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THE BILL OF RIGHTS AND JUDICIAL REVIEW IN THE AMERICAN CONSTITUTION OF 1787

It is a thesis of this article that the Bill of Rights in the Constitution facilitated the practice of federal judicial review. There were no explicit statements about review in the Bill of Rights but it conditioned the federal judiciary to exercise it. The potential of the Bill of Rights for increasing the role of the federal judiciary was not clear. But in the context of both the written and the unwritten dimension of the Constitution and the question whether the latter could be made positive law, the role of the Bill of Rights for judicial review of federal power became visible. The role of the Ninth Amendment was especially important here.

1. The origins of the Bill of Rights

The origins of the Bill of Rights go back to the political fight between the Federalists and the Antifederalists. The core of the Antifederalists' argument was best formulated by Brutus for whom the Constitution *will not be a compact entered into by states* and as such *cannot succeed without a sacrifice of your liberties.* What was needed then was the instrument *found in every free government... a declaration of rights.* For Brutus, the major task of the Constitution's framers was to *limit and define its powers... and guard against abuse of authority... The principles... upon which the social compact is founded, ought to have been clearly and precisely stated and the most express and full declaration of rights to have been made... [and] on this... there is... a... silence*[1]. For the Antifederalists all state constitutions were either based on the bill of rights or had express reservations of rights included among the provisions of them.

[1] H. Storing, *The Complete Anti-Federalist*, Chicago 1981, vol. 2, p. 9, 150, 36, 23, 25.

The Antifederalists refuted a crucial argument of the Federalists that the Bill of Rights was not necessary since the federal government was strictly of delegated powers. For them the powers of the federal government were total with respect to *every object to which they extend as that of any state government. It reaches to every thing which concerns human happiness*[2]. The Antifederalists thought that since the federal Constitution was the supreme law and since the national government moved towards consolidation, the efficacy of state bills of rights was negligent. The Federalists essentially agreed with the Antifederalists' concept of the bill of rights under the state constitutions. Bills of rights reserved certain natural rights and those not explicitly reserved were transferred to the omnipotent legislature vested with general powers. What divided both camps was not the understanding of the Bill of Rights but the question who were the parties to the Constitution. The Antifederalists accused the Federalists of breaking the instructions in the Philadelphia Convention and not revising the Articles of Confederation but destroying the social contract of the original states.

According to the Antifederalists the Confederation was thrown back to the state of nature in which the individuals again were writing a new social contract of which the new Constitution was an outcome, a repetition on a continental scale of the social contracts which created the states. Both the federal and the state constitutions were formed by the individuals and had to have the Bill of Rights reserving rights of persons outside of power of government. Thus, without the Bill of Rights the federal government would acquire an absolute power[3].

The Federalists dismissed the argument that the new government was formed by individuals. "The people" created the Constitution not as an assemblage of individuals but in James Wilson's term "assemblage of societies"[4]. The federal Constitution was only – as James Madison stated – a *Bill of Powers [that] needs no bill of Rights*[5]. It was an instrument of enumerated, or limited powers only, the remainder being retained by the people and the states. For Alexander Hamilton the bill of rights *would be dangerous... would contain... exceptions to the powers which are not granted; and... would afford a... pretext to claim more than were granted... why declare that things shall not be done which there is no power to do*[6]. For the Antifederalists the powers of the federal government were in fact unlimited and the government headed towards consolidation. The instruments of consolidation were inherent in the Preamble and the fuzzy provisions of the congressional article. The Federalists finally agreed to the Bill of Rights, but its structure and content were different from the premises on which the Antifederalists wanted them to be based.

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[2] *Ibidem*, p. 2, 9, 26.

[3] See H. Storing, *op. cit.*, p. 4, 3, 7, 3, 11, 4, 6, 51; M. Farrand, *The Records of the Federal Convention*, New Haven 1966, vol. 3, p. 192-193.

[4] *Federalist 39*, [in:] *The Federalist Papers*, ed. C. Rossiter, New York 1961, p. 243.

[5] *The Papers of James Madison*, ed. R. A. Rutland, Chicago 1979, vol. 12, p. 194.

[6] *Federalist 84*, [in:] *The Federalist Papers*... p. 513; *The Documentary History of the Ratification of the Constitution*, eds. M. Jensen, J. P. Kaminski, G. J. Saladino, "State Historical Society of Wisconsin" 1976, vol. 2, p. 167-168.

a) James Madison, the real author of the federal Bill of Rights, structured it not as a list of absolute, natural rights, but as social or civil rights. As such they were consistent with the Federalists' notion of the Constitution of 1787 as being formed not by the individuals leaving the state of nature but by the people through the state governments. For the Federalists natural rights of the individuals leaving the state of nature were the province of the states. Such rights usually formed preambles to them. That is why, preparing the federal Bill of Rights, Madison disregarded these portions of the state bills of rights which contained *certain natural rights of which men, when they form a social compact cannot deprive... their posterity, among which are the enjoyment of life and liberty... property, and pursuit... of happiness.* Madison omitted the phrase "natural rights" from the federal Bill of Rights, stripping it of its natural status since government ought *to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and... of pursuing... happiness...*[7]. The quarrel between the Federalists and the Antifederalists reflected a contest about the place of natural rights in American constitutionalism. In the eighteenth century the term "natural" had three meanings. "Natural" meant rights inherent in the colonists' formal relations with Britain. It also meant a reference to the laws established by God as the laws of nature in the universe[8]. However, to derive concrete rights from God's creation was not easy. Hence the third use, the rights inherited from the original state of nature. To talk in that context about rights was to reject historical experience and go into the state of nature and ask a question what rights *human beings must originally have possessed and could conceivably have agreed to surrender when, out of nothing but their free consent, they had brought governments into being*[9]. Such a doctrine undermined all arguments derived from history like the one employed by the English common law jurisprudence or the doctrine that parliament *has the supreme disposal of every thing*[10].

To be sure, an original element of American constitutionalism was the reduction to positive law of the norms of institutional and individual behaviour legitimate in a polity. That included only some principles of natural rights. Yet in the eighteenth century, the concept of the "higher law" protecting the totality of natural rights not included in the positive text was deeply internalized[11]. The Americans tried to reclaim their rights on the basis of the British Constitution. There was yet in their quarrels an assumption that its laws should be observed because they were the universal law of liberty, not just positive law. The Declaration of Independence of 1776 reflected not a revolutionary rhetoric but the very justification of the American polity with which the Constitution of 1787 had to have an intimate rapport.

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[7] M. Farrand, *op. cit.*, vol. 2, p. 137. The last, rejected attempt to include the natural rights in the Bill of Rights was made by Roger Sherman, whose proposal was similar to the state versions. *Ibidem*, p. 267.

[8] B. Bailyn, *The Ideological Origins of the American Revolution*, Cambridge 1967, p. 187.

[9] D. T. Rodgers, *Contested Truths*, New York 1987, p. 49-51.

[10] W. Blackstone, *Commentaries on the Laws of England*, Chicago 1979, vol. 1, p. 51.

[11] See: *Corwin on the Constitution*, ed. R. Loss, vol. 1, Ithaca 1981, pp. 79-140.

During the debate, the Americans were pushed to the "state of nature" rhetoric[12]. For once they could not find justification for a rebellion in the traditional natural law authorities, such as Puffendorf, Burlamaqui, Vattel or Hutcheson. But the justification of the revolution was of their own making. The colonists thought that their rights as men were best expressed in the British Constitution[13]. In the Declaration, Jefferson rejected the British positive law as in fact betraying the principles upon which it was supposed to be framed, namely the rights of Englishmen, as the rights of men. Although such rights were within a certain paradigm of human condition they were fundamental and took precedence over positive law[14].

The new "inalienable" rights were natural and as such antecedent to law, that is history. As Alexander Hamilton stated in 1775 *the sacred rights of mankind are not to be rummaged for among old parchments or musty records... they are written... in the whole volume of human nature*[15]. That meant departing from legal rights and supplanting them with inalienable natural rights, in the realm of moral philosophy. There was a danger in this break with the tradition of laws and history. That is why the authors of the state constitutions tried to contain the rhetoric of rights defining and limiting them and cutting off the speculations about the state of nature from the *soberer, legal word "right"*[16]. nevertheless, the absolute language of natural rights had not been weeded out from the state constitutions.

The same applied to the federal Bill of Rights. Madison tried to insert them into Art. I, sec. 9 of the Constitution. That would mean that they would not assume an absolute language of the state bills of rights placed at the beginning of the state constitutions or in their preambles. The consequences of such a structure would have been far reaching, especially in conjunction with the Ninth and Tenth Amendments. As part of the Congressional article the Bill of Rights would have amounted not to the absolute truth but could be dependent on the legislative definition. Those rights were conceived thus, as representative Egbert Benson remarked – *as belonging to the people.. all they meant to provide against was their being infringed by the Government*[17]. That meant that the fear of the Antifederalists concerning the potential abuse of powers by Congress was feasible.

However, the intended placement of the Bill of Rights in Art. I would have had another consequence. It would have required the use of legally enforceable "shall" and "will", which Madison intended. That would amount to an abandon-

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[12] But the rhetoric of natural rights was being abandoned in the second half of the eighteenth century /with an exception of Rousseau and Paine/. For instance Edmund Burke derided the idea of searching for the rights of men *in all the nakedness and solitude of metaphysical abstraction* which was utopian. See: *The Works of the Right Honorable Edmund Burke*, 5th ed., vol. 3, Boston 1877, p. 240.

[13] See: D. S. Lutz, *The Relative Influence of European Writers on Late Eighteenth – Century American Political Thought*, "American Political Science Review" 1984, vol. 78, pp. 189-197; see also: A. Bryk, *The Limits to Arbitrary Government*, Krakow 1995, p. 184.

[14] See: E. Vieira, *Rights and the United States Constitution*, "Georgia Law Review" 1979, vol. 13, p. 1448-1457. The issue was whether the Declaration was using the language of abstract or the communal sense of rights. Jefferson seemed to reject the former notion when he stated in 1814 that the authority of the Declaration rested on *the harmonizing sentiments of the day*, [in:] G. Wills, *Inventing America*, New York 1978, p. 172.

[15] B. Bailyn, *op. cit.*, p. 188.

[16] *The Works of John Adams*, ed. Ch. F. Adams, Boston 1850-1856, vol. 3, p. 463.

