1990

Book Review: The Rights Retained by the People: The History and Meaning of the Ninth Amendment. Edited by Randy E. Barnett.

Larry Alexander

are a people without a historical umbilical cord: as an intelligent student said to me last week, "Wasn't it remarkable how President Roosevelt finally got us to take on Hitler." Just as every American generation thinks sex was invented when it hit puberty, every political cohort strongly supports *stare* if it likes the *decisis*. American law has been politically "seduced" since the memory of man runneth not to the contrary.

THE RIGHTS RETAINED BY THE PEOPLE. Edited by Randy E. Barnett.[1] Fairfax, Va.: George Mason University Press. 1989. Pp. viii, 416. Cloth, $39.50.

Larry Alexander[2]

I

The ninth amendment is like a mysterious, unopened box only (relatively) recently discovered among constitutional artifacts. It has not yet been placed on public display because the constitutional curators are unsure in which section of the museum to place it. Some, the minimalists, believe that it is empty and should be regarded as a very minor exhibit in the federal powers wing. Then there are the maximalists, those who think the ninth amendment box is full and that it belongs in the individual rights wing of the museum. Some maximalists (the optimists) think the box is a treasure trove of rights that we should open as soon as possible. Indeed, they urge that the box and its contents not be kept in the museum at all, but should be put into service to deal with contemporary problems. Other maximalists (the pessimists) fear the ninth amendment is a Pandora's box that should in the public interest remain closed, despite the constitutional framers' desire that it be opened. They are quite content to treat the amendment as a museum piece and nothing more.

Interest in the ninth amendment is perhaps at an all time high. Evidence of this is the publication of a major symposium on the amendment and the book that is the subject of this review. The symposium,[3] also edited by Professor Barnett, consists of contemporary analyses of the ninth amendment. The book, on the other hand, is a collection of the major writings on the ninth amendment

1. Professor of Law, Illinois Instiute of Technology, Chicago-Kent College of Law.
2. Professor of Law, University of San Diego.
3. *Symposium on Interpreting the Ninth Amendment*, 64 CHI.[-]KENT L. REV. 35-268 (1988).

arranged chronologically from Madison's speech to the House of Representatives in support of the Bill of Rights to Charles Black's mid-1980s essay. The book and the symposium are nice complements because the essays in the book are predominantly focused on the historical, textual, and analytical evidence of the framers' intentions regarding the ninth amendment, while the contributions to the symposium are much more concerned with the contemporary policy implications of various interpretations of the amendment.

II

All of the positions that I listed above on the ninth amendment's meaning are represented in the book and in the symposium, though the pessimists are somewhat in disguise.[4] Disregarding subtle differences among commentators within each camp, here are the interpretations in play.

The minimalists view the ninth amendment as rhetorical only, analytically unnecessary and important, if at all, only psychologically. According to their theory, this amendment was inserted in the Bill of Rights to allay two concerns. One concern was that adoption of the Bill of Rights would imply that the federal government possessed plenary regulatory power except as prohibited by the first eight amendments. The other concern was that adoption of the Bill of Rights would imply that the Constitution repealed *ex in propio vigore* various rights granted by state law *against the states*—in other words, that the Bill of Rights would be read to be exhaustive of all rights, whether against the federal government or against the states, state law grants of rights notwithstanding.

In Barnett's book, the two camps of minimalists are represented by Raoul Berger (ninth amendment intended to block any inference of otherwise unlimited federal powers) and by Russell Caplan (ninth amendment intended to block any inference of repeal of state-granted rights). (In Barnett's symposium, Michael McConnell also joins the Caplan wing of the minimalists,[5] a wing that also includes Robert Bork).[6]

Each minimalist position faces a major objection. If the ninth amendment was intended to block an inference of unlimited federal powers from inclusion of the Bill of Rights, then, as most who argue against minimalism point out, the tenth amendment was redun-

4. *See infra* Part IV.

5. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.[-]KENT L. REV. 89 (1988).

6. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 184-85 (1989).

dant.[7] On the other hand, the idea that the ninth amendment was intended to negate repeal of rights under state law encounters the objection that the inference of such repeal is itself too bizarre to have been a motivating factor behind the ninth amendment's inclusion.[8] Put differently, any sane interpretation of the Constitution plus the Bill of Rights but minus the ninth amendment would leave most state-law-based individual rights in place unless and until Congress exercised its limited enumerated powers in ways inconsistent with such state laws.

