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CHARLES BLACK'S REDISCOVERY OF THE NINTH AMENDMENT, AND WHAT HE FOUND THERE

Russell L. Caplan*

DECISION ACCORDING TO LAW. By *Charles L. Black, Jr.* New York: W.W. Norton & Co. 1981. Pp. 83. \$12.95.

In the quarter century since Bennett Patterson revived *The Forgotten Ninth Amendment*,¹ analysis of that amendment² has advanced in three stages. Before 1965, writers³ devoted themselves to exhuming the relic and extolling its value for the promotion of individual rights. Then Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,⁴ which found a right to marital privacy supported by the language and history of the ninth amendment, suddenly made the amendment respectable. *Griswold* spurred considerable literature⁵ on the nature and role of the ninth amendment, particularly with regard to claims concerning personal privacy. Finally, with the passing of the Warren Court into history, a third vanguard⁶ has emerged. This new cadre assumes that *Griswold* is here

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1. B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955).

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

3. See, e.g., E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* (1957); B. PATTERSON, *supra* note 1; Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627 (1956); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962). Earlier scholarly and judicial attention to the ninth amendment was sparse. Justice Jackson allowed that the rights alluded to in the ninth amendment "are still a mystery to me." R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 75 (1955).

4. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring, joined by Warren, C.J., & Brennan, J.).

5. See, e.g., Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

6. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975); Ringold, *The History of the Enactment of the ninth amendment and Its Recent Development*, 8 TULSA L. J. 1 (1972). For challenges to the expansionist trend, see Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Note, *The Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980).

to stay and invokes the ninth amendment as a basis for preserving and expanding individual rights, and so continues the work of that Court.

I

Professor Charles L. Black, Jr., who teaches at Yale, explicitly aligns himself (p. 44) with those who look to the ninth amendment as a reservoir of individual freedoms.⁷ The substance of Black's expensive book was delivered as the Holmes Lectures at Harvard Law School in April 1979. Like his predecessors in this distinguished lecture series — Learned Hand,⁸ Herbert Wechsler,⁹ Alexander Bickel¹⁰ — Black addresses the contradictions inherent in a representative, constitutional democracy that includes a powerful, tenured, nonelected federal judiciary. In so doing, Black reprises themes he sounded twenty years before in a frankly impassioned defense of the Warren Court, *The People and the Court*.¹¹ Then, as now, there were threats to strip the court of its jurisdiction over certain kinds of cases.¹² Then, as now, Black's primary defense of the Court, and by implication the federal court system, is that the people, through their elected congressional representatives, have authorized the Court to live and thrive.¹³ The system has worked for the most part extraordinarily well, *Brown v. Board of Education* being the chief case in point (p. 15). Defending judicial review of state acts is in any event far less a problem than defending federal judicial review of federal acts, since the supremacy clause¹⁴ and common

7. Black is right to wonder "if indeed [Professor Ely] did not himself make the motion [urging acceptance of the ninth amendment]." P. 44. The extent of Ely's commitment is difficult to discern exactly, which is worth remembering in the midst of academic parsing of things like the legislative history of the Reconstruction amendments.

8. L. HAND, *THE BILL OF RIGHTS* (1958).

9. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

10. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970; 2d ed. 1978).

11. C. BLACK, *THE PEOPLE AND THE COURT* (1960) [hereinafter cited as *PEOPLE AND THE COURT*].

12. See, e.g., *Can Congress Curtail Federal Court Power?*, 67 A.B.A.J. 1095 (1981).

13. See p. 18; *PEOPLE AND THE COURT*, *supra* note 11, at 2-3; 23-25; C. BLACK, *THE OCCASIONS OF JUSTICE 70-77* (1963). See generally L. LEVY, *Judicial Review, History and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 1, 12 (1967); McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 357-59, 362-64 (1966).

