The Lost History of the Ninth Amendment

KURT T. LASH

OXFORD
UNIVERSITY PRESS

Contents

Preface: Bad luck

JAMES MADISON MUST HAVE BEEN EXHAUSTED when he sat down to read Hardin Burnley's letter about the goings-on in the Virginia Assembly. It was the fall of 1789. In the previous two years, Madison had helped draft and shepherd through ratification what currently stands as the longest-functioning constitution in the history of the world. Ratification had not been easy, and the vote in the states had been close. The so-called Anti-Federalists had been incensed by what they saw as a dangerous intrusion on the sovereignty of the states, and they had lobbied hard for a second constitutional convention and the adoption of a bill of rights. Although Anti-Federalists had publicly insisted that a new convention was necessary to secure the rights of the people, Madison suspected that their true motivation was to create an opportunity for reshaping the entire Constitution—a scenario that would almost certainly doom the Federalists' effort to establish a strong federal government. Such a doom, of course, would suit the Anti-Federalists just fine, for this would preserve the independent status of the states under the Articles of Confederation.

Madison and the Federalists soon realized that their failure to include a bill of rights in the Constitution was a tactical mistake. To deprive the Anti-Federalists of their most persuasive argument for a new convention, Federalists promised that the newly established federal Congress would add a bill of rights as one of its first official actions. That promise proved to be just enough to turn the tide in favor of the Constitution. True to his word, in the spring of 1789, Madison submitted a draft bill of rights to the House of Representatives and, only a few months later, Congress submitted a list of twelve suggested amendments to the states for their approval. Eight states of a required nine quickly ratified ten of the proposed amendments, leaving the fate of the Bill of Rights to James Madison's home state, Virginia. Although the state was a hotbed of Anti-Federalist sentiment, Madison had good reason to believe that Virginia's ratification would soon follow. Edmund Randolph, the former governor of Virginia, was well respected by all sides

and, thankfully, Randolph supported the proposed Constitution. Federalists could count on him to support the proposed Bill of Rights in order to avoid a second constitutional convention and calamity.

Thus, when Madison sat down to read Burnley's letter, he may have been exhausted, but he probably expected good news from the Virginia assemblyman. If so, his expectations were dashed. A controversy had erupted in the Virginia House of Delegates regarding the meaning of one of the proposed amendments—the clause we now know as the Ninth Amendment. Capitalizing on these objections, Anti-Federalists had quickly raised additional concerns about other provisions in the proposed Bill of Rights, and the entire ratification effort, which until then had seemed assured, ground to a halt. Ordinarily, Madison would have counted on Governor Randolph to help put out any political brushfires. To Madison's dismay, however, Burnley reported that Governor Randolph himself had raised the objection to the Ninth Amendment. As Madison wrote (in an understatement) to President George Washington, Edmund Randolph's objection was "unlucky." It was indeed. Randolph's concerns about the Ninth Amendment ended up delaying the country's ratification of the Bill of Rights for two years. It was not until after Madison delivered a major public speech in which he discussed the meaning and application of the Ninth Amendment that the Virginia Assembly overcame its objections and ratified the Bill of Rights.

And so it was that confusion and concern about the Ninth Amendment temporarily endangered the adoption of one of the most beloved texts in our nation's history. This inauspicious birth of the Ninth Amendment proved telling, for time and again over the next two hundred years, the amendment would be the recipient of bad luck. The victim of historical accident, mistaken identity, dubious advocates, and misplaced documents, the Ninth Amendment today is viewed as an obscure provision in the Constitution that lacks both serious historical application and currently enforceable meaning. Recovering the lost history of the Ninth Amendment not only reveals a robust history, but also points the way toward restoring the Ninth Amendment's original role as a critical—and judicially enforceable—aspect of the Bill of Rights.

As this book explores at length, there are a number of reasons why the original meaning and application of the Ninth Amendment fell into darkness. One of the important themes running through the coming chapters involves understanding how judicial and scholarly assumptions about the original Bill of Rights has affected the interpretation and even the *collection* of historical evidence regarding the Ninth Amendment. The primary reason

that much of this history has been lost, however, is probably a simple quirk of history. When it was first added to the Constitution, what we call the Ninth Amendment was known as the "eleventh article of amendment," reflecting the early practice of referring to provisions in the Bill of Rights according to their placement on an original list of *twelve* proposed amendments. Our Ninth Amendment was the *eleventh* proposed amendment on that original list, and it was conventional to refer to the "eleventh article of amendment" during the ratification debates and for decades afterward. Over time, when it became clear that only ten amendments would be immediately ratified, the convention changed and the eleventh proposed amendment became known as the "Ninth Amendment."