[17] D. T. Rodgers, *op. cit.*, p. 63.

ment of the merely admonitory "ought" and "should" used in the state bills of rights placed usually at the beginning of their constitutions. The Madisonian change was probably more technical than intellectual. With Jefferson he saw the need of the bill to defend individual rights but their possible placing in Art. I. showed that he considered them at the same constitutional level as enumerated or unenumerated powers, with possible consequential changes. When finally the House of Representatives accepted a proposal to place the Bill of Rights at the end of the Constitution as amendments it was necessary to change the wording *to legally enforceable language since "shall" cannot be amended with an "ought"*[18]. That change in language resulted in the fact that the Supreme Court could later emerge as the definer and protector of legal rights thus paving the way for judicial review. Yet the consequences of the Bill of Rights for the development of judicial review stemmed, first of all, from the inclusion of the Ninth Amendment.

The Ninth Amendment, the Natural Rights and Positive Law of the Constitution

The First Congress of 1789 finally accepted the amendments. The Ninth Amendment declared that *The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people*[19]. The Ninth and Tenth Amendments were traditionally interpreted as articles ensuring that the federal government could not go beyond the first eight enumerated articles of the Bill. They were to preclude the interpretation of the Constitution that what was not explicitly prohibited in the Bill. The Ninth Amendment was simply to state that the declaration of certain limits on federal powers was not *to be construed as meaning that those are the only limits*[20].

The "other rights retained by the people" were to be other limits since the granting of powers to the federal government was of a limited nature. The power not granted to it was a right possessed by the people. This kind of reasoning was the standard Federalist argument about the nature of the enumerated powers. It was stated in the Tenth Amendment which expressed the principle of the American federal system. It declared that *the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.* The original Madisonian motion did not contain the phrase "or to the people". It was just a proposal to alleviate the states which were *particularly anxious that it should be declared in the Constitution, that the power not therein delegated should be reserved to the several states*[21]. Roger Sherman altered the last clause, possibly to stress that it was up to the people of each state to decide which powers they wanted to give to their state governments and which they

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[18] "Annals of the Congress of the United States", Washington 1834, vol. 1, p. 731-732; E. Vieira, *op. cit.*, pp. 105-112, 117-128, 197-198, 287-288.

[19] D. S. Lutz, *A Preface to American Political Theory*, Lawrence 1992, p. 77.

[20] F. Canavan, *Judicial Power and the Ninth Amendment*, "The Intercollegiate Review" 1987 (Spring), p. 27.

[21] See: "Annals of Congress...", vol. 1, p. 441.

should retain. In that sense those powers did not constitute a federal constitutional question[22].

The aforementioned interpretation of the Ninth Amendment, was congruent with its authors' intentions. But its role in American constitutionalism was to be wider. It was also a response to the Antifederalists' fear of the danger of the general constitutional clauses for the power of the federal government. The Ninth Amendment would then answer the reservations of a graver nature than those raised by Madison and would repudiate the Federalist argument about the precise limits of enumerated powers. By the inclusion of the Ninth Amendment, the Federalists implicitly conceded, that there might be certain rights the people could claim if the federal government acting in trust usurped power beyond the provisions of the Constitution.

Such a usurpation would not mean only the usurpation of the rights which the people possessed in the states, that is the encroachment on the state rights. It would also mean the usurpation of rights which the people possessed by the very fact of being human and which were not guaranteed by the state rights. In such an interpretation the meaning of the clause "rights retained by the people" would not be limited to the political protection of rights by the states. Hence the Ninth Amendment could be treated as a general clause, irrespective of its authors' intentions, guarding the totality of rights, even those protected by neither the state constitutions nor the federal Bill of Rights. It would then express the norm that the federal and state governments were just the people's creation. They would decide every time what rights they would consider to be off limits to the state or federal governments. Otherwise, the federal and state governments would have to be thought of as a construction freezing the meaning of what is human vis a vis the power of the state. That would be a rejection of the fundamental premise of the United States that the meaning of "liberty", "pursuit of happiness" or "welfare" expressed in the Declaration of Independence and in the Preamble were given the ultimate definition.

These undefined rights "retained by the people" of the Ninth Amendment seem to go beyond the rights reserved to the people by the state or federal bills of rights. Moreover those rights did not necessarily mean the rights which the people in proper time could give only to their state governments on the assumption that the power of the federal government was by definition limited. The undefined rights of the Ninth Amendment could be the rights which the people might claim against the state governments if these governments contravened their new understanding of rights and the federal government if it tried to go beyond the enumerated powers. That interpretation would be congruent with the Federalist understanding of the Constitution as a compact not between the states but as an arrangement created by the people.

Such an interpretation is not contradicted by the fact that Roger Sherman added the phrase "or to the people" to the original Madisonian clause that *the pow-*

[22] *Ibidem*, vol. 1, p. 768; F. Canavan, *op. cit.*, p. 27.

ers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively[23]. The notion was accepted with the understanding that it was up to the people of each state to decide which powers they wanted to give the state government and which they wanted to withhold. That phrase would not constitute then a federal question[24]. The Constitution was a compromise and to assume that its text would be free of imprecise legal provisions was not shared even by its authors. The people were in a position in the future to confer or withhold any right on both the state and the federal government. That right stemmed ultimately from the right of liberty, the subject I will treat at length later.

The Ninth Amendment's "rights retained by the people" were thus not only the rights retained by the states or by the people who could specify them through the states. They could be natural rights and other unspecified unwritten rights as well. Such an interpretation contradicts the Federalist understanding of the Constitution, that there were no individual natural rights in contradistinction to social rights claimed under the Constitution. Madison, the main author of the Bill of Rights, was yet not clear whether the rights in the Constitution would be only social or also natural rights.

In the Congress of 1789 he stated, as later Jefferson would, that some amendment rights asserted, not created, were based on practice and the nature of the political compact, but he added that some were based on the laws of nature. Among these the right of liberty was here a boundless right which might be made specific. But the trial by jury or the other specific rights in the Constitution did not amount to the total meaning of the right of liberty which was culture bound[25].

Common Law and Puritanism as sources of the American constitutionalism

The aforementioned statement could mean that the United States was not based solely on the positive law of the Constitution. In the American context that possibility was supported by a tradition of common law and Puritanism. The law for the common law tradition was much more than just the measure of reason, it was *the measure and source of virtue as well*[26]. Puritanism, on the other hand, had a tendency to "make a moral question of everything, and yet in such a way as to make it a legal question"[27].

Those two traditions created a legal culture where the common law courts were in a peculiar position towards the law. The justification and interpretation of it, rooted in precedent, not a code of civil law tradition that demanded simply administration of law, were its modus operandi. The adjudicating in individual cases,

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[23] "Annals of Congress...", vol. 1, p. 436, 768.
[24] F. Canavan, *op. cit.*, p. 27.
[25] "Annals of Congress....", p. 437.
[26] D. Little, *Religion, Order and Law*, New York 1969, p. 177.
[27] A. Pekelis, *Law and Social Action*, Ithaca 1950, p. 4.

infused with the puritan culture gave the courts a quasi "religious" character[28]. Some think that the Constitution of 1787 had that dual quality of written and unwritten law since its general and morally biased clauses as well as the most important provisions of the American fundamental statutes *contain no more than an appeal to the decency and wisdom of those with whom the responsibility for their enforcement rests*[29].

The common law mode of reasoning never relinquished its claim to an autonomous inquiry into justice based on reason. Such a pre-liberal and pre-enlightenment tradition, perfected by Edward Coke in the seventeenth century, was rooted in the capacity of the common law judiciary to meet human problems on the case to case basis in reference to past situations and decisions. Thus it was implicit in the common law tradition that any positive enactments issued by command could never be automatically accepted as law. The common law judiciary's rational inquiry into justice on the day to day adjudication enabled them to claim for themselves a norm to disregard the command of positive enactments. In the seventeenth century England as well as in the colonies this already meant a right to question the parliamentary statute or the king's prerogative as contrary to reason and justice[30].

Such an approach was based on a conviction that the will of the sovereign would not be able to structure the multitude of human experience into clear cut rules applicable to any situation. Hence, the common law courts were, from their beginning, inclined to give 'reasons' for their decisions whether they interpreted the law or made it. The finding of reasons went beyond just the mere statutory construction. It was an exposition of a particular morality. It was a kind of a communal preaching derived from an individual case. The courts were taking on a role of forming a standard of behaviour and elevating their role to an unprecedented height. The legal culture of the Anglo-Saxon world despite the individualistic technique of the common-law courts where the case and precedent were the rules, because *of the strength of the enforcement devices, the clerical and moralistic character of the legal approach at large, the duty of disclosure, the close control exercised by the community upon the individual and upon the law, if compared with the analogous institutions of the Latin countries,... disclose... a more collectivistic than... individualistic character of the common-law system... what is generally considered as and taken for the individualistic aspect of American life is simply the existence and coexistence of a plurality of communities and... of an extremely great number of communities of various types*[31].

Thus apart from dispensing law, the American legal institutions had from the beginning the role of creating a commonly acceptable meaning of conduct. That gave the courts both legal and moral or even quasi religious character. The moralistic approach, the Enlightenment and the code of natural rights, the rigid Constitution as fundamental law and finally the majoritarian politics effectively

[28] The idea was implicit in "Dr. Bonham's Case" of 1610, "Rowles vs. Mason" of 1612 and "Writs of Assistance Case" in 1761. See: A. Bryk, *op. cit.*, pp. 169-189.

[29] H. J. Powell, *The Moral Tradition of American Constitutionalism*, Durham 1993, pp. 66-67, also 81-82.

[30] The same applied to the common law tradition in England. See: A. Bryk, *op. cit.*, p. 113-114.

[31] See: C. Albanese, *Sons of the Fathers*, Philadelphia 1976, p. 194.

blocked, made the judiciary not only an interpreter of constitutional law. Those elements elevated the American judiciary, especially the Supreme Court to an unprecedented position of power[32].

It was the judiciary not Congress which was looked upon as an institution to express the moral community standards, where the administrative system of the state in the European sense did not exist and the common culture were weaker. At the beginning, the Congress tried to play such a role, making reference to things fundamental but later it abandoned that role[33]. The ethical and religious diversity of the expanding republic soon made the homogeneity of the American society a thing of the past. The judiciary began to assume a role of a lawyer, preacher, official and judge. The culture ceased to be a unifying element; such a role was expected of and imposed on the judges. They, not the churches, began to express and to define the standards for the community as such.