14. U.S. CONST. art. VI, § 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

sense indicate that matters committed to the Federal Constitution should not be left to the interpretations of the individual states.¹⁵

Another topic to which Black returns is the confusion about the potential for judicial interventionism, an "imperial" judiciary, because of the nonobjective nature of legal values and reasoning (pp. 20-23).¹⁶ Judges must decide cases not according to whim but according to law; yet, "[e]verything we know of law . . . warns us that we must not look, in its reasonings, for the rigor of mathematics or of the sciences" (pp. 20-21). "[C]onstitutional law, like all law," Black continues, "employs methods beyond textual interpretation — the method of *analogy* with the textual provision, the method of inference from the structures and relationships created by the text, and — in developed law — the method of following precedent" (p. 23).

Two decades ago, Black unabashedly faced the tensions of a democracy that chooses a federal court system. Despite the potential for abuse, Black said, the judiciary had proved to be an overwhelmingly beneficial institution.¹⁷ "[I]t will work if we want it to work and will fail if we want it to fail."¹⁸ The creativity of judges within the interstices of the political fabric allows and requires the exercise of "insight and wisdom and justice."¹⁹ Black concluded:

Judicial review cannot be defended as a mechanical process. But it can be defended as a prudent and wise allocation of the power of deciding certain questions . . . Underneath all I have said is the conviction that "decision according to law" can be a meaningful phrase, even when the decision in question is made by something other than a machine, or even a mathematician.²⁰

Twenty years ago, then, Black was convinced that expansive constitutional interpretation was not necessarily tantamount to rule by judicial fiat.

Now, Black offers up the ninth amendment as a means of ensuring rigorous legal reasoning, especially for cases "in which actions of the state claimed to be inimical to national constitutional rights are overturned on the basis of norms not literally expressed in the Constitution" (p. 43). The ninth amendment, Black is quick to say, is superior to the due process²¹ and equal protection²² clauses as a

15. See p. 36; PEOPLE AND THE COURT, *supra* note 11, at 122-29.

16. *Id.* at 156-82.

17. *Id.* at 2-3. See generally Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970) [hereinafter cited as *Unfinished Business*].

18. PEOPLE AND THE COURT, *supra* note 11, at 107.

19. *Id.* at 182.

20. *Id.*

21. U.S. CONST. amends. V & XIV, § 1.

22. U.S. CONST. amend. XIV, § 1.

source of substantive rights because "due process," particularly the "substantive" kind, cannot sustain many of the constructions that have been given it "without rudest violence to ordinary meaning" (p. 45), and "equal protection" doctrine does not go far enough (pp. 45-46). He would reject the "new" equal protection for a determination that sex discrimination is not somewhat, but exactly analogous to racial discrimination, and flatly prohibited under the aegis of the ninth amendment (p. 73). Curiously, though, he adds that "if for some reason you do still prefer 'equal protection' or 'due process,' there need be no substantive quarrel between us, ever" (p. 48).

The content of the ninth amendment, says Black, "is to be constructed by reasoned operations" (p. 59). By such means, "every structural or analogic derivation of an unwritten personal right can be restated . . . as a derivation of a Ninth Amendment right This setting up of an atmosphere *hospitable* to the establishment of unnamed rights is a natural function of the Ninth Amendment's words" (p. 48).²³ But beyond the substance gleaned from structure and analogy, Black posits a "pure" ninth amendment with its own content, and "there is nothing more eligible for inclusion than protection of what I will call, meaning to use the term in a wide sense, the marriage and parent-child interest" (p. 66). The ninth amendment's special contribution, says Black, is to ask whether a particular interest is "worthy of protection" in our constitutional system (p. 53), and "perhaps above its other merits, makes possible fully rational discourse in the formation of personal rights law, toward the construction of a coherent system."²⁴

II

Beneath the assertion that the ninth amendment is "a fountain of law" (p. 44 n.47) lies the unvoiced assumption that a constitutional amendment, indeed a part of the original Bill of Rights, must contain some substantive rights of its own. Yet not even Justice Goldberg in *Griswold* went so far, as he carefully explained:

23. See *Unfinished Business*, *supra* note 17, at 43 ("the ninth amendment . . . [can] best be given content by the method of analogy to more specific constitutional guarantees"); Redlich, *supra* note 3, at 812 ("the Ninth and Tenth Amendments should be used to define rights adjacent to or analogous to, the pattern of rights which we find in the Constitution").