Not generally recognized in constitutional scholarship until relatively recently, even once legal historians became aware of this early convention, it remained exquisitely difficult to tease out historical references to the "eleventh amendment" because of the founding generation's rapid adoption of the *actual* Eleventh Amendment. For example, an electronic search for the term "eleventh amendment" produces a haystack of references to the Eleventh Amendment and no obvious way to separate out the needles of evidence involving the historical Ninth Amendment.

Largely because of this obscured early history, Ninth Amendment scholars have long assumed that the Supreme Court ignored the Ninth prior to the twentieth century. This is not so. The founding generation had not passed away before the Court first grappled with the meaning of the clause. Early Supreme Court justice Joseph Story described the Ninth Amendment in terms closely following those of Madison. Unfortunately, Justice Story also referred to the Ninth as the "eleventh amendment." Thus, despite the fact that Story's discussion of the Ninth was quoted for many years by the best lawyers in the country in arguments before the Supreme Court, as well as by other Supreme Court justices, this early discourse on the Ninth Amendment eventually fell into obscurity. So perplexed were later judges by Story's reference to the "eleventh amendment" that they actually *changed the quote*, replacing the "eleventh amendment" with the "Tenth." As a result, Justice Story's early discussion of the Ninth Amendment was effectively erased. Bad luck.

Had the "eleventh amendment" been discussed in a Supreme Court case of historic significance, lawyers and historians would have had ample opportunity to study and recognize the confusing reference long before now. Unfortunately, early references to the "eleventh amendment" took place during a period of our constitutional history dominated by the opinions of Chief Justice John Marshall. More bad luck. Originally, the Ninth Amendment

was understood and applied as a rule of construction limiting the scope of federal power. This made the Ninth Amendment persona non grata to Chief Justice Marshall, who sought to establish a broad reading of federal authority. Despite being prodded by advocates before the Court, Marshall never once mentioned the Ninth Amendment (in any manner) during his entire career on the bench—a silence all the more effective given Marshall's practice of issuing a single opinion for the entire Court. Even under Marshall, however, the Ninth Amendment came tantalizingly close to immortality. In the famous case *Gibbons v. Ogden*, the defendants expressly raised Ninth Amendment claims to state autonomy—claims that would have been viewed favorably by a newly appointed justice to the Supreme Court who viewed the Ninth Amendment as an important declaration of limited federal power. Justice Smith Thompson, moreover, was willing to issue his own separate opinions. Had he done so in a case as famous as *Gibbons v. Ogden*, any reference to the "eleventh amendment" by now would have been studied and understood by generations of lawyers. Unfortunately, although Justice Thompson was scheduled to join the Court for arguments in *Gibbons*, the unexpected death of his daughter prevented him from attending oral arguments, and he authored no opinion.

There is much more. Although ignored by the Marshall Court, the Ninth Amendment flourished in later nineteenth-century jurisprudence. It had the misfortune, however, of being consistently paired with the Tenth Amendment as one of the twin guarantors of limited federal power. Thus, the Ninth shared the same fate as the Tenth in the constitutional upheaval known as the New Deal revolution, when both amendments were dismissed as mere truisms and the Court abandoned, at least for a while, the idea that federalism constrained the interpreted scope of federal power. By the time Justice Goldberg dusted off the Ninth Amendment in *Griswold v. Connecticut*, 150 years of federalist jurisprudence involving the Ninth Amendment had fallen into shadow, along with the rest of the pre–New Deal analysis of federal power. As a result, the Ninth appeared to have washed up on the shore of the Supreme Court out of nowhere in 1965, having drifted at sea since its enactment in 1791.

There is more to this tale than simply a series of historical accidents and modern misunderstanding. The fate of the Ninth Amendment is inextricably bound to the fate of federalism in the American system of government. Uncovering the lost history of the Ninth simultaneously uncovers key episodes in the history of federal-state relations. Although modern constitutional scholars often view federalist constraints on national power as a matter of judicial preference and political policy, the traditional understanding and

application of the Ninth Amendment suggests that until very recently federalism was treated as a constitutional command—and one with specific textual referents. The Tenth Amendment may indeed be no more than a truism, but the Ninth expressly demands that the enumerated restrictions on federal power found in the Bill of Rights not be treated as an exhaustive list. Historically, courts read these two amendments as imposing a dual constraint on the scope of federal authority to interfere with a broad array of unenumerated rights—individual, majoritarian and collective—retained under the control of the people in the several states.