Most of the remaining contributors to both Barnett's book and his symposium are optimistic maximalists who view the ninth amendment as constitutionalizing unenumerated moral rights.[9] On this view, the ninth amendment is neither redundant nor silly. Instead it reflects the framers' recognition of the higher moral law that the Constitution was meant to instantiate.

The optimistic maximalists themselves divide into two camps depending upon the types of arguments about unenumerated constitutional rights that they believe the ninth amendment makes admissible. The "constructivists" would recognize as ninth amendment rights only those that are consistent with or presupposed by the enumerated rights and powers.[10] In other words, a ninth amendment constructivist would pedigree under that provision, not true

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7. *See, e.g.*, Barnett, Foreword: The Ninth Amendment and Constitutional Legitimacy, *supra* note 3, at 37; Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, *id.* at 239, 245-46.

8. *See, e.g.*, Sager, at 243-45.

9. Among these are Barnett, *Introduction: James Madison's Ninth Amendment* in THE RIGHTS RETAINED BY THE PEOPLE (R. Barnett ed. 1989); Corwin, *The "Higher Law" Background of American Constitutional Law*, *id.* at 67; Kelsey, *The Ninth Amendment of the Federal Constitution*, *id.* at 93; Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, *id.* at 291; McIntosh, *On Reading the Ninth Amendment: A Reply To Raoul Berger*, *id.* at 219; Patterson, *The Forgotten Ninth Amendment*, *id.* at 107; Redlich, *Are These "Certain Rights . . . Retained By The People"?*, *id.* at 127; and Van Loan, *Natural Rights and The Ninth Amendment*, *id.* at 149.

There is an interpretation of the ninth amendment intermediate between minimalism and maximalism. According to this interpretation, the amendment constitutionalized as against the federal government a closed list of certain specific rights that were recognized by the state governments in 1791. In Barnett's book, this interpretation is adopted by Massey as *part* of the meaning of the ninth amendment. Elsewhere, Henry Monaghan has proposed this interpretation as perhaps the entire meaning of the amendment. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 367 (1981). Note that this interpretation limits application of the ninth amendment to acts of the federal government, whereas the maximalists would apply it to the states as well, either through due process incorporation, or, more logically, in its own right.

10. In Barnett's book, Black, Massey, McIntosh, and Redlich all appear to be constructivist maximalists. Stephen Macedo—*Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levision*, 64 CHI.[-]KENT L. REV. 163 (1988)—and Andrzej Rapaczynski—*The Ninth Amendment and the Unwritten Constitution*, id. at 177—also appear to be in this camp.

moral rights, but only those rights that, following Ronald Dworkin,[11] the interpreter derives from the best political/moral theory that would justify the Constitution's text (enumerated rights, powers, and structure). The "naturalists," on the other hand, would read the ninth amendment as constitutionalizing any and all moral rights we actually have, regardless of their relation to the Constitution's text.[12]

The constructivists are in theory the more constrained of the optimistic maximalists. Some, like John Ely, are in fact quite constrained: Ely reads the dominant intention behind the Constitution as a whole to be the proceduralist one of establishing a representative democracy rather than a substantive one presupposing a vision of the just society. Ely, therefore, would construct out of the open-ended provisions like the ninth amendment only such rights as are necessary to reinforce representative decisionmaking.[13] Other constructivists, such as Ronald Dworkin,[14] Richard Epstein,[15] and David Richards,[16] find a complete substantive vision presupposed by the text and would locate the nontextual portion of that vision in the open-ended provisions.

The naturalists, on the other hand, would not restrict ninth amendment rights to those that link up with and round out the intentions behind the more specific constitutional rights and powers. They would admit any argument that seeks to establish that such and such a moral right is one that we actually have, regardless of its textual pedigree. The only link the naturalists maintain to the historical Constitution is that the ninth amendment is part of that document, and the intention behind it is to constitutionalize our moral rights.

III

One complication in this taxonomy concerns the possible conflict between the rights we actually have—those the naturalist would read into the ninth amendment—and the more specific provisions of the Constitution. The constructivists would appear to have

11. *See* R. DWORKIN, LAW'S EMPIRE Chs. 6-7 (1986).