24. P. 53 (emphasis deleted). Such a strategy recalls Black's appeal to rights unnamed in the Constitution but necessary to fill out the governmental structure that the text has created. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Black now acknowledges the haven that the ninth amendment can give such unnamed rights. See p. 44 n. 48.

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment 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 deemed exhaustive.²⁵

The history of the ninth amendment, sketchy as it is, bears this out.

The absence of a bill of rights was probably the most formidable obstacle to the Constitution's ratification, and the promise of amendments may well have secured the critical margin of approval.²⁶ Madison's original version of what became the ninth amendment, submitted on May 4, 1789, 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 the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.²⁷

In support of his proposal, Madison 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 . . . [by this amendment].²⁸

Justice Joseph Story, appointed to the Supreme Court by President Madison and intimately familiar with his thought on the subject, later wrote of the amendment that it

25. 381 U.S. at 492 (Goldberg, J., concurring). Justice Douglas later agreed that "[t]he Ninth Amendment obviously does not create federally enforceable rights." *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (concurring opinion).

26. See Comment, *supra* note 5, at 820.

27. 1 ANNALS OF CONGRESS 452 (J. Gales & W. Seaton eds. 1834), *quoted in* Berger, *supra* note 6, at 8; Comment, *supra* note 5, at 821. The amendment seems derived from the seventeenth resolution proposed by the Virginia ratification convention of 1788:

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.

3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 661 (1861), *quoted in* E. DUMBAULD, *supra* note 3, at 188. In a 1788 letter to Jefferson, Madison pronounced himself "in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration." *Quoted in* Kelly, *supra* note 5, at 152.

28. 1 ANNALS OF CONGRESS, *supra* note 27, at 456, *quoted in* 381 U.S. at 489-90; Berger, *supra* note 6, at 7; Comment, *supra* note 5, at 821.

was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.²⁹

Clearly the author of the ninth amendment intended it to be merely a rule of construction, operating to preserve previously established rights; there is no indication that it was to be an independent source of substantive rights.

The reasoning of the Federalist on a bill of rights is contained in Numbers 83 and 84, where Hamilton leaves clues suggesting that unenumerated rights are to be closely identified with existing state constitutions, statutes, and common law. Hamilton was partly concerned with refuting the antifederalist argument that without a bill of rights any right not mentioned in the Constitution would be abolished. The specific argument that Hamilton chose to rebut in the first essay is the contention that since the Constitution provides for jury trials in criminal cases³⁰ but not in civil, trial by jury in civil cases would be eliminated.³¹ Hamilton stated that the Constitution's "specification of particulars evidently excludes all pretension to a general legislative authority,"³² and concluded:

[T]rial by jury is in no case abolished by the proposed constitution, and it is equally true that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the state constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The . . . national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the state courts only, and in the manner which the state constitutions and laws prescribe.³³

Again, the intent to have the ninth amendment operate only as a rule of construction to protect rather than generate rights seems established.

Hamilton's next essay, Federalist Number 84, reveals why the framers felt that something like the ninth amendment was necessary

29. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (5th ed. 1891) (1st ed. 1833).

30. See U.S. CONST. art. III, § 2.

31. THE FEDERALIST No. 83, at 559 (J. Cooke ed. 1961). See generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 539-43 (1969).

32. THE FEDERALIST, *supra* note 31, No. 83 at 560.

33. THE FEDERALIST, *supra* note 31, No. 83 at 561. Hamilton adds later that the omission was due at least in part to the different provisions in the various states for jury trials, thus "leaving the matter as it has been left, to legislative regulation." *Id.* at 567.