This suggests that the title of this book may be misleadingly narrow. The project is not just about recovering the history of one amendment; it is also about the history of federalism—a subject generally considered in conflict with the declaration of the Ninth Amendment. Pairing federalism and the Ninth Amendment will seem odd to some and heresy to others. Nevertheless, the central role that federalism played in the adoption of the Bill of Rights is inescapable. Indeed, the man who drafted the Ninth Amendment, James Madison, presented the clause as a key element in balancing the powers of the states and federal government. Over time, Madison's balance was knocked out of kilter by the competing polar claims of nationalists like Alexander Hamilton and John Marshall on the one hand and states' rights advocates like John Taylor and John C. Calhoun on the other. To his dying day, Madison sought to restore and preserve the original balance that he viewed as essential to our constitutional experiment. The story of the Ninth Amendment in many ways is the story of Madison's vision of a middle ground between unconstrained nationalism and unworkable localism.

As far as historical method is concerned, this book involves both *legal* history and legal *history*. In other words, the effort is to recover the history of a principle of law as well as the historical context in which that principle was adopted and evolved. Embedded in this effort is the assumption that legal principles are a subject capable and worthy of historical investigation. Law-office history is a much maligned concept, but it remains an endeavor critical to modern lawyers who practice before the U.S. Supreme Court and, I would assert, constitutes an area of history worthy of scholarly investigation in its own right. It is an undeniable fact that the discussion, adoption, and application of legal principles, in particular *constitutional* principles, has played a critical role in the history of the American people. Although one might be tempted to dismiss all historical legal debate as window dressing for underlying social and political agendas, one cannot escape the impression that the participants in these historical debates sincerely believed that *law mattered*.

By exploring the original understanding and historical application of a legal text, this book follows the approach of other influential works of American legal history written in the last half century and takes seriously the idea that legal principles not only are *shaped* by people and events but also have—and are intended to have—their own *impact on* people and events.

The Supreme Court of the United States has long sought to reconcile its interpretation of the Constitution with the original understanding of the document. All historical accounts of the Constitution, therefore, become part of the contemporary debate regarding the proper judicial construction of governmental power and the protection of individual liberty. This has been particularly true for the Ninth Amendment, which has been the subject of a number of "originalist" historical investigations, all of which have made claims regarding the need to link contemporary meaning to original understanding. This book is no different; it closes with a discussion of how the historical understanding of the Ninth Amendment ought to affect contemporary interpretation of the Constitution. Although this might cause some to dismiss the work as no more than law-office history, I offer it as important precisely *because* it is law-office history. There is nothing ignoble in a lawyer's search for a usable history so long as the history produced is accurate and there is good reason why that history ought to be used.

As is true for all historical investigations of the American Constitution, a history of the Ninth Amendment involves a search for the people's fundamental law. The Ninth Amendment insists that the Constitution not be construed in a manner that denies or disparages the retained rights *of the people*. This is a declaration of popular sovereignty, the idea that the institutions of government must conform their actions to the declared will of a sovereign citizenry. Political institutions may chafe at the limits imposed on their powers, but it is not their prerogative to throw off those limits absent an authentic act by the people themselves. Unless the people have erased the original principles of the Ninth Amendment through later constitutional activity, the text and its original understanding remains an active constraint on the interpretation of governmental power.

Most Ninth Amendment commentators agree with these assertions. Where this book differs from almost all other accounts, however, is in its vision of a *federalist* Ninth Amendment. As will become clear in the following chapters, the founders envisioned an amendment that preserved the retained rights of the people as a collective entity in the several states. What this means, and how it differs from contemporary accounts, is explored in depth in later chapters. For now, suffice it to say that the historical Ninth Amendment

strongly suggests that the Constitution was to be construed in a manner that preserves as much as possible the people's right to local self-government.

Today, the federalism jurisprudence of the Supreme Court is based more on judicial policy than on constitutional text—a fact that leaves the future of federalism poised on the edge of a knife. Establishing a historically grounded *textual* mandate for the limited construction of federal power could play a critical role in issues as diverse as whether states may authorize medicinal use of marijuana, regulate physician-assisted suicide, or define the institution of marriage. These issues cut across political lines—as they should. The right to local self-government has never been the exclusive province of either political party. It remains a right retained by us all.