After the Constitution and the Judiciary Act of 1789 the federal judges' role was enhanced as "republican schoolmasters", the builders of the "civil religion", of which the faith in the Constitution was an indispensable element[34]. Federal judges *rode with the gospel of the civil religion and preached sermons in which the Constitution, its virtue and its promise, figured prominently*[35]. The Antifederalists were right, if for different reasons, when they were afraid of the extension of the republic and the destruction of the "civil religion" of the small communities. For the big republic to be more homogeneous, forces imposing cultural homogeneity were needed. When Brutus wrote about judicial review he had such an imposition of the civil religion by means of the federal government in mind. Puritanism and the common law also caused the courts to rise to unprecedented prominence in American society[36].

Natural Rights as a source of American "civil religion"

At the end of the eighteenth century there were only two shared fundamental presuppositions of the American society. One was the war with Britain, the other the doctrine of "natural rights". These rights were a cultural reality, the only legacy of the new nation. For the founders, the popular government had to be reconciled with *higher standards of political morality*[37]. The assumption that the positive law of the Constitution had to conform to that doctrine of natural rights was taken for granted. That assumption was yet difficult to conceptualise. The Americans were aware that they did not discover all natural rights. Moreover, they were not certain how to

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[32] See: J. J. Rousseau, *The Social Contract*, Chicago 1954, book 4, chapter 8, pp. 204-223; R. Lerner, *The Thinking Revolutionary*, Ithaca 1987.

[33] See: C. Albanese, *op. cit.*, p. 218.

[34] See H. J. Storing, *What the Anti-Federalists Were For*, Chicago 1981, pp. 15-24.

[35] S. Barber, *The Federalist and the Anomalies of New Right Constitutionalism*, "New Kentucky Law Review" 1988, vol. 15, p. 437, 439.

[36] *The Bill of Rights*, ed. J. Kukla, Richmond 1987, pp. 143-144.

[37] W. Blackstone, *op. cit.*, vol. 1, pp. 39-40.

secure those put forth in, for instance, the Declaration of Independence[38]. In the Declaration and the Preamble the very concept of liberty, as a natural right, suggested the indeterminacy of natural rights.

The inability to discover natural rights all at once, meant that they were open to reason, flexible and culture bound, thus subject to endless determinations. That was the staple of the eighteenth century legal thinking best expressed by Blackstone and his idea of indeterminacy of natural rights due to the failure of human reason. Experience decided the content of natural law more than reason[39].

The Americans knew that natural rights were immutable but the operative factors might change due to better understanding of human societies and human nature. As the Chief Justice of the Virginia Highest Court Edmund Pendleton remarked in 1788: *May we not in the progress of things, discover some great and important [right] which we do not now think of?*[40]. One commentator stated that as civilization progressed we *increase in spiritual and intellectual growth and are capable of understanding natural rights and liberties that have always existed, but which have been beyond our limited intellect to comprehend*[41]. The application of the natural rights doctrine could also change thus. The Constitution contained phrases which were definitely open-ended. It was obvious that the language of those open-ended provisions was not definite, imposing on the interpreter the duty to identify *the sorts of evils against which the provision was directed and to move against their contemporary counterparts*[42]. That did not defy the original intentions of the framers, it would leave to the interpreter a determination of *the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into the constitutional text*[43].

In that context the Ninth Amendment as a statement of the repository of the rights retained by the people was a certain safety valve, a comment on the cultural paradigm of the Americans. It was also a statement that the positive law was subservient to a larger one giving anyone whom the people trusted – including the courts – the right to wrench from the political system those would be rights. But the amendment constituted a defeat of Madison and of the more conservative framers. If they tried to strip the Constitution and the Bill of Rights of speculation regarding the origins of rights, and consequently the ultimate legitimacy of government, in other words if they wanted to drop any pretences comparable to the grandiose statements of the first Virginia Declaration of Rights or the French Revolution's "Declaration of the Rights of Man and the Citizen", they failed. The state recommendations for the bills of rights were, for instance, full of natural rights philosophy. The natural rights rhetoric of the Antifederalists had won.

Madison and the conservatives did not fail completely. The vocabulary of the first eight amendments did not contain even a hint that those rights were inal-

[38] *Letters and Papers of Edmund Pendleton*, ed. D. Mayes, Cambridge, vol. 2, p. 533.
[39] B. Patterson, *The Forgotten Ninth Amendment*, Indianapolis 1955, p. 54.
[40] J. H. Ely, *Democracy and Distrust*, Cambridge 1980, p. 13.
[41] H. Linde, *Judges, Critics and the Realist Tradition*, "Yale Law Review" 1972, vol. 82, p. 227.
[42] See: J. M. Smith, *Freedom Fetters*, New York 1956, pp. 305, 433.
[43] *The Bill of Rights*, ed. B. Schwartz, New York 1971, vol. 2, pp. 840, 911, 966.

ienable. They were legal, positivist commands without any – at least it seemed so in 1789 – generalities open to speculation. The talk was about power and its containment. The language of "inalienable rights" was abandoned even by Thomas Jefferson who, battling the Alien and Sedition Acts of 1798 did not use the language of rights of man but of the Constitution[44].

That did not mean that the natural rights rhetoric was just a useful tool to sever ties with Britain but could not form the basis of the positivist rules of decision. Even Madison preparing amendments made such remarks[45]. James Wilson, voiced the same opinion. He referred to the Declaration of Independence that *this is the broad basis on which our independence was placed; on the same certain and solid foundation* [*the Constitution*] *is erected*[46]. The natural rights rhetoric of the Declaration was indeed in vogue then. The "pursuit of happiness" doctrine was the underlying value of the contemporary positivist legal thinking of Locke or Blackstone[47]. Early Supreme Court opinions were also grounded in the natural rights rhetoric which testified to the fact that natural rights could be a legitimate source of decision[48].

The Ninth Amendment and the Judiciary

In this context the Ninth Amendment had a potential to be treated as a provision the legal nature of which was not excluded. Implicit in it was the *notion of a reserve of extra legal rights* [*which*] *had been a tool... a crowbar to throw in the tracks of* [*a political system*][49]. The Ninth Amendment's natural rights could not be directly translated into the judicially enforced rights. They *[did] not lend themselves to principled judicial enforcement and should therefore be treated as if they were directed exclusively to the political branches.* The same argument could be applied to the positive rights which could also be abused by the judiciary.

One has to mention here the fundamental premises of the American liberal culture which make the confinement of the idea of liberty to the strict language of the positive law, including the Constitution difficult. The "rights" talk of the American Revolution, the implicit civil disobedience, the extra-legal political cul-

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[44] In: *The Documentary History...*, vol. 2. p. 473.

[45] The "pursuit of happiness" used by John Locke in reference to ethical system subsumed the rights of liberty and property, which were related. But it was a wider concept. M. Cranston, *John Locke*, London 1957, p. 123; J. Locke, *Essays Concerning Human Understanding*, Clarendon Press 1894, vol. 1, pp. 342, 345, 348, 352. There was nothing new about "pursuit of happiness". Tory Samuel Johnson as well as Blackstone used it. See": H. I. Ganter, *Jefferson's Pursuit of Happiness and Some Forgotten Men*, "William and Mary Quarterly" 1936, 2nd ser., vol. 16, p. 558-585.

[46] Van Horne's Lessee vs. Dorrance, 2 Dallas 304. 1975; Calder vs. Bull, 3 Dallas 386, 1798; Fletcher vs. Peck, 6 Cranch 87, 1810, Terrett vs. Taylor, 9 Cranch 43, 1815. Jefferson himself never denounced the natural rights philosophy of the Declaration.

[47] D. T. Rodgers, *op. cit.*, p. 66.

[48] J. H. Ely, *Democracy...*, p. 39.

[49] Jeremy Bentham considered the American and French Declarations to be incomprehensible. For him the rights talk was vague and useless legally. But the critics missed the point in the context of the American political culture. See: *The Collected Works of Jeremy Bentham*, ed. J. Bowring, New York 1962, vol. 1, pp. 221-295.

ture has not been confined to the letter of law. For the Americans liberty meant a rhetoric of defiance against any authority and the "anarchic" spirit in every American always demanded compelling reasons for any governmental activity. Such an attitude had consequences for the constitutional law. Because it could be used against the more powerful legislative and executive branches, and because it had a sense of the mission to impose moral order, rooted in common law reasoning and puritan culture, assumed in American history an unprecedented role in American history.

Thus, the natural rights talk had thus subversive possibilities[50]. The American "rights talk" was not just an enunciation of a political creed but an expression of the society nurtured in the environment of boundless possibilities, frontier independence, individualism and self-government where such a philosophy was practically tested. It was not a blueprint for the future, it was a defensive polemic to secure rights of men ready to fight for their possessions with anything, including the words dusted off from the European tradition. Such thinking was part of the Ninth Amendment.

The rights rhetoric in America was a rejection of an argument that any legal instrument could be definitive, an affirmation of the veto power of the people and of each individual. The legitimacy of a political order could be created only by an individual acting in concert with others, or as it became later customary, an individual having a right to exercise its veto power. In the United States that individual could exercise his power in defence of his rights through political branches and that was the rationale for the modern democratic theory. But the individual could defend his rights in a more direct way through the machinery of the federal courts, acting on his behalf against the state. The Antifederalists were afraid that the federal judiciary would ally itself with the other branches of the federal government. Yet this never happened. It began, in time, to challenge the federal power in the name of natural rights of whose repository was the Ninth Amendment.

Judicial review in the name of natural rights of the Ninth Amendment was thus a possibility written into the Constitution, but was rooted in the American political culture. The strife for the Ninth Amendment in the Constitution, that is positive law document, was a strife for the safety valve of the unbound natural rights of the individual grounded ultimately in the very justification of the American polity, that is the Declaration of Independence and its most explosive rhetoric of liberty and the pursuit of happiness as well as the potentially explosive rhetoric of the Preamble. It was a hidden expression of that old English concept of liberties visible in Coke's theory of the Ancient Constitution long abandoned in Britain, which stated that the Constitution was never a grant of inherent rights and liberties to the individual. It was only a collection of powers which were granted to the government. The theory of individual rights was much more than a *part of the American unwritten Constitution, in the same manner in which portions of the unwritten English Constitution are recognized and enforced.... it* [*was and*] *is much more*

[50] B. Patterson, *op. cit.*, p. 20.

than the unwritten Constitution; the individual inherent rights and liberties antedate and are above the constitutions and may be called pre-constitutional rights.

