

October 1988

Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium

Earl M. Maltz

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 Chi.-Kent L. Rev. 981 (1988).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss3/12>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

UNENUMERATED RIGHTS AND ORIGINALIST
METHODOLOGY: A COMMENT ON THE NINTH
AMENDMENT SYMPOSIUM

EARL M. MALTZ*

The ninth amendment plays an important role in the ever-popular sport of originalist-bashing. Originalists believe that judges should follow the intent of the framers in constitutional adjudication. In particular, in individual rights cases adherents to originalism argue that judges should constitutionalize only those rights specifically contemplated by the framers.¹ The theory has been widely criticized from a variety of different perspectives.²

The use of the ninth amendment against the standard originalist position is distinguished by its apparent consistency with the basic premises of originalism itself. On its face, the language of the amendment seems to acknowledge the existence of unenumerated rights. Thus, the argument goes, if one is really concerned with effectuating the intent of the framers, he should not adopt a "clause-bound" view of rights, but rather some other, more open-ended approach to constitutional interpretation.³

In order for this argument to justify expansive judicial review of actions by *state* governments, two preconditions must be satisfied. First, the ninth amendment must be shown to have been intended to be a limitation on state governments. Second, one must demonstrate that the framers of the ninth amendment did in fact intend to constitutionalize unenumerated rights. The remainder of this Comment will show that neither of these assumptions are supportable.

* Professor of Law, Rutgers (Camden). B.A. 1972, Northwestern; J.D. 1975, Harvard.

1. For arguments supporting originalism, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

2. E.g., M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 9-10 (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

3. E.g., J. ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980).

I. THE APPLICABILITY OF THE NINTH AMENDMENT TO THE STATES

Commentators on the ninth amendment typically concede that, as an original matter, the ninth amendment was only intended to be a constraint on the federal government.⁴ Thus, their case depends largely on acceptance of the controversial thesis that section 1 of the fourteenth amendment was intended to make the Bill of Rights applicable to the states. Once this premise is accepted, they argue, to exclude the ninth amendment from the incorporation doctrine can only be viewed as a manifestation of the intellectually unpalatable concept of "selective incorporation."⁵

The difficulty with this argument is that it rests on an historical definition of the phrase "Bill of Rights." In modern parlance, "Bill of Rights" does refer to the first ten amendments to the Constitution. During the Reconstruction Era, by contrast, the understanding of the phrase seems to have been somewhat more limited. Both Representative John A. Bingham of Ohio and Senator Jacob Howard of Michigan—the two authorities relied upon most heavily by supporters of the incorporation theory—stated that section 1 incorporated the first *eight* amendments.⁶ Thus, from an originalist perspective, incorporation theory should not support the application of the ninth amendment to the states.

Of course, this conclusion does not necessarily end the debate over the ninth amendment. One might still construct some other historical argument that demonstrated the applicability of the ninth amendment to the states.⁷ Moreover, even if the ninth amendment did not constrain the states, the question of its impact on the power of the federal government would remain a pertinent issue. Therefore, even given the failure of the framers of the fourteenth amendment to contemplate its incorporation, the question of whether the ninth amendment was intended to constitutionalize nontextual rights remains important.

II. THE NINTH AMENDMENT AND NONTEXTUAL RIGHTS

Commentators have expressed sharply differing views of the intended scope of the ninth amendment. Russell Caplan has provided the

4. 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?*, 64 CHI-KENT L. REV. 239, 253 (1988).

5. *Id.* at 253-54.

6. Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (Howard); *id.*, 42d Cong., 1st Sess. App. 84 (1872) (Bingham).

7. See Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI-KENT L. REV. 131, 143-44 (1988).

most extensive defense of the narrow view of the amendment.⁸ Caplan argues that the framers intended only to guard a wide range of state-created rights from the suggestion that they were somehow eliminated by the enumeration of rights in the federal Constitution. He contends, however, that the amendment was not intended to guarantee that these rights would not be invaded by extra-constitutional government action.⁹ Obviously, this interpretation creates no problems for originalists.

Others, by contrast, take a much more expansive view of the framers' intent. Drawing on the work of scholars such as Thomas Grey¹⁰ and Suzanna Sherry,¹¹ the proponents of the expansive view note that the framers were operating against the background of a legal culture that recognized the existence of legally-enforceable natural rights. They contend that the ninth amendment was intended to protect this natural law tradition from the potential implication that it was inconsistent with the specification of a list of rights by a written constitution. On its face, the expansive view might seem to create some difficulties for those advocating a clause-bound originalist approach. Closer analysis, however, reveals that these difficulties are more apparent than real.