ONE

The Enigmatic Amendment

Justice Goldberg and the Ninth Amendment

In a tale that involves a great deal of bad luck, it is appropriate to begin by introducing a rather unlucky member of the U.S. Supreme Court: Justice Arthur Goldberg. Nominated by President John F. Kennedy, Justice Goldberg served on the Court a scant thirty-four months. In 1965, President Lyndon B. Johnson persuaded Goldberg to resign and replace the late Adlai Stevenson as U.S. ambassador to the United Nations. Although Goldberg was reluctant to do so, he ultimately agreed in the hope of helping to negotiate a settlement to the conflict in Vietnam.[1] What Goldberg did not know was that Johnson wanted him off the Court so that Johnson could replace him with Abe Fortas. In 1968, Goldberg gave up trying to alter the president's policy toward Vietnam and resigned his ambassadorship.[2] Although Goldberg longed to return to the Supreme Court, it was not to be. Turning to politics, Goldberg ran an unsuccessful campaign for the governorship of New York and eventually returned to the practice of law. Arthur Goldberg would hold no other significant legal or political office for the remainder of his life (he died in 1990).

Despite his short tenure on the Court, however, Justice Goldberg played an important role in one of the most famous decisions of the twentieth-century

1. *See* Lee Epstein & Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005); David L. Stebenne, Arthur J. Goldberg: A New Deal Liberal 347–48 (1996); Artemus Ward, Deciding to Leave: The Politics of Retirement from the United States Supreme Court (2003). According to Professor Sanford Levinson, Goldberg made a "disastrous decision" in leaving the Court. *See* Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment,* 64 Chi-Kent L. Rev. 131, 134 (1988).

2. Goldberg resigned on July 25, 1965. *See* Susan N. Herman, *Arthur Joseph Goldberg*, *in* The Supreme Court Justices: A Biographical Dictionary 193 (Melvin I. Urofsky ed., 1994).

Supreme Court, *Griswold v. Connecticut*.[3] In fact, there is reason to believe that Goldberg viewed the case as an opportunity to leave his mark on the law. As he later described it, his concurrence in *Griswold* was a self-conscious attempt to "revitalize" the moribund Ninth Amendment.[4] It was Justice Goldberg who pressed Estelle Griswold's lawyer, Thomas Emerson, to consider the right to privacy as one of the "rights retained by the people."[5] Unlike his colleague William O. Douglas, whose lead opinion in *Griswold* mentioned the Ninth Amendment only in passing, Justice Goldberg, in his concurrence, focused on the Ninth, which he believed provided critical support for the constitutional right to privacy. According to Goldberg:

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words in the first eight amendments to the Constitution is to ignore the Ninth Amendment, and to give it no effect whatsoever.[6]

Although Justice Goldberg claimed that "this Court has had little occasion to interpret the Ninth Amendment," the fact that the text remained part of the Constitution convinced Goldberg that it should be given some effect. In *Griswold*, the effect was to support the Court's invalidation of Connecticut law.

Although only two other justices signed on to Goldberg's opinion, even the dissenters agreed with his assumption that the Ninth had not received any serious judicial attention since its adoption in 1791. Given the near-universal assumption that the Ninth Amendment had languished since its birth, it is no wonder that Griswold's attorney had to be pressed to discuss the Ninth in his oral arguments before the Supreme Court.[7] Goldberg's 1965

---

3. 381 U.S. 479 (1965).

4. *See* Arthur J. Goldberg, *Foreword—The Burger Court 1971 Term: One Step Forward, Two Steps Backward?*, J. Crim. L. Criminology & Police Sci. 463, 467 (1972) ("I take particular satisfaction that . . . Justice White, writing for a majority of the Court, referred to the ninth amendment which I sought to revitalize in my concurring opinion in *Griswold*.").

5. An account of the oral argument in *Griswold* can be found in David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade* 237–40 (updated ed. 1998). A recording of the relevant portions of the oral argument can be found online at http://www.oyez.org/cases/1960-1969/1964/1964_496/argument-1/.

6. *Griswold*, 381 U.S. at 491.

7. *See* Garrow, *supra* note 5, at 238.

concurrence in *Griswold* appeared to raise the Ninth Amendment out of general obscurity and breathe new life into the text as a possible source of unenumerated individual rights. Since *Griswold*, the Ninth has been the focus of numerous books and articles, and the amendment itself has played an important supporting role in Supreme Court decisions developing the individual right to privacy.[8]

The emphasis, however, is on *supporting* role. No case, including *Griswold*, has ever actually relied on the Ninth Amendment as the source of a claimed individual right. Instead, the Ninth has been invoked as indirect support of broad interpretations of other constitutional provisions, such as the due process clause of the Fourteenth Amendment. For those new to the vagaries of constitutional law, this might seem odd; the Ninth seems to be a perfect candidate for supporting any one of a number of oft-claimed rights, from sexual autonomy to the right to die. The fact that neither right is listed in the Constitution seems irrelevant in the face of the Ninth's declaration that there are "other" rights retained by the people. Indeed, the Ninth almost seems to insist that such rights be respected *regardless* of their lack of textual pedigree. Despite the occasional judicial nod in this direction, however, the Supreme Court has *never* relied on the Ninth as a source of unenumerated rights. Nor is the modern Supreme Court likely to do so. Understanding why this is so requires knowing something about the Supreme Court's approach to individual rights and the struggle of the Supreme Court to avoid repeating the supposed error of the infamous case *Lochner v. New York*.