The Ninth Amendment constituted thus an act of inclusion into the Constitution of the ultimate philosophy of government expressed by John Adams in 1765 *I say RIGHTS... antecedent to all earthy government, Rights, that cannot be repealed or restrained by human laws – Rights derived from the great legislator of the Universe.* That meant the assertion of the inherent right of revolution being part of the Constitution. Such a theory of rights was a burden on the constitutional system which required an institutional containment of that inherent veto power of individuals against the government.

For Americans that logic of rights had an indefinite indeterminacy. If they discovered rights once and then from time to time reformulated them and put them into enumerations having legal character that would have blunted the revolutionary potential of the concept of right. The Federalists in general wanted that. Yet the connection of "right" and "nature" developed in America into a more extreme form in the political arena. The language of rights expressed not only the rights which humans possessed and which could arguably be enumerated by deliberations about history, existing laws or comparative legal enquiries. The language of rights in the Constitution framed the discussion in terms of what rights humans, given their nature, ought to possess. It meant that the rights the Americans ought to possess were going to be taken from the future, if the concept of humanity would follow the precepts of progress in human character or society.

Such an understanding of rights opened imagination about the hypothetical state of nature, where the humans had uncontaminated, full rights. It was exactly that frame of mind, that beginning *ab ovo* of human creation, this *open enticement to leapfrog across custom, institutions, and history into a nick of time, a state of nature antecedent to all human governments, and to repossess whatever claims had been left behind – it was this that made the words so volatile, the rights themselves so expandable*[51]. The rigidity of the Constitution in the federal system caused that the natural rights ingredient of the Ninth Amendment of the Constitution had a potential of growth well beyond the intentions of those who created it. It could also define the tenor of American society and constitutional law in time more than anything else. It also created an opening for judicial review in the form of judicially enforceable rights demanded by the individuals which the blocked ordinary politics of the federal system could not deliver.

In that sense judicial review could be understood as a correction of a blocked or perverted political system of both state and federal government, as a means of creating legitimacy and preventing revolution in the name of perverted or blocked rights. Judicial review was just one of the possible institutions more adequate to the expression of the final justification of the peoples' will in the Constitution. That justification rested ultimately on the premise that all political power had to give compelling reasons, or justify themselves to citizens understood as

[51] J. Adams, *op. cit.*, pp. 4-5.

bearers of equal natural rights. Of those rights the right of liberty equal to all of the Declaration of Independence and Preamble, were the most fundamental since they constituted the very reason for which the American government was created[52]. Law created by democratic institutions such as Congress could not thus be deemed justifiable *ipso facto*. Democratic politics was not in the American blocked system the only and the best way of ensuring the right of individual to defend his human rights. There was thus in the Constitution, as a fundamental law, a need for an institution going beyond democratic theory. Judicial review next to legislative authority of Congress was an outcome of that[53].

The explosion of the "rights" talk in America at the end of the twentieth century had nothing to do with the Antifederalists' idea of the civilized society of individuals, having not only rights but also duties. Yet such were the consequences of the political culture they lived in. The contradiction in the Antifederalists thought was thus a contradiction which lay at the root of American constitutionalism and is thus a contradiction of modern, liberal thought, or simply put of modernity.

The natural rights theories of the eighteenth century could not completely codify all the rights pertaining to the humanity and had to leave that indeterminacy as a background to the positive law. Such an unwritten law existed and the ultimate political expression of it was the "right of revolution"[54]. In the state constitutions those certain binding principles of higher law were unwritten, left out of the text but still binding[55]. The Ninth Amendment was the textual expression of this idea in the Constitution of 1787[56].

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[52] The right of revolution was a sacred right of a British subject. Under the US Constitution it was tacitly acknowledged although the conditions for such a right were not clear. See: *The Founder's Constitution*, P. B. Kurland, R. Lerner, Chicago 1987, vol. 1, pp. 76-95; J. Adams, *op. cit.*, pp. 19-20; D. T. Rodgers, *op. cit.*, p. 46. Even Blackstone, a believer in the sovereignty of parliament stated that the actions destructive to "the spirit of liberty" were contrary to natural law and the English Constitution. But he begged the question how the sovereign parliament could be prevented from doing this. See: *Commentaries...*, p. 125.

[53] The Ninth Amendment was dormant for most of its history. It got into the fore in the 1960's. when the process of incorporation of the Bill of Rights into the Fourteenth Amendment began. The Supreme Court was here divided over the meaning of the new unenumerated rights read into the Constitution. In terms of positive constitutional law, the amendment that spoke of unenumerated rights seemed to be of little use. But it reasserted itself with full force in a case "Griswold vs. Connecticut" in 1965 where the Court created a right of privacy found in *penumbras, formed by emanations* from guarantees of the First, Third, Fourth and Fifth Amendments. Three justices in an opinion by justice Goldberg used the Ninth Amendment as an additional basis for striking down the Connecticut law. They referred to "traditions", "conscience of our people" to determine whether a right was to be regarded as fundamental. It was the reading into the Constitution of a substantive due process clause compromised already at the beginning of the twentieth century by the conservative court which read into the Constitution the "freedom of contract" clause. Justice Hugo L. Black dissented. For Black "natural law due process formula" permitted the judges, unacceptably "to roam at large in the broad expanses of policy and morals", violating the authority of legislature. The Ninth Amendment was then used in Eisenstadt vs. Baird in 1972 and Roe vs. Wade in 1973. In general the Ninth Amendment was invoked in over 1200 cases in the states and at the federal level. See: R. Berger, *The Ninth Amendment*, "Cornell Law Review" 1980, vol. 61, p. 1, note 2.

[54] That turned later to the "right of civil disobedience". See: *Making America*, ed. L. S. Luedtke, Chapel Hill & London 1992, pp. 453-464.

[55] T. C. Grey, *Do We Have An Unwritten Constitution?*, "Stanford Law Review" 1975, vol. 27, pp. 715-716; also his: *Origins of the Unwritten Constitution*, "Stanford Law Review" 1978, vol. 30, p. 843.

[56] As Roscoe Pound remarked nothing in the Constitution should be taken to be idle and of no moment, in B. Patterson, *op. cit.*, p. III.

That opened up the question who was in a position to specify the content of those non positive natural rights[57]. It could be "the people" through the legislature or "the justices". That was not very clear during the founding period. Of course, the Constitution, the state constitutions with all the rights enumerated, powers granted did not exclude the possibility of additional rights. Both the federal and the state fundamental laws defined the operational boundaries of power. The origin of the Bill of Rights was to *remove the fears... of many... people of the Commonwealth, and... more effectively guard against an undue administration of the federal government*. The operational phrase here is "more effectually" or as Madison wrote the rights in the Bill of Rights were included as exemplary "limitations of... powers, or as inserted merely for greater caution"[58]. The Bill of Rights supported by the Federalists was conceived as a list not creating any rights.

Since the Federalists rejected natural rights as part of the federal Bill of Rights the possible justification of it would be to treat it as a traditional charter of British liberties, as a contract between the people and the federal government, as a double guarantee to the shaky doctrine of the enumerated powers. The Federalists were able to draw a conclusion from the Antifederalists' attack and stated that the pure enumeration could mean that what was not prohibited in the Bill of Rights was given to the federal government. In such a case the Ninth Amendment rejected such a reasoning. Its "rights retained by the people" meant in such a case that the federal government was not of "general" powers, along the lines of the state governments. That was the justification given to it by Edmund Randolph for whom the Ninth Amendment's purpose was a *reservation against constructive power*[59]. The limits of the Ninth Amendment's rights were set by the Tenth Amendment repeating the Federalists' argument that: *powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the People.*

Whatever the Federalists thought, the Ninth Amendment constituted a rejection of their argument of the Constitution of the "enumerated" powers. It was a block to the "implied powers" doctrine. People now had all the powers not delegated by Constitution. One could argue that the Ninth Amendment was a repetition of the founding doctrine of the United States that *the supreme, absolute, and uncontrollable authority remains with the people*[60]. But the Ninth Amendment went further. It did not only contain that basic, aforementioned doctrine. It opened the road to means of controlling the usurpation of power by the peoples institutions, such as Congress or President, by another institution which had legitimacy by the logic of rights which could be legally enforceable. The notion of "rights" is crucial here, and the Ninth Amendment's inclusion in the Bill of Rights underscores it. As part of the Constitution which might be enforceable on the basis of rights the Ninth Amendment underscores the fact that the structure of the Constitution and its in-

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[57] L. Levy, *Original Intent and the Framers Constitution*, New York 1988, p. 278; *The Rights Retained...*, pp. 291-336.

[58] "Annals of Congress 1789"...

[59] *Papers of James Madison...*, vol. 12, p. 459.

[60] *The Documentary History...*, p. 472.

stitutions is accountable to the inalienable rights as the basis of legitimacy of any power.

As such the legitimate political power was essentially a form of judicial power a *judgment about our equal inalienable rights, and the reasonable use of power to advance human interests equally.* The Bill of Rights underlined the fact that the relations of citizens with the government were justified only if their rights were protected. Besides, these rights could not be abstract; they had to be judicially protected. In that sense the inclusion of the state and federal Bill of Rights corresponded with the tradition of protecting rights through the common law courts. Traditionally, the common law judiciary was focused on forms of proceedings, concrete grievances of individuals and the *discovery of law through consideration of 'the nature and the reason of the thing'*[61].

Under the United States Constitution the "nature and reason of the thing" were individual rights grounded in the fundamental right of liberty grounded in justice. That did not mean that the judiciary could not usurp that power. It only meant that there had to be an institution within the structure of the government which could guard rights in individual cases. The judiciary would be the guardian not the sovereign which by protecting rights would underscore the basic understanding of the Constitution as a motley of rules of constitutional law, that is as an institutional structure accountable to some form of control of essentially judicial nature. That stemmed from the liberal theory of the Constitution as a framework within which the individual rights had to be realized. In that context the Ninth Amendment was extremely important. It conceived of the Constitution not as a closed system of government, but as the best institutional approximation which the human mind in 1787 could devise to protect the development of individuals as autonomous human beings.

As has already been mentioned the last statement needs clarification. If the United States Constitution was a flexible instrument, prone to frequent change, then the will of the people could be thought to be realized by its representative institutions. The faculty of judgement so specific to the judiciary could be also located in the legislators or the people themselves[62]. But the Constitution was a rigid document with the will of the people of 1787 frozen in time. The amendments are extremely difficult to introduce and thus frequent references to the people are not a feasible mechanism of assessment as to what their will would be. The alternative, that is the so-called "departmental review", which would give each department of government the right to be a constitutional judge of its own powers, thus the Constitution as a whole, would be contrary to the notion of *nemo iudex in propria causa* law and would lead to incessant disputes and the final appeal to the people.

