction toward the provision designed for the protection of fundamental rights.

Therefore, it is completely unnecessary for the court to bend or stretch a specific provision of the Constitution or Bill of Rights to make it fit a particular fundamental right which was not specifically enumerated within.[79] The "due process" clause was historically conceived to give solid recognition to this myriad of rights which it would be virtually impossible to ever incorporate into any one document. As Mr. Justice Harland has so aptly stated it:

> While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause . . . stands, in my opinion, on its own bottom.[80]

This, in summary, is the Ninth Amendment, both in historical and judicial perspective. Interpreted many ways and cited very little, it has been largely forgotten[81] in the almost two centuries of our Constitutional history. However, inadvertently, the courts have followed its mandate and direction, although not consciously relying upon it, and it is hopefully predicted that, in the future, whenever the courts encounter an unreasonable and arbitrary infringement of a fundamental, inherent, and unenumerated right by government whether it be federal or state, they will look to the Ninth Amendment as a guidepost toward the constitutional provision historically conceived for the protection of the fundamental rights of every individual.

David K. Sutelan

79. Griswold v. Connecticut, *supra* note 74, at 1681. See generally, Mr. Justice Douglas' opinion for the Court in which he states that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

80. *Id.*, at 1690. See also, Mr. Justice Harlan's dissenting opinion in Poe v. Ullman, 367 U.S. 497, 522 (1961).

81. See generally, PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).