Avoiding *Lochner*

The national freedoms with which we are most familiar are generally listed in the first eight amendments to the Constitution—the Bill of Rights. These enumerated

8. An abbreviated list of books on the Ninth Amendment would include Charles L. Black, Jr., Decision According to Law (1981), Daniel A. Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (2007), Calvin R. Massey, Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights (1995), and The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989–1993) (collecting a number of works devoted to the Ninth Amendment). *See also* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004). Modern Supreme Court majority opinions referring to the Ninth Amendment include *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980), *Roe v. Wade*, 410 U.S. 113, 153 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848 (1992).

rights, such as the First Amendment's freedom of speech and religious exercise, protect us from the actions of the federal government. They do not, however, protect us from the actions of the states. When the state police arrest us for making a speech criticizing the governor in a public park, we turn for protection not to the First but to the Fourteenth Amendment, which declares that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." In the first half of the twentieth century, the Supreme Court interpreted the due process clause to have "incorporated" many of the rights listed in the Bill of Rights, including freedom of speech, thus making these rights applicable against state as well as federal officials.

In *Griswold*, the Supreme Court ruled that a state law banning the distribution of contraceptives violated the right to privacy. Unlike other incorporated rights such as freedom of speech and the free exercise of religion, the right to privacy cannot be found anywhere in the Constitution. This lack of textual enumeration prompted the dissenting justices in *Griswold* to criticize the majority for unjustifiably enforcing a right mentioned nowhere in the text. The criticism carried a particular sting. Deeply embedded in the institutional memory of the Supreme Court is the fear of repeating what is today viewed as the monumental mistake of *Lochner v. New York*.[9] Named after an early-twentieth-century Supreme Court ruling that struck down a New York law regulating the number of hours bakers could work in a given week, the *Lochner* Court vigorously enforced the individual's liberty to contract free from undue governmental interference. Although liberty of contract is not specifically mentioned in the text of the Constitution, the Court held that the individual right to agree to work for certain hours and wages was a liberty interest protected under the due process clause of the Fourteenth Amendment. Although this clause appears to provide only procedural safeguards (due *process*), the *Lochner* Court interpreted the text as limiting the very substance of the law when it came to certain fundamental rights.

Liberty of contract was only one of a number of "substantive due process" rights protected by the *Lochner* Court—some of which today remain important aspects of modern individual freedom.[10] Enforcing property and economic

9. 198 U.S. 45 (1905).

10. Among other rights, the *Lochner* Court interpreted liberty under the due process clause to include freedom of speech, *Gitlow v. New York*, 268 U.S. 652 (1925), the right to counsel in a capital trial, *Powell v. Alabama*, 287 U.S. 45 (1932), and the right of parents to control the educational upbringing of their children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

rights like liberty of contract, however, brought the Supreme Court into direct conflict with the national political branches during the economic crisis of the Great Depression. President Franklin Delano Roosevelt's attempts to commandeer the national economy in order to stabilize prices and employment were rebuffed by a majority of the Supreme Court, who were convinced that the Constitution placed such economic matters beyond the reach of the federal Congress.[11] In response, Congress considered amending the Constitution to curtail the Court's power of judicial review, and President Roosevelt proposed adding a new member to the Supreme Court for every sitting justice over the age of seventy who refused to retire (the so-called Court-packing plan).[12] Just as the confrontation seemed to reach a boiling point, Justice Owen Roberts suddenly changed his position on federal power and began voting to uphold New Deal legislation.[13] Because the Court no longer posed a threat to the policies of New Deal Democrats, the steam went out of the drive to restructure the judicial branch. Justice Robert's change of heart thereafter became known as the "switch in time that saved nine."[14]

Over the course of a few short years, roughly from 1937 to 1941, the New Deal Court reversed course over a broad spectrum of constitutional doctrines. Older judicial precedents that had limited the scope of federal power to regulate commerce and delegate broad responsibility to executive agencies were swept aside. Judicial enforcement of liberty of contract and individual economic rights, which had hamstrung both state and federal economic regulation, were abandoned.[15] Not only was the New Deal constitutional under this new reading of federal power, but the Court's decisions laid the groundwork for the rise of the modern administrative state. Everything from Social Security to the civil rights acts of the 1960s to environmental statutes like the Clean Water Act, all of which would be suspect

---

11. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935) (striking down aspects of the National Industrial Recovery Act of 1933).