In Federalist 49 Madison discussed such an appeal proposed by Jefferson in his draft of the Virginia constitution and rejected it[63], for lack of prudent judg-

[61] J. R. Stoner, *Sovereign Judging,* unpublished PhD dissertation, Harvard 1987, p. 371.
[62] *The Federalists Papers...*, pp. 332, 522.
[63] *Federalist 49, ibidem*, p. 313.

ment. During departmental disputes the dominant faction in Congress would control them and a convention and impose its interpretation of the Constitution, on the government as a whole. The executive could challenge such a convention but still the whole discussion *could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would relate. The passions, therefore, not the reason, would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government*[64].

In the light of the aforementioned comments the consequences of the Ninth Amendment were thus far reaching. One was the rejection of the "enumerated powers" doctrine and the concession that Congress had to be observed since its powers could be usurped. If Congress yet was in a position of expanding its power, then as Coke stated in Dr. Bonham's Case of 1610 prohibiting *iudex in propria causa*, there had to be an outside locus of judgment of legislation. The executive would not be a proper locus of judgment in such a case also because Congress was at the beginning the most potent institution. The Ninth Amendment could thus be used as a challenge to congressional legislation and a need for an arbiter was a logical necessity[65].

Madison's judgment was unequivocal, a certain afterthought on his earlier efforts to introduce a Council of Revision. Any legislative usurpation which might threaten the liberties of the people should be protected and the federal judiciary was the only institution which could do it. For the Antifederalists such a possibility was not likely, since they, like Brutus, were sure the judiciary would be in alliance with the legislature. But the judiciary could be looked upon as a protector of rights both enumerated and not enumerated in the written text[66]. Ultimately the locus of judgment was the "people". But "people" were an abstraction and their right of revolution would be a disaster. There was thus a possibility that that locus of judgment would lie in the judiciary, provided that the Antifederalists were wrong and the judiciary would retain its independence from the legislative branch.

In such a situation a judicial review imposing a unifying meaning on the Constitution had to be given to a nominally non-political body, that is the federal judiciary. Only the judiciary was able in case of an individual matter to ascertain whether the actions of the elective branches were in pursuance of the Constitution, within which the individual rights were guaranteed. But such rights could never be wholly codified. That is why there was the Ninth Amendment as a general clause specifying that the totality of rights were retained by the people. The way of checking whether the rights needed protection against the federal government

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[64] *Ibidem*, p. 317.
[65] *Federalist 10, ibidem.*
[66] See: R. Berger, *Selected Writings on the Constitution*, Virginia 1987, p. 193.

could be done by an individual act of adjudication. The judiciary, acting according to the common law mode of reasoning would assess whether there was any harm done to an individual.

There was an additional problem of the Ninth Amendment, namely, the very nature of rights retained by the people. The question thus was not only who should guard the rights retained by the people but what were they and who would express them. Assuming that the Ninth Amendment established constitutional rights, did not yet mean that those rights were operational in the judicial sense that they could *lend themselves to principled judicial enforcement*[67]. The natural rights of the Ninth Amendment could equally be the province of the political branches decided in the process of ordinary political discussion and then taken for granted by the judiciary. There were at the beginning of the republic some attempts to make the natural law judicially enforceable[68] but they were unsuccessful. Yet that problem has stood at the centre of American constitutionalism from the very beginning, and it raises some additional questions.

What is the Constitution and who is the interpreter?

If the Constitution had a written and unwritten dimension which was implicit in the Ninth Amendment, that meant that both dimensions were part of the fundamental law. That did not imply that both dimensions were part of the constitutional law but did not exclude such a possibility. There was also a question what was the relation between the written and unwritten dimension of the Constitution, whether the unwritten sphere was part of the document or whether the unwritten dimension was by definition outside the constitutional law.

If the unwritten dimension was outside the constitutional law then the judiciary, the institution endowed with the interpretation of the Constitution and the rights inherent in it, would go beyond its authority if it appealed to "higher law" invoked from behind the Constitution. The natural rights dimensions could of course be invoked to clarify the meaning of the positive text. The written words did not preclude a natural rights content but judges should *not feel free to invoke ideas of natural justice that are not grounded in constitutional text.* If the Constitution was a set of rules and procedures it was so partly *because it flows out of a coherent and knowable, not arbitrary or ever-mutable, set of philosophic presuppositions*[69].

If, on the other hand, the Constitution had that unwritten sphere legitimate then whoever interpreted the Constitution might legitimately enforce the unwritten norms as constitutional. It would follow that those unwritten norms had to be first constitutionally established before being judicially enforceable[70]. In such a case the Constitution would rest on the set of unwritten morals as well as political principles which it ex-

[67] J. H. Ely, *op. cit*, p. 39.
[68] Van Horne's Lessee vs. Dorrance, Calder v Bull; Fletcher vs. Peck; Terrett vs. Taylor.
[69] G. Jacobsen, *The Supreme Court and the Decline of Constitutional Aspiration*, Totowa 1986, p. 75.
[70] J. H. Ely, *op. cit.*, p. 39.

pressed and within whose meanings it made sense. It would be then a written document which would represent a particular type of an incomplete embodiment of a higher law which was *sine qua non* a condition of the understanding of the Constitution. Without that higher law, the true dimension of the text would be not comprehensible.

With that unwritten dimension of the Constitution the question would not then be whether the Constitution was the normative standard in the American polity but "what was the Constitution"; the issues of the constitutional interpretation and what arbitrary will following. This brings us to the Ninth Amendment. The indeterminacy of the Ninth Amendment precludes any appeal to the original intent as understood in 1787. What is more, if the general clauses expressed in the Declaration of Independence or Preamble do not belong to the text of the Constitution, then its interpretation could be given to the people. The people would be the sole agents to define the boundaries of power and their rights. The public deliberation would be the standard of constitutional interpretation and would entail a possibility of political argumentation[71]. The Ninth Amendment would exclude reference to the framers' intent. Public deliberation in history would take precedence. The interpretation of the Constitution through such a process would then be a political practice about the balance of power vs. liberty, individualism vs. community, of the potentialities of human experimentation.

It would not mean that the Constitution was not a standard outside of political process[72]. It was. But it was especially so in America because of the rights culture and the blockade of the "checks and balances". The Constitutional text would thus draw into it all political forces trying to win them over to their side. The constitutional political judgment is "true" when it is public *not public when it accords to some standard external to politics*[73]. Such an interpretation would not necessarily exclude the judiciary from the debate. As an institution rooted in the tradition of the *discovery of law through consideration of "the nature and the reason of the thing"* it might be well positioned to do that.

Later in life, Madison stated that the express provisions of the Bill of Rights in the Constitution would cause that "independent tribunals *of justice will consider themselves in a peculiar manner the guardians of those rights.* Those tribunals would form a bulwark *against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights*[74]. The question was whether there was a legitimate reason that independent tribunals should play such a role as far as the other unenumerated rights retained by the people in the Ninth Amendment, that is whether the unenumerated rights could be judicially enforceable as the enumerated rights or must they first be established as

[71] See R. N. Dworkin, *Law's Empire*, Cambridge 1986, p. 7, 47, also: A. MacIntyre, *After Virtue*, Notre Dame 1981, p. 175.

[72] J. Appleby, *Liberalism and Republicanism in the Historical Imagination*, Cambridge 1992, pp. 219-221.

[73] S. Wolin, *Politics and Vision*, Boston 1960, p. 64.

[74] *Annals of Congress 1836*, ed. Gales and Seaton, vol. 1, p. 440.

constitutional laws by the political branches before the judiciary could enforce them[75].

The possibility that the federal judiciary would judicially enforce those unenumerated rights before they would be defined by the political branches was thus an open option. Judging from the theory of the Constitution and its interpretation through the statutory construction that was a possibility. That would also mean that the federal judiciary would be independent.

The Content of the Unenumerated Rights

The paramount question in that context was what could be the content of these unenumerated rights. The Madisonian proposal excluded natural rights from the federal Bill of Rights and only the inclusion of civil rights or social rights derived from social compact was contemplated. But it was logical that the Ninth Amendment had to include "natural rights", along the lines proposed by Sherman[76]. The individual had rights before and without the Constitution and only some of them, were mentioned in the Constitution[77]. Madisonian objection against inclusion of the natural rights was based on the validity of the enumerated powers argument.

The Ninth Amendment in fact rejected Madisonian limitation of the Bills of Rights. If it was put in the Constitution as a reservation against constructive power of the federal government, if the Federalist theory of legally precise enumerated powers was given up, then the relation between the federal government and the people was of the same order as between the state governments and the people.. It was simply a traditional, the English Whig, compact between the rulers and the ruled. The fact that the rulers were now the officers of the sovereign people did not change the equation of power, since they too had a potential to usurp its power through the construction of the Constitution. In such a case the role of the federal Bill of Rights and the State bills of rights would be the same, the prevention of the encroachment of political power on the social rights. But that also meant the possibility of similar encroachments against the natural rights, and not only the social rights. The natural rights guaranteed in the State bills of rights were sufficiently guarded in the overall federal system, as long as the penetration of the fed-

[75] J. H. Ely, *op. cit.*, p. 39.

[76] After all, the final list of the Bill of Rights did not contain all the social, positive rights derived from social compact such as: the right to vote, hold office, the right to free election, the right not to be taxed except by consent through representation of one's choice, the right to be free from monopolies, the right to be free from standing armies in time of peace, the right to refuse military service on grounds of religious conscience, the right to bail, the right of the accused person to be presumed innocent, and the right to have the prosecutor prove the guilt beyond reasonable doubt. They were existing positive rights protected by state laws, constitutions and the common law. They could also be regarded as rights of the people before which the power of government must be exercised in subordination, and as civil, social rights might be invented. But next to them was the sea of natural rights and they might be invented too.

[77] L. Henkin, *The Age of Rights*, New York 1990, p. 97.

eral government into the state domain was excluded. But precisely that could not be guaranteed as the Antifederalists' consolidation theory tried to show[78].