12. The naturalists in Barnett's book are Barnett himself, Corwin, Patterson, and Van Loan. Examples of the naturalist position in the symposium are Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, *supra* note 3, at 67; Grey, *The Uses of an Unwritten Constitution*, *id.* at 211; and Sager, *The Ninth Amendment and the Unwritten Constitution*, *id.* at 239.

13. J. ELY, DEMOCRACY AND DISTRUST (1980).

14. R. DWORKIN, *supra* note 11.

15. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

16. D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

no difficulty here since their ninth amendment is supposedly constructed out of the rest of the Constitution. The naturalists, however, need some account of how to resolve conflicts between the unwritten higher law and the written text that refers to it.[17]

This point leads to a more general point about the maximalists' ninth amendment, which is that it provides a very good lens through which to view the central jurisprudential problem, the relation of "reason" and "will" in law generally and in constitutional law in particular.[18] Put briefly, when we promulgate constitutions and laws, we seek to instantiate the moral rights we really have and the design of governmental structures and powers that is most conducive to bringing out (really) just, good, and wise government. In short, we attempt to follow reason. On the other hand, because we are fallible, any decision we actually reach on these matters—the constitutions and laws we actually will—may, from another's (or our later selves') perspective, conflict with reason. From that perspective, our reason and our will are opposed. Yet, to complete this picture, our reason also tells us that, fallible though we are, we must decide things with some finality, that is, "will" some results that will be effectively final over a range of cases, even though what we will may not be what reason would later tell us we should have willed.

It is this complex relationship between reason and will that lies at the heart of the general jurisprudential disputes between positivism and natural law, between narrow interpretivism and broad interpretivism/noninterpretivism, and between process orientations and outcomes orientations. In fact, all these disputes are just different angles on the one big battle between will and reason. Will and reason are complements—will detached from reason is tyrannical, and reason without will is anarchical—but they are also, given human fallibility, always potentially opposed to one another.

The maximalists' ninth amendment offers the illusion of a way to overcome the opposition of will and reason. For according to the maximalists, the ninth amendment represents a *willing* that judges be guided by nothing but their *reason* in ascertaining our rights, an interpretivist basis for engaging in noninterpretive judicial review.

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17. Their best bet would be to interpret the "incorrect" parts of the written text as a set of narrow rules that are to be followed within their limited domain rather than as broad but incorrect principles. *See* Alexander, *The Constitution as Law*, 6 CONST. COMM. 103, 113 (1989); Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW AND PHIL. 419, 432-34 (1987); Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 14-16 (1981).

18. *See* Alexander, *Essay: Of Two Minds About Law and Minds* (forthcoming MICH. L. REV., 1990); Alexander, *The Constitution as Law*, *supra* note 17.

Indeed, argue the maximalists, if we really want to be interpretivists, then paradoxically we should be noninterpretivists, at least about rights, since interpreting what the framers willed in the ninth amendment yields that result.[19] Surely the ninth amendment represents the best of all jurisprudential worlds, reason and will, substance and procedure, noninterpretivism and interpretivism, all brought together in harmony.

Of course, this really is just an illusion. The central problems of jurisprudence cannot be legislated away by the ninth amendment or by anything else. It is easy enough to see that the naturalists can't avoid these problems. For what if we accept their invitation to constitutionalize through the ninth amendment the moral rights we actually have. Not only will we have to decide what to do in case our actual moral rights under the ninth amendment turn out to conflict with other parts of the constitutional text, but we will also have to face the possibility that the moral rights we actually have include the right not to have decisions about our rights made by an unelected judiciary untethered to a written text. Just as the maximalists argue that the ninth amendment is a narrow interpretivist warrant for engaging in broad interpretivism or noninterpretivism, engaging in the latter may lead us back to narrow interpretivism. To avoid infinite looping, we will have to reject the authority of the ninth amendment, in essence excise it from the Constitution. Radical surgery to be sure, but inevitable if the rights we actually have include the right not to be governed by judges.