at all. The New York antifederalists, he wrote, had defended their state's constitution, though it, too, contained no express bill of rights: "[I]t contains in the body of it various provisions in favour of particular privileges and rights . . . [and] the constitution adopts in their full extent the common law and statute law of Great-Britain, by which many other rights not expressed in it are equally secured."³⁴ Hence the Bill of Rights was designed to quell apprehensions about losing under the new Constitution the kinds of rights long enjoyed and protected by state or common law.³⁵ The rights Madison sought to preserve in the ninth amendment were generally those set down and readily accessible in the treatises of Coke and Blackstone and in landmark documents such as the Magna Carta and the Bill of Rights of 1689. Madison certainly gave short shrift to any notions of unwritten "natural" law in his draft.³⁶ The notion of unenumerated rights thus drew upon a shared understanding of relatively specific, written legal principles, which background argues powerfully against an activist recourse to the ninth amendment as a bottomless well of last resort. Despite the slender historical record, therefore, it is fairly clear that the ninth amendment "was intended to . . . negate the [anti-]Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The ninth is simply a rule of construction, applicable to the entire Constitution."³⁷

III

Far from being the "hospitable environment" for new rights — mainly those in the area of personal privacy, à la *Griswold* (pp. 65-66) — the ninth amendment expressly directs the courts to look elsewhere than its own text for the root of any substantive, dispositive right. It is, in fact, probably counterdemocratic to strike down a stat-

34. THE FEDERALIST, *supra* note 31, No. 84 at 575.

35. Madison believed that "the great mass of people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power . . ." 1 ANNALS OF CONGRESS, *supra* note 27, at 450.

36. See Kelly, *supra* note 5, at 154-55; Dunbar, *supra* note 3, at 640 n.47. Madison placed significant emphasis on written law as a guarantee of liberty in responding to the objection that a bill of rights would be superfluous "upon the presumption that the people have those rights in their own hands, and that is the proper place for them to rest. It would be a sufficient answer to say, that this objection lies against such provisions under the State Governments, as well as under the General Government; and there are, I believe, but few gentlemen who are inclined to push their theory so far as to say that a declaration of rights in those cases is either ineffectual or improper." 1 ANNALS OF CONGRESS, *supra* note 27, at 455.

37. Comment, *supra* note 5, at 835. See E. DUMBAULD, *supra* note 3, at 63-64; Ringold, *supra* note 6, at 10; Kelly, *supra* note 5, at 154-55.

ute on the basis of a constitutional text so devoid of content.³⁸ To make the amendment the repository of all rights deemed "worthy of protection" risks circumventing the amending process envisioned in article V. At least broad penumbras are the shadows of substantive amendments, compelling, as Black would want, the completion of the scheme of government contemplated by the Constitution. Fluid as the "liberty" component of the due process clause is (p. 47 n.58), its history and glosses provide sounder footing for reasoned analysis than an amendment never meant to be a starting point for adjudication in the first place. Laurence Tribe recently analyzed various theories that aim to uncover the fundamental rights implicit in the Constitution, and concluded: "None of the theories offered to date is wholly satisfying."³⁹ That conclusion still holds.

Black's point that the ninth amendment is an acceptable textual basis for the reasoned derivation of individual rights, certainly no more nebulous than any other clause or amendment (pp. 49, 51), is therefore doomed. There is nothing *there* to reason *from*. Black's theory seems to be: if the proposed interest is similar enough to another amendment (p. 50), and the interest is "worthy of protection" (p. 53), then there is a niche for it in the ninth amendment. But this turns analogical reasoning on its head. The purpose of reasoning by analogy is to discover whether a sufficient similarity exists, not to find a residuary clause in which to tuck away appealing principles that fall short.

Rendering decisions according to law is of course demonstrative and not strictly deductive, but demonstration requires a persuasive source for the first step in a chain of reasoning. The ninth amendment alone is not that source.

38. See Cahn, *The Parchment Barriers*, AM. SCHOLAR, Winter 1962-1963, at 21, reprinted in CONFRONTING INJUSTICE 104 (L. Cahn ed. 1962); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1059 (1977). The tenth amendment, sometimes paired with the ninth amendment in discussion, reserves powers not delegated to the federal government "to the States respectively, or to the people." U.S. CONST. amend. X. The tenth, in contrast to the ninth amendment, has a substantial textual hook because interpretation can focus on the powers appropriate to the states operating as independent entities, "states qua states," vis-à-vis the federal government. See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976); *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).

39. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 573 (1978).