The Ninth Amendment was consistent with the Antifederalists' theory. Any government was to be founded in such a way as to *expressly reserv[e] to the people such of their essential natural rights as are not necessarily to be parted with*[79]. What were those natural rights for the Antifederalists? For instance for Brutus they were *the great principles of the late revolution, and those which governed the framers of our state constitutions... self-evident truth that all men are by nature free.* The civil society and the state was created as to limit the injury that that exercise of liberty in the state of nature could cause to others. The origin of society was not to be sought *in any natural right which one man has to exercise authority over another but in the united consent of those who associate... but it is not necessary that individuals should relinquish all their natural rights. Some are of such a nature that they cannot be surrendered.* Brutus lists some of such rights all rooted in the natural right of liberty: *rights of conscience, of enjoyment and defending life.... and others which [should not] be resigned in order to attain the end for which the government is instituted*[80]. The end of government was just *common good.* This was the classical liberal theory of natural rights belonging to the sphere of private liberty within which individuals have a right to do as they wish, provided it is not detrimental to others. If their behaviour did not transgress such a boundary the others, the government included, had no right to interfere.

Brutus, like the American founding elite in general, must have realised, that any attempt to define the confines of the sphere of liberty of the Declaration of Independence and the Preamble as a key to the natural rights possessed by the people, was impossible. These rights were limitless. Moreover, the notion that the definition of harm to the community was not ontological but socially and culturally construed could not be ruled out[81]. As such, it could never be completely codified. The extent of those natural rights could be tested only daily with the current definition of the common good as nothing more than the prohibition of injuring the others. The people would engage constantly in the debate about the legitimacy of certain rights derived from the right of liberty. Yet the list of such rights was as limitless, as the human imagination[82].

Such a theory of natural rights presupposed not only a theory of limited government but a liberal moral theory of the Constitution which entailed the rights

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[78] The Federalists' tacit abandonment of the "enumerated powers" doctrine as a feasible concept conceded that fact. They had to turn to the business of the rules of interpretation, the field which has grown into an industry of its own.

[79] H. Storing, *op. cit.*, p. 2, 9, 24.

[80] *Ibidem.*

[81] This is a perennial problem of American constitutionalism. Is there a boundary between ontologically and socio-culturally defined rights, and if so, where it is. Who defines such rights? The courts, the representatives, or social movements? These are the questions which could not be defined by the Constitution. These are the questions of modernity stemming from the individualistic contemporary society, which limits the ontological notion of "human nature". See: G. Borradori, *The American Philosopher,* Chicago 1991, pp. 137-152.

[82] In 1787 the meaning of liberty was difficult to define. It could mean public and private liberty, as Madison wanted it, the former referring to the right of assembly or vote. The latter referred to as private rights included for instance freedom of religion, expression, or movement. In: H. Storing, *op. cit.*, p. 2, 9, 48.

of citizens to have moral rights, or claims against government. The republican theory of the representative government did not have moral legitimacy to dispose of natural rights, which could never be totally listed. Thus the moral theory of the Constitution was inherently bound with the written text and the Ninth Amendment was a recognition of that theory. It was a clear-headed recognition of the inefficacy of the legal, positive provisions limiting the powers of government.

The problem of codification of natural rights woven together with social rights occurred in the State constitutions. They tried to contain the usurpation of the legislative power and included longer and longer lists of rights which were never satisfactory[83]. James Wilson, a foremost American theorist of natural rights remarked that *there are very few who understand the whole of these rights... Enumerate all rights of men! I am sure, sirs, that no gentleman in the late Convention would have attempted such a thing*[84]. In human communities there were *many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of government; and the rights of the people would be rendered incomplete*[85].

One of the gravest political implications of the Ninth Amendment was its potential for judicial review in its most activist form. Madison and Jefferson contemplated that the amendments could be judicially enforceable. They seemed not to think that way about the Ninth Amendment. Enforcement had to be confined to the rights of the Eight Amendments or scattered in other constitutional provisions. The independent tribunals of justice *will consider themselves in a peculiar manner the guardians of those rights; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights*[86].

For Madison enumeration meant transformation of rights into positive law. The courts could exercise them[87]. It would follow that not being positive law the unenumerated rights could not run in the courts Art III, sec. 2, clause 1 described federal court jurisdiction and stipulated that the federal judiciary adjudicated in *all cases... arising under this Constitution.* The "rights retained by the people" as not enumerated, would not belong then to the domain of positive law. A suit brought on such a right would lack standing. The Rights from the Ninth Amendment would exist independently of government or they would *constitute an area of no-power*[88], just delineating the ultimate boundary of power of the federal government.

But even if we assume such an interpretation, these rights could be defended, as mentioned earlier, through political action. As such they could eventually concern the federal judiciary provided that that action could transform itself

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[83] D. S. Lutz, *op. cit.*, pp. 59-68.
[84] *Debates*, ed. Elliot, vol. 2, 2nd ed., Philadelphia 1937, p. 454.
[85] *The Documentary History...*, vol. 2, p. 388; also: *Annals of Congress*, vol. 1, pp. 731-732.
[86] *Annals of Congress...*, p. 440.
[87] See L. Dunbar, *James Madison and the Ninth Amendment*, "Virginia Law Review" 1956, vol. 42, p. 643.
[88] *Ibidem*, p. 641.

into legislative enactment. But even if such a political action did not transform itself into legislative enactment the judiciary could define and defend the rights defined politically. "Brown vs. Board of Education" of 1954, is a major modern example. In such a situation the decision could stand only as long as it had political support, if the institutions created to express the people's will, Congress or President, were blocked.

Thus the unenumerated Ninth Amendment rights opened a possibility that the people could challenge any governmental policy on the basis of unlimited rights. The challenge to Congress, for instance that it was abusing the "necessary and proper" clause was a possibility. The Ninth Amendment could also be used as a check on state governments which originally was not contemplated. That could be inferred from the inability of Madison to push through the Senate the resolution forbidding the states to violate *the equal rights of conscience... freedom of the press, or the trial by jury in criminal cases... [since] every Government should be disarmed of powers which trench upon those particular rights... The State Governments are as liable to attack these... privileges as the General Government is, and therefore ought to be as... guarded against*[89].

But the rejection could never mean that people had surrendered all their rights to the state governments. For once, the state governments quickly incorporated into most of their constitutions the provisions very much like the Ninth Amendment. Moreover some of the rights in these constitutions were natural rights, inalienable any way. The lack of incorporation meant rather that Congress and the federal judiciary lacked jurisdiction to protect the retained rights against the states, The passage of the Fourteenth Amendment after the Civil War made such an incorporation possible[90]. Those unenumerated rights, according to the American revolutionary generation, seemed to reside in the self-evidence of human needs and values and were justified by human existence grounded in liberty, as defined in the Declaration and the Preamble. Such a justification challenged any policy of the federal or state government going beyond their powers and restricting people's liberties.

Of those unenumerated rights the most fundamental and unlimited was the natural right of liberty operating as an all-encompassing check on both governments. Justice William O. Douglas in Doe vs. Bolton of 1973 stated that the Ninth Amendment did not create directly any federally enforceable rights but a catalogue of the rights "retained by the people" *including customary, traditional, and time-honored rights, amenities, privileges and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term liberty*[91].

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[89] *Annals of Congress...*, p. 435, 441, 755.

[90] See: W. E. Nelson, *The Fourteenth Amendment*, Cambridge 1988.

[91] 410 US 179, 210, 211, Douglas added that the term "liberty" had a legal meaning only through the positivist language of the Fourteenth Amendment. But that did not preclude the fact that the potential of the Ninth Amendment for the development of the judicially enforced rights in case the political system was blocked or perverted could not be denied.

The Ninth Amendment had a judicial and political potential of which the Antifederalists were not entirely aware. For once, it constituted a concession that the whole federal constitutional system was not so much a legally defined contract, but a system of "communicating vessels", the balance of which was politically conditioned. To put it in other words, he who had the power, had the Constitution, that is the ability to impose its interpretation on others. As Lorenz von Stein remarked in 1852: "whenever Constitution and government become involved in serious conflict it is always the government which overcomes the constitution"[92].

In the eighteenth-century America that meant essentially a contest between the federal power and the states for the meaning of the Constitution. In the province of rights it could mean that the rights retained by the people could be fought for through the states. The states could challenge federal power whenever it tried to go beyond the enumerated powers. Thus the Constitution gave birth to the States' rights doctrine[93]. But the states could also be challenged by the Ninth Amendment. When the defence would turn out to be impossible through the states, the federal judiciary could be used against them. The judiciary would be an institution that could guarantee the "retained" people's rights.

The understanding of the Ninth Amendment as a depository of unenumerated rights stemming from liberty had far-reaching consequences. They were rooted in a liberal theory but contained an implication no one was aware of at the time. That implication turned the reading of the Ninth amendment upside down. It was based, in fact, on the assumption that the amendment could be understood as a guarantee against the government on the basis of "a general right of freedom"[94]. But its exercise seemed to have no limit provided it did not harm the others.

The Liberal Theory and the Positive Action of Government under the Constitution

During the revolutionary struggle the concept of harm was based on the common law experience of liberty. The British concept of liberty was in fact narrow, practical, impervious to the abstract notions expressed by the thinkers of the Enlightenment[95]. The same concept became limitless when it was based on the idea of liberty as a natural right. In America it was exercised in the context of the divided federal government operating on the basis of a written document. The concept of "harm" embodied serious substantive moral judgments and could not be neutral between rival moral outlooks. Because of that, liberty could be a sufficient yardstick for

[92] M. Kammen, *Sovereignty and Liberty*, Madison 1988, p. 16.

[93] It would seem that the Bill of Rights and state rights had little in common, but the issue was also locality and the natural right of pursuit of happiness. Increasingly the issue was also the natural right of property that is slaves. The states' rights doctrine was thus a process which *knows no special habitation. It is a nomad, reviving whenever and dwelling wherever toes are trod upon or feelings severely ruffled by the exercise of federal power,* [in:] M. Kammen, *op. cit.*, p. 188.

[94] See: *Nomination of Robert H. Bork... Hearings before the Senate Committee on the Judiciary*, Washington 1987, vol. 1, p. 117.

[95] H. vs. Jaffa, *Liberty and Equality*, New York 1965, p. 124.

demanding more rights than those specifically enumerated only if it could arbitrate cases of controversial value judgments. And that was an impossibility. In other words, what was liberty for Hamilton in 1787 was not necessarily so for William Manning or a slave in the South.