12. *See* Franklin D. Roosevelt, Radio Address on Reorganizing the Federal Judiciary (Mar. 9, 1937), *in* S. Rep. No. 75-711, app. D at 41 (1937).For a discussion of proposed congressional amendments and the general political response to the Court's striking down of New Deal programs, *see* 2 Bruce A. Ackerman, We the People: Transformations 320 (1998).

13. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

14. *See* The Oxford Companion to the Supreme Court of the United States 204 (Kermit L. Hall, ed.) (2d ed., 2005).

15. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

under the approach of the *Lochner* Court, are rooted in the New Deal Court's construction of national power and the abandonment of judicial enforcement of individual economic rights like liberty of contract.

However welcome this dramatic reinterpretation of the federal Constitution may have seemed at the time, it nevertheless cried out for some kind of explanation. *Why* had the Court so suddenly reversed its course? Ever since the New Deal, constitutional scholars have struggled to explain (and justify) the Court's revolution in jurisprudence.[16] A cynic (or a legal realist) might dismiss the episode as reflecting nothing more than the fictional Mr. Dooley's observation that the Court "follows th' iliction returns."[17] As the institution of government charged with defending the people's Constitution, however, the Supreme Court could not afford to be viewed as altering the meaning of the Constitution simply to escape political pressure. Ever since *Marbury v. Madison*, the very idea of an enforceable Constitution has presupposed a Supreme Court willing to stand up to the political branches and strike down unconstitutional laws. It was incumbent upon the New Deal Court, therefore, to explain just where the *Lochner* Court had gone wrong and why the Court's new reading of governmental power more faithfully followed the Constitution.

The New Deal Court's explanation for abandoning *Lochner* and a prior century's worth of jurisprudence first appeared as a footnote in a 1938 case involving the regulation of filled milk. In *United States v. Carolene Products Co.*, the Supreme Court upheld a federal ban on the interstate distribution of "Milnut" (a mixture of condensed skimmed milk and coconut oil) against a claim that the ban interfered with, among other things, liberty of contract.[18] In his majority opinion, Justice Harlan Fiske Stone rejected the earlier approach of the *Lochner* Court and ruled that judicial deference was appropriate in cases involving economic regulation. Such laws were *presumed* constitutional absent a showing that they were wholly irrational. This did not mean, however, that the Court had wholly abandoned its role in protecting

16. Among the many important works discussing the New Deal Court's dramatic reinterpretation of federal power, some of the most influential include 1 Bruce A. Ackerman, We the People: Foundations (1991), Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), and John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

17. Finley Peter Dunne, Mr. Dooley's Opinions 26 (1901).

18. 304 U.S. 144 (1938).

constitutional liberties. In a footnote destined for constitutional history, Justice Stone suggested that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[19]

Justice Stone's footnote 4 suggested that although the Supreme Court would defer to regulation affecting the right to contract, it might not show the same degree of deference to laws abridging one of the liberties expressly listed in the Bill of Rights. By implying that the error of *Lochner* was judicial enforcement of rights having no mention in the actual text of the Constitution, the New Deal Court was able to explain its rejection of *Lochnerian* liberty of contract while continuing to protect particular textual liberties like freedom of speech and religion.

Footnote 4 was no more than dicta—a suggestion, and a tentative suggestion at that. In the early years of the New Deal, it was not clear whether the Court would actually continue to intervene when the political process impinged upon individual rights; the initial signals were not promising. New Deal appointments to the Supreme Court like Justice Felix Frankfurter argued that the Court should almost always defer to the decisions of the political process; to intervene was to risk repeating the countermajoritarian errors of the *Lochner* Court. Accordingly, Justice Frankfurter led a majority of the New Deal Court in upholding the power of local school officials to force children to salute the flag and recite the pledge of allegiance.[20] Only three

---

19. 304 U.S. at 152 n.4.

20. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). According to Justice Frankfurter in *Gobitis*:

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply cherished liberties. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Id. at 600 (internal citation omitted).

years later, however, in *West Virginia Board of Education v. Barnette*, the Court reversed itself ruled that refusing to salute the flag was a right protected under the free speech clause of the First Amendment.[21] In an opinion written by Justice Robert Jackson, the Court ruled that the Fourteenth Amendment's due process clause "incorporated" against the states the same principles of freedom of speech that had originally bound only the federal government. This freedom included the right of public-school children to refuse to salute the flag. In response to dissenting justice Felix Frankfurter's claims that the Court had gone back to the bad old days of *Lochner*, Justice Jackson embraced Justice Stone's reasoning in Footnote 4 and distinguished nontextual due process rights like *Lochner*'s liberty of contract from "incorporated" due process rights such as those listed in the first eight amendments:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. . . . It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case.[22]

Here, then, was the New Deal Court's official explanation of why *Lochnerian* unenumerated rights had to go and why protection of First Amendment rights ought to remain. Claims that involved no more than a free-floating assertion of liberty invited the Court to fill such a "vague" term with its own preferred set of unenumerated rights (as had the *Lochner* Court with its invocation of "liberty of contract"). Judicial intervention in the political process was not warranted in such cases, and the matter was best left to the control of political majorities. Liberty claims involving rights listed in the first eight amendments, on the other hand, were a different matter. These "textual liberties" had received the positive sanction of the people themselves and thus

21. 319 U.S. 624 (1943).

22. 319 U.S. at 639.

deserved judicial protection. Henceforth, the Supreme Court would limit its enforcement of individual liberties to those textually listed in the Constitution. As for *Lochner*, the case became a watchword for unjustified judicial interference with the political process. To this day, to accuse the Court of *Lochnering* is to level the foulest insult in constitutional law.

The Modern Restoration of Unenumerated Rights

Fast forward two decades. Facing a bench composed of many of the same justices who joined the Court at the time of the New Deal, the lawyers representing Estelle Griswold seemed to be asking the Court to embrace the kind of reasoning it had emphatically rejected in 1938. The right to privacy was not among the specific freedoms declared in the Bill of Rights. By asking the Court to find privacy somewhere in the vague term "liberty," the plaintiffs seemed to be using precisely the kind of *Lochnerian* analysis rejected in *Carolene Products* and *Barnette*. Indeed, New Deal justice Hugo Black pressed Griswold's lawyer Thomas Emerson on precisely this point during oral argument, drawing an immediate denial from Emerson that his client sought a return to the errors of the *Lochner* Court.[23] But without a textual hook in the Constitution upon which to hang the right to privacy, this is exactly what Emerson seemed to be asking.

Well aware of the need to avoid any accusation that the Supreme Court had resurrected the approach in *Lochner v. New York*, Justice William O. Douglas, in his lead opinion, creatively derived the right to privacy from various textual provisions in the Bill of Rights. Within the metaphorical "penumbras" of various texts, Douglas explained, one could identify "emanations" that collectively suggested the existence of an independent right to privacy. His opinion was an awkward attempt to follow the reasoning of footnote 4 and *Barnette* and ground the right to privacy in the text of the Constitution. The attempt was too clever by half. Later courts abandoned Douglas's approach, leaving the quest for penumbras and emanations the stuff of first-year law-school amusement.

For his part, Justice Goldberg believed that he had identified a clause that would more persuasively ground the right to privacy in the text of the Constitution and immunize the decision against the deadly taint of *Lochner*.

---

23. *See* GARROW, *supra* note 5, at 238 (discussing the oral arguments in *Griswold*).

The Ninth Amendment declared the existence of "other rights" beyond those listed in the Constitution. Limiting due process rights to those expressly listed in the Bill of Rights violated the clear command of the Ninth and rendered the amendment "without effect." Thus, in an act of legal jujitsu, Goldberg flipped the approach of the New Deal Court on its head.[24] By linking the unenumerated right to privacy to the very-much-enumerated Ninth Amendment, progressive judges and scholars also turned the tables on conservative critics of the Warren Court's "judicial activism." Advocates for judicial restraint insisted that the Court desist from discovering new rights and limit their judgments to interpretations based on the text and original meaning of the Constitution. When it came to the Ninth Amendment, however, the Court's critics were hoist by their own petard: the *Constitution itself* points to rights beyond those listed in the Bill of Rights.[25] The Ninth Amendment appeared to have been added to prevent precisely the cramped reading of liberty advocated by critics of the right to privacy. Thus, when conservative academics like Judge Robert Bork dismissed the Ninth Amendment as unenforceable, this seemed only to confirm critics' belief that it was conservatives who had abandoned the text and original meaning of the Constitution.[26]

In many ways, the Senate hearings on the nomination of Judge Bork to the Supreme Court were a watershed moment in the modern history of the Ninth Amendment, and I discuss the event in the final chapters of this book.[27] It was well known that Judge Bork disagreed with the Court's analysis in

---

24. Goldberg's use of the Ninth implied that Justice Jackson erred in *Barnette* when he suggested that the error of *Lochner* was its embrace of nontextual rights. In more recent decisions, some members of the Supreme Court have suggested that *Lochner*'s error was not the embrace of an unenumerated right but its failure to recognize how protecting liberty of contract entrenched the unequal bargaining power of the poor. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992) (plurality opinion) ("In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.").