To appreciate this point, one must begin with an examination of the precise claim advanced by those who take the expansive view. They cannot effectively argue that ninth amendment rights were created by the Constitution itself; indeed, the essence of their argument is that the amendment protects some rights not established by the written document. Their argument must be that the rights whose existence is recognized by the ninth amendment should be viewed as part of an "unwritten" or "common law" constitution, different from and supplementary to its written counterpart.

This view is antithetical to the core assumptions of originalism, which rests on a positivistic view of law itself. Of course, originalists do argue that courts should follow the "intent" or "understanding" of the framers. But they do not believe that courts should feel constrained by every thing that the framers knew or believed; only those understandings that are incorporated into the constitutional text have the force of law. In essence, originalists believe that judges should be bound by the understanding of the framers because a) the framers had legitimate authority to create constitutional constraints; b) that authority was superior to that

8. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983).

9. *Id.*

10. Grey, *Origin of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854-56 (1978).

11. Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

of other agencies of government acting at a later date, and c) the framers exercised their authority in a manner consistent with legal norms. In situations where the framers had not exercised their authority, under originalist theory, the courts should be bound by legislative action or common law principles.

Viewed from this perspective, even under the expansive view of the ninth amendment, the unenumerated rights recognized by the amendment do not rise to the level of constitutional norms. The framers of the amendment did not create those rights through operation of the legitimate constitution-making process envisioned by originalists; at most the framers simply assumed that a body of rights existed prior to the making of the written Constitution and resolved that creation of other constraints on government by the framers' constitution-making process should not destroy those rights. But by definition, the body of rights protected by the ninth amendment are not constitutional at all, but rather extra-constitutional. Since the recognized rights are *not* created by the legitimate operation of the constitution-making process, originalist theory does not mandate their protection.

Some critics of originalism contend that this version of the theory takes an overly narrow view of the framers' intent. They argue that in order to be consistent, originalists must also consider the framers' "interpretive intent"—the question of whether the framers themselves believed that their specific intentions should constrain later judicial action.¹² If this argument is persuasive, then the proper interpretation of the ninth amendment is critical to constitutional theory. For if the expansive view is correct, then the framers plainly did *not* intend to bind future courts to the rights explicitly guaranteed by the text of the Constitution. Thus, if a consistent originalist must consider interpretive intent, he would be compelled to search for nontextual rights.¹³

As I have suggested elsewhere, this argument misunderstands the source of the appeal of originalism.¹⁴ The flaw in the argument is that it is contemporary judges—not the framers themselves—who are being asked to take political action by deciding cases. Here a statutory analogy is instructive. In searching for the intent of the drafters of a statute, judges do not ask if that mode of analysis was in the minds of those who

12. See Brest, *supra* note 2, at 212. See generally Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that framers did not intend future judges to be bound by original understanding).

13. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 76-84 (1988), makes a similar argument.

14. Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 800.

created the statute; instead, courts search for the relevant intent because modern conceptions of the judicial role require such an inquiry. Similarly, if originalist judges consider the views of the framers important, it is not because the framers themselves believed those views important, but rather because a modern political theory requires fidelity to the framers' views. Therefore, a consistent originalist need not necessarily feel bound by the framers' interpretive intent; instead he can plausibly rely on an independently-derived theory of constitutional interpretation.

Of course, one could easily describe a plausible theory of constitutional adjudication that directed courts to focus on the interpretive intent of the framers. The point is that one can construct equally plausible originalist models that do not embrace interpretive intent. Thus, even accepting the most expansive view of the intent of its framers, the existence of the ninth amendment does not conclusively discredit clause-bound theories of originalism.

III. CONCLUSION

Ninth amendment *aficionados* greatly overestimate its significance to contemporary debates over constitutional theory. Admittedly, the amendment does seem to suggest that the framers believed that people possessed rights other than those specifically enumerated in the Constitution. At the same time, however, the language does not indicate that those rights were to be protected *by* the Constitution, but rather *from* the remainder of the Constitution. Further, the evidence supporting the view that the drafters of the fourteenth amendment intended to incorporate the first eight amendments does not support a similar inference with respect to the ninth amendment. In short, the critics of originalism must look elsewhere if they wish to find a constitutional provision that unequivocally refutes those who would bind courts to the intent of the framers.