The concept of "harm to others" was thus not morally neutral. It meant that whenever there was harm to others, liberty restrictions were justified. It followed that liberty had to be supplemented by equity, which in turn would impose inequitable restricting policies on others. The implications of such a reasoning for the American constitutional practice was far reaching and unintentional. The demand on the federal government, for instance, to fulfil the liberty promise of the Ninth Amendment could be contemplated for the reason that someone would have to arbitrate between conflicting understandings of liberty. Moreover, in such a case the defenders and critics of a particular liberty would have to justify their positions. They would probably have to employ the additional justifying concepts of the American revolution, for instance equality, or pursuit of happiness[96].

That brings us to the paradox of the Ninth Amendment. Initially construed as a check on the federal government, it opened up a possibility of that government acting as an arbitrator between conflicting rights derived from it. That paradox seemed to be written into the very thinking of the revolutionary generation. The concept of "no harm" to others in the revolutionary definition of liberty entailed necessarily equality and the Ninth Amendment could be looked upon as a means of positive action to realize it both against the federal and state power. The social compact as the constituting event of a free society presupposed the equality of the natural rights[97]. That was the message of the Declaration of Independence, the realisation of the potential of liberty. Rights were antecedent to all positive laws and as such they belonged equally to all.

In that sense, the Constitution could be understood as having legitimacy not only because of its adoption but because it embodied the natural rights, the ultimate guarantee of which was the Ninth Amendment. But since people adopted inalienable natural rights as their code of behaviour, these rights not only had to be secured, but there were definite duties corresponding to them[98]. And since rights may be limitless, the corresponding duties could be limitless. There was thus not only a practical problem of defming the rights in a concrete cultural and historical setting[99], but also the problem of arbitration and the boundaries of compromise.

With his concept of "property in rights" Madison addressed that issue in 1792: *A man is said to have a right to his property... [but] equally said to have*

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[96] This is a general problem of liberalism, see J. Gray, *Liberalism*, Minneapolis 1986, p. 53-54. That shortcoming of the American concept of rights prompted Samuel Johnson in 1775 to comment sarcastically on the paradox of American liberty: "How is it that we hear the loudest yelps for liberty among the drivers of negroes", [in:] *Samuel Johnson's Political Writings*, ed. D. L. Greene, New Haven 1977, p. 454.

[97] See: H. vs. Jaffa, *What were the 'Original Intentions' of the Framers of the Constitution of the United States?*, "University of Puget Sound Law Review" 1983 (Spring), vol. 10, no 3, p. 382-386.

[98] See the contemporary, left-liberal argument C. R. Sunstein, *The Partial Constitution*, Cambridge 1993, pp. 138-140, 338-345.

[99] See: M. White, *The Philosophy of the American Revolution*, New York 1978, pp. 185-228.

a property in his rights[100]. But then he added *Government is instituted to protect property of every sort.* For Madison *a bill of rights will be a good ground for an appeal to the sense of the community*[101]. For Madison government, acting out of the pressure for the fulfilment of liberty could play an active role in promoting it. Madison assumed that there was in the Constitution a permission for the intervention of government, whether state or federal. There was thus a fissure in the Bill of Rights which was not only a barrier against governmental action but because of the Ninth Amendment, it was also an invitation to its intervention, possible beyond the enumerated powers list. At this point there arises the question what was the meaning of the terms "common good" or "sense of the community" used by Brutus or Madison. Did they constitute an expression of conformity with the Constitution and the enumerated rights as they were or an expression of a potential that ultimately the sovereign people could realise?

If the former was the case then the question has to be asked who should define these rights, who should enforce them and how should the deliberative process be structured. If the latter was the case – how was the sovereignty measured and expressed? That was a dramatic question of the modern constitutionalism grounded in rights[102]. The American revolution was a rebellion against government and a rejection of the "natural order of things". It was neither nature nor tradition which justified the political choices but they had to be grounded in deliberative discourse. For the first time in history the Constitution established *a republic of reasons... opposed equally to outcomes grounded on self-interest and.. on 'nature' or authority*[103],where government was purely "man made" with recourse to natural rights. In that sense Revolution became a *full scale assault on dependency.* Or, as Thomas Carlyle said, America was only "anarchy plus a street constable"[104].

The constitutional system excluded simple majoritarian politics. It worked both ways. It prevented the tyranny of the majority, but it also restricted governmental power. As such, the equal distribution of liberty could not be guaranteed simply by a deliberative process of elective branches as was the case in England. It had to proceed by the way of the fundamental law; it had to have constitutional justification. Through legislative power as a way of distributing equality of liberty the sovereign will was in the system of separation of powers and checks and balances limited[105]. The only recourse which was left was to demand rights through the Constitution. The culture of constitutionalism and the demand for rights would become for the Americans a powerful way of distributing equality of liberty. The Constitution as a standard of liberty was to be invoked against those who blocked the democratic process[106]. The Constitution justified by purposes it was supposed

[100] *The Writings of James Madison...*, vol. 6, p. 103.

[101] R. Rutland, *op. cit.*, vol. 14, 1975, p. 162-163.

[102] The idea was intimated many times by the thinkers of the American revolution. See for instance: Ch. S. Hyneman, D. S. Lutz, *American Political Writing during the Founding Era 1760-1805*, Indianapolis 1983, vol. 2, p. 703; H. Storing, *op. cit.*, vol. 5, p. 55, 269, vol. 4, p. 29, also vol. 3, p. 5, 56, 77-88, 118.

[103] C. R. Sunstein, *op. cit.*, p. 20.

[104] In: P. S. Paludan, *A Covenant with Death*, Urbana 1975, p. 15.

[105] J. Appleby, *op. cit.*, p. 220.

[106] See: J. Choper, *Judicial Review and the National Political Process*, Chicago 1980, p. 25-29.

to realise which enabled individuals and groups to appeal to it and to demand ends it was supposed to guarantee[107].

The culture of constitutionalism and a pressure to distribute equally the liberty put forth in the Declaration, the Preamble and the Bill of Rights became a powerful substitute for the majoritarian, parliamentary politics. It made social energy focus on the Constitution and the war for its interpretation has became a major American sport, preserving democratic politics from war of all against all[108]. It was not the text of the Constitution which made it the vehicle of the culture of constitutionalism. It was that text in the context of the powerful anti-governmental bias of the structure of the US federal system of institutions and its virtual resistance to change through amendment that enforced a gradual channelling of all social, economic and political energies towards its interpretation.

The Constitution as a substitute of majoritarian politics caused that the fight for rights took on the character *of military manoeuvres in a fixed terrain*[109]. The Constitution understood as a legal text, was a "fixed terrain". The US history has been the history of a strife for the meaning of the Constitution and the vehicle through which such an interpretation could be made[110]. It turned out that the paramount position in that process was acquired by the Supreme Court for although: *The past may be only a prologue, but for the Supreme Court that prologue... appears to direct the whole drama. The drama is the interpretation of the words of the United States Constitution*[111]. That did not mean that the federal judiciary had to assume such a position, but it explains why it was achieved. The key position of the judiciary without necessarily deciding what its precise role would be was conditioned by both the text of the Constitution and the culture of constitutionalism based on rights.

There has always been a pressure in such a situation to depart from constitutional text or the intention of the framers and to resort to the salutary fiction of the 'living constitution' as a substitute for amendment and the blocked majoritarian political process[112]. The federal judiciary assumed a role of a continuous constitutional convention, including new and changing interpretation of the unenumerated individual rights[113].

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[107] See: D. S. Lutz, *The Declaration of Independence As Part of an American National Compact*, "Publius" 1989 (Winter), vol. 19, p. 41-58.

[108] There have been yet some who have minimized the impact of the Constitution on the creation of civilized American democracy. See: F. J. Turner, *The Significance of the Frontier in American History*, [in:] *An American Primer*, ed. D. J. Boorstin, New York 1985, p. 544-546, 562-564; R. A. Dahl, *A Preface to Democratic Theory*, Chicago 1956, p. 143.

[109] J. Appleby, *op. cit.*, p. 225.

[110] H. Jefferson Powell, *Parchment Matters*, "Iowa Law Review" 1986, vol. 71.

[111] J. G. Wofford, *The Blinding Light*, "The University of Chicago Law Review" 1964, vol. 31, p. 502.

[112] The term "living constitution" gained prominence only in the 1920's and 30's. See: M. Kammen, *A Machine That Would Go of Itself*, New York 1986, pp. 17-20, 34, 140-141, 177, 397; B. Cardoso, *The Paradoxes of Legal Science*, New York 1928, p. 60-61; O. Wendell Holmes, *Missouri vs. Holland 252 US 416*, 1920, pp. 433-434.

[113] *The Constitution, the Courts, and the Quest for Justice*, eds. R. A. Goldwin, W. A. Schambra, Washington 1989, p. 7.

The aforementioned issue in American constitutionalism has been framed as a problem of the source of norms governing judicial review and expressed by dichotomies: judicial activism vs. restraint, or judicial activism vs. democratic politics, originalism vs. non-originalism or interpretivism vs. non-interpretivism. They revolve around the issue whether in reviewing laws for constitutionality the judges should determine whether the scrutinized laws conflict with the norms grounded in the written Constitution, or should they also have the right to enforce principles like liberty, justice, fairness even if the normative content of those principles can not be overtly found in the original text[114]. There was no way the judiciary could avoid the role imposed on it by the logic of American constitutionalism. As the custodians of the fundamental law based on rights the judiciary was pushed towards power bigger than the electorate itself[115].

Such a culture was coupled with the feeling of unlimited potential and equality of condition, something which later was referred to as the culture of entitlements[116]. But to presuppose that the judiciary could get free interpretative role is misleading. The American constitutional argument in such a situation had to be a political argument. It was a participation in the ongoing constitutional convention where the text of the Constitution was a unifying mechanism of a pluralistic, rights and equality obsessed society. To presuppose that such a society would worship the Constitution if it had been just a legal contract to which the parties were accountable as they were 200 years ago, obscures its role. In the American context, the Constitution has been a generator of culture and norms of legitimacy, with the tacit consent of all participants in the debate: the judges, the public, the federal and state institutions[117].