25. *See also* Levinson, *supra* note 1, at 142 (using the same turn of phrase to describe the presumed predicament of judicial conservatives).

26. *See Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 2844 (1987) [hereinafter *Bork Nomination Hearings*] (testimony of Prof. Philip B. Kurland) ("Judge Bork however would now limit the rights of the individual to those specifically stated in the document, thereby rejecting his claim to be a textualist by ignoring the Ninth Amendment.").

27. *See infra* chapter 10.

Griswold and later right-to-privacy cases like *Roe v. Wade*. In preparation for Judge Bork's testimony, the Senate Judiciary Committee heard from a number of legal experts, including University of Chicago Law School historian Philip Kurland, who argued that the original meaning of the Ninth Amendment supported judicial enforcement of the right to privacy—and that this was one reason to deny Bork a seat on the Supreme Court.[28] Confronted with this testimony, Judge Bork denied that the Ninth had any identifiable meaning capable of judicial enforcement:

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.[29]

Judge Bork's argument was that the historical meaning of the Ninth Amendment had been completely lost and that judicial enforcement was therefore impossible. The lack of historical application, of course, was a positive advantage to Justice Goldberg and those who agreed with his reading of the Ninth. Even though using the Ninth Amendment in support of the right to privacy was entirely new, there was no need to revisit or overrule prior precedents or judicial analysis of the Ninth. There was no history at all. To Judge Bork, this rendered the Ninth an indecipherable inkblot. To Justice Goldberg, this made the Ninth Amendment uniquely *available*—a jurisprudential blank slate on which to write unenumerated rights. It also provided a textual platform on which to build the right to privacy without repeating the sins of the *Lochner* Court.

No Supreme Court decision, however, has ever directly relied on the Ninth Amendment to establish the existence of an unenumerated individual right; rather, the Supreme Court has chosen instead to locate such rights within the text of the due process clauses of the Fifth and Fourteenth Amendments. Upon reflection, it is not difficult to guess why this is the case. To move completely beyond the text of the Constitution is to stare into the void. In such a

---

28. *See Bork Nomination Hearings*, *supra* note 26; *see also* Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, CHI. TRIB., Aug. 18, 1987, § 1, at 13 col. 1, *reprinted with footnotes in* Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 CARDOZO L. REV. 127 (1987).

29. *Bork Nomination Hearings*, *supra* note 26, at 249 (remarks of Judge Robert H. Bork).

case, there would be no constitutional guidepost to assist the Court in identifying and enforcing one of the "other rights" retained by the people. Constructing such a right out of whole cloth would effectively transfer to the Supreme Court the authority to amend the Constitution—*Lochnering* writ large. However much cynics might claim that the Court does this all the time, the Supreme Court itself has never claimed such authority. It would be forced to do so, however, if it directly applied its current reading of the Ninth Amendment as a guardian of unenumerated individual rights. On the other hand, by declining to do so, the Court has reduced the Ninth to an unenforceable amendment that provides no more than indirect support for judicial interpretation of other clauses in the Constitution. Thus, it appears that by its very insistence that the Ninth Amendment refers to "other" unnamed individual rights, the Court has ensured that the Ninth will play no more than a supporting role in constitutional law. A clause that potentially protects everything, in the end, protects nothing.

In the chapters that follow, I argue that this need not be the fate of the Ninth Amendment. Indeed, it ought not to be, for it reflects a mistaken understanding of what the Ninth Amendment was designed to accomplish. It also contradicts at least a century and a half of discussion and application of the Ninth Amendment by some of the most influential legal minds in our nation's history, including the man who actually framed the amendment. This history was unknown when Justice Goldberg penned his opinion in *Griswold v. Connecticut*—thus his assertion that there had been "little occasion" to consider the amendment since its enactment. In fact, to this day, the consensus view among scholars and judges is that the Ninth Amendment somehow escaped any serious attention for the first two centuries of the U.S. Constitution. As Berkeley law professor Daniel Farber recently lamented, "the Ninth Amendment went into hibernation almost as soon as it was created."[30]

Justice Arthur Goldberg and the legal academy could not have been more wrong.

---

30. Farber, *supra* note 8, at 45.