The constructivist maximalists appear to avoid the problem of having moral rights conflict with their noninterpretive imposition by judges because they view ninth amendment rights as constructed from the other rights, powers, and structures found in the text. But except for Ely's version of constructivism, which sees almost all of the Constitution as reflecting a specific procedural concern, most constructivist theories turn out to be indistinguishable from naturalist ones. Constructivism that would extend textual mistakes by building an entire, judicially-enforceable political/moral theory out of the text is bizarre. After all, the political/moral theory so constructed is by hypothesis an incorrect one. Moreover, the reasons to advert to a text—to provide certainty, separate powers, and monitor decisionmakers—don't apply to the way that broad constructivists treat the text and the intentions behind it. Constructivism of this type no more serves these rule of law values than does unbridled naturalism. Therefore, constructivism that builds on the text, *mistakes and all*, has neither the rule of law virtues associated with will

19. *See* Sager, *supra* note 7, at 254-61.

nor the virtue of correctness associated with reason.[20]

This is why broad constructivists usually turn out to be naturalists in thin disguise. They either interpret the text at such a high level of generality that will and reason merge ("the framers willed whatever reason dictates"), or they find presupposed in the framers' narrower intentions a political/moral theory that just so happens to be the one the constructivists would recommend on grounds of reason alone. Surely one can justifiably suspect that the Lockean or Rawlsian visions of the constitutional order favored by constructivists Epstein, Dworkin, and Richards are favored because they are viewed as correct and not because they are the best ways to construe the historical framers' enterprise. The constitutional text and intentions behind it seem to be makeweights in the constructivists' recommendations.

If this is correct, then there really isn't a dime's worth of difference between naturalism and broad constructivism as maximalist approaches to the ninth amendment. The basic problem of naturalism—that one plausible right we have is the right not to be ruled by unelected judges unbound by a text—is applicable as well to constructivism. I might also add that Barnett's own version of the naturalist approach, which he sets forth in the Introduction to the book, is afflicted by the same problems that afflict naturalism generally. His approach would have courts indulge a presumption in favor of common law liberties, a presumption that could be overcome by demonstrating a compelling governmental interest. In my experience, tests framed in terms of presumptions, levels of scrutiny, degrees of compellingness of governmental interests, etc., are empty and therefore totally manipulable in the absence of a background political/moral theory. And when one has in hand such a theory through which these tests might be fleshed out, the theory ends up doing all the real work, as it should.

IV

I have not yet mentioned any ninth amendment maximalists who are also pessimists, who view the ninth amendment as an invitation from the framers to constitutionalize unwritten rights that we must decline because of our own moral convictions. One reason I have not mentioned any pessimists is that I haven't found any clear examplars of the breed in Barnett's book, his symposium, or else-

20. *See* Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, *supra* note 17, at 430-31.

where for that matter.[21] On the other hand, I think that Ely's narrow, process-focused constructivism is motivated in large part, not by Ely's reading of the ninth amendment framers' intentions, but by his abhorrence of a judiciary given free reign to block the popular will by appeal to unwritten rights.[22] Similarly, Michael McConnell's contribution to Barnett's symposium, while it adopts a minimalist interpretation of the amendment, seems all too clearly to be driven by the same concern.[23] For them, better to take our chances with majoritarian mistakes about our moral rights than with judicial ones. More strongly, for them perhaps one of our moral rights is a right against judicial imposition of specific rights that lack a textual basis. If the ninth amendment was intended to legitimize such judicial imposition, then, on the basis of proper preconstitutional norms,[24] those that tell us why and to what extent the Constitution is authoritative and what interpretive methodology we should apply to it, we should reject the constitutional authority of the ninth amendment.

If we were to adopt the pessimists' approach and ignore the ninth amendment, it would not be the first constitutional provision to meet such a fate. For example, the Supreme Court has made the fourteenth amendment's privileges and immunities clause into a dead letter,[25] though its probable intended function has been taken over by the due process clause. But no other constitutional provision has been ignored on the explicit ground that it leads to immoral results. (There are, however, some decisions—*Blaisdell*,[26] for example—that might be characterized as implicit rejections of the Constitution on moral grounds.)

V

The ninth amendment is surely worth thinking about seriously, and Barnett's book and his symposium are the best and really the only places to begin. But if minimalism is an untenable interpretation of the amendment, we are left with maximalism and are therefore in the middle of all the big questions of constiutional jurisprudence. And nothing we can learn about the ninth amendment will help us there.

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21. John Ely accuses Justice Black of being a pessimist. ELY, *The Ninth Amendment* in THE RIGHTS RETAINED BY THE PEOPLE 179, 185-86 (R. Barnett ed. 1989), at 185-86.

22. *See generally* J. ELY, *supra* note 13, ch. 3.

23. McConnell, *supra* note 5, at 100-09.

24. *See* Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

25. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

26. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).