If the values of the American polity expressed in the Declaration, the Preamble and the Bill of Rights could not be frozen in time, because by the nature of things they were boundless and as such made constitutional which was indicated clearly by the Ninth Amendment then American constitutionalism, since so much has always been demanded from it, has to be a political discourse[118]. The larger question of course arises what has been the ultimate aim of the aforementioned values, all of them grounded as equality of liberty understood as no harm to others. Was that liberty understood as a libertarian concept? In America the aim of such a liberty seemed to point towards justice. Justice has always been a notoriously elusive concept in liberal theory. But in American constitutionalism it figured

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[114] The issue has a voluminous literature. See: J. H. Ely, *op. cit.*, p. 1-2; T. C. Grey, *op. cit.*, p. 703; on the conservative school of "judicial self-restraint" see: A. Bickel, *The Least Dangerous Branch*, New York 1963; R. H. Bork, *Styles in Constitutional Theory*, "South Texas Law Journal" 1985, vol. 26; on the left-liberal, "judicial activism" school see R. Dworkin, *Taking Rights Seriously*, Cambridge 1977; M. Perry, *The Constitution, the Courts and Human Rights*, New Haven 1982, p. 91-145.

[115] J. Appleby, *op. cit.*, p. 225; D. S. Lutz, *From Covenant to Constitution*, "Publius" 1980, vol. 10, p. 101-164.

[116] *The Radicalism...*, p. 230; J. B. White, *When Words Lose Their Meaning*, Chicago 1984, p. 267.

[117] A. Cooke, *America*, New York 1987, p. 389; E. Maltz, *The Failure of Attacks on Constitutional Originalism*, "Constitutional Commentary" 1987, vol. 4, p. 46.

[118] Ch. Wolfe, *All Too Political?*, "Polity" 1990, vol. 23, no 2; H. C. Mansfield, *America's Constitutional Soul*, Baltimore 1991, p. 207.

prominently: in the Preamble, in the Federalists and the Antifederalists. Madison stated *Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit*[119].

What Madison meant above of all was a procedural justice, the prohibition against the operations of the strongest factions. The extended republic would form a coalition of *majority of the whole society /which/ could seldom take place on any other principle than those of justice and the general good.* In Federalist 51 he reiterated the point from the perspective of rights: *In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.* Procedural justice was to be *open to the force of argument* and to provide justification for the decisions taken[120]. But at the same time it was procedural justice imposing on the political actors the obligation of a pursuit of self-interest, provided they were really free and no one had concentrated power. The clash of those interests would be *guided, constrained, and ultimately transformed by the regular procedural channels*[121] created by the Constitution.

Those procedural pathways, argued Madison, were to ensure the final accommodation among the most egotistic interests. When such accommodation becomes habitual, public-spirited citizens would develop, which in itself was a guarantee of justice. The "rights" were thus somehow self-automata, providing that they would be acting not in alienation but through republican institutions in public. They would have to be somehow forced into the public realm. The task of the constitutional system would be to secure equality of rights. The system was conditioned by the merging of public activities and private self-interests. The end result of that process was republican politics with civilized individuals[122].

Public obligation would thus be a by-product of rights, man was not a citizen by nature as the ancients envisioned him to be. Political society was created artificially. Public education was conditioned on rights, and the duty towards the community was the result of their equal and honest pursuit. Such a polity would produce justice[123]. That concept of justice was essentially harking back to the Aristotelian concept of "corrective or commutative" justice as based on private transactions of equal men[124]. Such a concept of justice was close to the framers' idea of equality of liberty as a capability of engaging in free transactions. It had nothing to do with distributive justice, but relied on the guarantee of fair game, that is equity.

The problem would occur if the political process belied the Madisonian impartiality. What if, for instance, the political process was an interest-group plu-

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[119] *Federalist 52...*, p. 324.

[120] C. R. Sunstein, *op. cit.*, pp. 23-24.

[121] R. A. Goldwin, *Why Blacks, Women, and Jews Are Not Mentioned in the Constitution*, Washington 1990, p. 67.

[122] *The Moral Foundations of the American Republic*, ed. R. H. Horwitz, Charlottesville 1986, pp. 75-108.

[123] M. Farrand, *op. cit.*, vol. 1, p. 134; R. A. Goldwin, *op. cit.*, p. 64.

[124] R. A. Goldwin, *op. cit.*, p. 41.

ralism which destroyed deliberative democracy? What if the requirements of natural rights were in conflict with the practical results of the deliberative process? What was deliberative process? Did the Constitution licence any forms of public debate over the common good or are particular types of public decisions excluded by it? For Madison religious freedom could not be denied by any deliberative process[125]. But could the natural right to liberty be compromised by the political arrangement? Madison accepted slavery as an example of such an arrangement. For the sake of the common good of the union of which the slave owners were a part and the right of property Madison granted the right to liberty, out of political expedience, only to citizens, denying them to men, that is slaves. Madison or Jefferson did not close the door to the equality of natural right to liberty for slaves. He never denied their humanity but adopted a compromise, to check equality in liberty in the name of social concord[126].

But the Madisonian theory of the extended republic as a guarantee of impartiality ran into another difficulty at the national level. It was against the logic of the American blocked constitutional system[127]. Thus Madison's doubt was not only that the extended republic might not provide equality of liberty at the federal level. It might prevent tyranny of the majority, but the plan *will neither effectually answer its national object nor prevent the local mischief which every where excite disgust against the state governments*[128].

For Madison the danger was that the federal government would be unable to guarantee security of rights in the states. The effective barrier to oppressive majorities in the states was the federal veto on state laws which was the way of providing justice and which Madison thought was not provided in the Constitution. What Madison was saying was that the equality of liberty might require a positive exertion of power, this time by the federal government[129]. That the government sometimes might force solutions stemming from natural rights of the Declaration and the Bill of Rights, especially the Ninth Amendment. As such the federal government had to formulate again what was the proper relationship between liberty and power. The flight from government that is from power for the preservation of liberty for all might not be enough. The natural right of liberty as the end of the

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[125] M. White, *op. cit.*, p. 221.

[126] *Ibidem*, p. 222; W. Berns, *Taking the Constitution Seriously*, New York 1987, p. 15; H. Storing, *op. cit.*, p. 2, 9, 39; M. White, *op. cit.*, p. 222.

[127] See: R. M. Cover, *Justice Accused*, New Haven 1975, pp. 159-191; P. Finkelman, *An Imperfect Union*, Chapel Hill 1981, pp. 236-284.

[128] *Papers of James Madison...*, vol. 10, pp. 163-164, 206-219. For the Anti Federalists there was no danger of majoritarian oppression in the States, only by federal government.

[129] The transforming event was of course slavery and the Civil War. The federal power was used to quarantee equality of liberty. The liberty guaranteed in the Bill of Rights, except the Ninth Amendment were the negative liberty from interference by outside authority. Positive liberty was a form of power, to achieve liberty denied by the inability of the constitutional system to achieve the equality of liberty of all. What the slaveholders and their political allies wanted to do was to use the negative liberty of self-government and absolute protection of liberty in the case of slaves, not as a temporary expedient but as the essence of the American polity. But, for Lincoln, the equality of liberty, political and civil had to take precedence. J. M. McPherson, *Abraham Lincoln and the Second American Revolution*, New York 1990, pp. 137-138. McPherson was yet imprecise when he wrote that the first eleven amendments limited the federal power and the next six expanded it. The expansion of that power was implicit in the Ninth Amendment.

republic could require a call for power in the name of liberty. It was a radical change of the revolutionary logic of the relationship between power and liberty. But it took two generations to implement it; in practice it happened after the Civil War[130].

Such a development was not inconsistent with the understanding of the Ninth Amendment. Not only did it prevent the political power to trample on liberty but it also implied the opposite power since "rights" retained by the people in the eighteenth century also meant "power". It could include the right of the federal government to use power against the states to fulfil the end of government as formulated in the Declaration of Independence, the equal distribution of liberty. The Ninth Amendment meant the retention by the people of rights not enumerated in the Constitution. But since "right" was equated with "power", people could use it to delegate power to any government, including the national one, the right to guarantee the right of equality of liberty. The Americans in the eighteenth century equated those two concepts, which was common practice in the West for a long time.

When the concept of an individual right was first formulated by nominalists in the fourteenth century, it was William Ockham who provided the *first... systematic account of subjective rights* and who also elucidated *the notion of* ius *in something by using the word* potestas[131]. In 1402 Chancellor of the University of Paris Jean Gerson wrote in "De Vita Spirituali Animae", that ius *is a dispositional* facultas *or power... appropriate to someone and in accordance with right reason.* In 1651, Hobbes in his *Leviathan* also declared that the right of nature is *the liberty each man hath, to use his own power, as he will himself*[132]. Also Blackstone, basing his ideas on Burlamagui stated that *natural liberty consists properly in a power of acting as one thinks fit, without any... control, unless by the law of nature... every man, when he enters into society, gives up a part of his natural liberty... receiving the advantages of.. the community... Political... or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws... as is necessary... for the general advantage of the public.* But Blackstone conceded that if *the law...* [*would do*] *mischief to his fellow citizens...* [*it*] *is... a tyranny*, the natural right gives power to act[133]. For Americans thus right meant a power to act, to do right.

In the eighteenth century such an understanding of the Ninth Amendment where it equated right with power was dormant, but it was going to be a sleeping giant of the American constitutional law. As the first revolution invoked the right of liberty, the second constitutional revolution of 1860-65 invoked the right of equality of liberty. It was Abraham Lincoln who made the connection possible. By

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[130] R. Tuck, *Natural Rights Theories*, Cambridge 1979, pp. 22-23.

[131] *Ibidem*, p. 25, 130.

[132] W. Blackstone, *op. cit.*, vol. 1, pp. 121-122.

[133] Ultimately, it was citizenship and not federalism that became the defming power of American identity. Federalism was one of the ways of implementing it. But in the end the shape of federalism was defined by citizenship grounded in equality of liberty. There were, problems with the concept of natural rights grounded in freedom as limitless derived from the state of nature.

the political will of his presidency he established the natural rights of the Declaration as the constitutional rights. He took upon himself the task of politically defining them and prompted the enactment of the Civil Rights amendments which paved the way for the judicial enforcement of the natural rights of the Ninth Amendments. That pertained especially to the due-process clause. It was a legal revolution, a reassertion that the states were also bound by the natural rights which could be imposed on them, this time by the federal government.

The issue, to be sure, had a dangerous potential. But the constitutional history went towards such a development through an additional legitimisation of "implied powers" doctrine anyway through the extension of the federal power, especially of judicial review. It was first exercised against the state and then national government and it was dormant in the Bill of Rights from the beginning. Thus the Bill of Rights, especially the Ninth Amendment, had paved the way to the creation of the enormous power of the federal judiciary, especially judicial review of federal power. The role of the Bill of Rights in the creation of that institution, whatever the intentions of its authors, cannot thus be overlooked.