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Articles

The Lost Jurisprudence of the Ninth Amendment

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*It is widely assumed that the Ninth Amendment languished in constitutional obscurity until it was resurrected by Justice Arthur Goldberg in the 1965 case, *Griswold v. Connecticut*. In fact, the Ninth Amendment played a significant role in some of the most important constitutional disputes in our nation's history, including the scope of exclusive versus concurrent federal power, the authority of the federal government to regulate slavery, the right of the states to secede from the Union, the constitutionality of the New Deal, and the legitimacy and scope of incorporation of the Bill of Rights into the Fourteenth Amendment. The second of two articles addressing the lost history of the Ninth Amendment, *The Lost Jurisprudence* takes a comprehensive look at the Ninth Amendment jurisprudence that flourished from the early nineteenth to the mid-twentieth century. Though long assumed never to have received significant attention from the Supreme Court, the first discussion and application of the Ninth Amendment was, in fact, by Supreme Court Justice and constitutional treatise author Joseph Story. In a passage unnoticed since the nineteenth century, Justice Story interpreted and applied the Ninth Amendment precisely the way James Madison and the state ratifying conventions intended—as a rule of construction preserving the retained right of local self-government. Ignored by the framers of the Fourteenth Amendment, the Ninth Amendment and its attendant rule of construction were deployed by courts throughout the nineteenth and early twentieth centuries to limit the interpretation of federal powers and rights. Ubiquitously paired with the Tenth Amendment, the Ninth suffered the same fate as the Tenth at the time of the New Deal, when both were rendered mere “truisms” in the face of expansive constructions of federal power. By 1965, the Ninth was assumed to exist in a doctrinal and historical vacuum, an assumption that no one has questioned until now.*

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I. Introduction

It is widely assumed that the Ninth Amendment¹ languished in constitutional obscurity until it was resurrected by Justice Arthur Goldberg in 1965.² In his concurring opinion in *Griswold v. Connecticut*, Justice

1. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

2. See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 64 (1957) (“There is no occasion for amazement when the fact comes to light that apparently there has never been a case decided which turned upon the Ninth Amendment. It has been invoked by litigants only ten times and in each instance without success.”); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* 9–10 (1995) [hereinafter MASSEY, *SILENT RIGHTS*] (“Very little effort has been devoted to doctrinal argument for the simple reason that a majority of the Supreme Court has never relied upon the Ninth Amendment as the basis for any decision.”); *id.* at 224 n.17 (“Only seven Supreme Court cases prior to *Griswold* dealt

Goldberg announced that “this Court has had little occasion to interpret the Ninth Amendment.”³ Pointedly citing Bennett Patterson’s 1955 book *The Forgotten Ninth Amendment*, Goldberg announced that he had located only three prior Supreme Court discussions of the Ninth Amendment, none of which offered much help.⁴ There being no precedent to guide the Court, Goldberg consulted what he believed was the original understanding of the

in any fashion with the Ninth Amendment.”); BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT 27* (1955) (“There has been no direct judicial construction of the Ninth Amendment by the Supreme Court of the United States of America. There are very few cases in the inferior courts in which any attempt has been made to use the Ninth Amendment as the basis for the assertion of a right.”); PROCESSES OF CONSTITUTIONAL DECISIONMAKING 113 (Paul Brest et al. eds., 4th ed. 2000) (“The title of Bennett Patterson’s 1995 book, *The Forgotten Ninth Amendment*, accurately captures the status of this provision of the Bill of Rights throughout most of our constitutional history.”); Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 442 (2000) (“While the Amendment began as an important condition to the states’ ratification of the Constitution, it subsequently went unnoticed by the Supreme Court for 174 years.”); Randy E. Barnett, *Introduction: James Madison’s Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT vii (Randy E. Barnett ed., 1989) [hereinafter RIGHTS RETAINED BY THE PEOPLE] (“For all but the last quarter of a century the amendment lay dormant, rarely discussed and justifiably described as ‘forgotten’ in the one book devoted to it.”); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 1 (1980) (“Justice Goldberg rescued [the Ninth Amendment] from obscurity in his concurring opinion in *Griswold v. Connecticut*.”); *id.* at n.3 (“Prior to *Griswold* . . . the Court had few occasions to probe the meaning of the ninth amendment.”); Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 223 (1983) (“After lying dormant for over a century and a half, the ninth amendment to the United States Constitution has emerged from obscurity to assume a place of increasing, if bemused, attention.”); *id.* at 223–24 (“Ninth amendment analysis has proceeded in three stages. In the first stage, which lasted until 1965, the amendment received only perfunctory treatment from courts and commentators.”); *id.* at 224 n.5 (“During this first period there were only the most glancing judicial and scholarly references to the ninth amendment, with no explicit construction of the amendment by the Supreme Court in the seven cases that represent the sum total of the Court’s pronouncements on the amendment prior to 1965.”); Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 319 (1936) (noting that “[t]here seems to be no case that decides the scope of the Ninth Amendment even in part” and that when the Ninth is mentioned “it is either grouped with the Tenth Amendment in decisions based upon or involving the latter, and hence concerning reservation or denial of power, or it is merely classified as one of the first ten which are held to be limitations on national and not state power” and concluding that “[n]o case has been found that uses the Ninth Amendment as the basis for the assertion or vindication of a Right”); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 89 (2000) (“[N]o Supreme Court decision, and few federal appellate decisions, have relied on the Ninth Amendment for support.”); Norman Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 N.Y.U. L. REV. 787, 808 (1962) (“The Ninth Amendment has been mentioned in several cases but no decision has ever been based on it.”) (citing cases listed in PATTERSON, *supra*, at 27–35); Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 769 (1994) (“[U]ntil 1965, the Court mentioned the Ninth Amendment in fewer than ten cases. In all but one of these, the references were brief and passing.”); Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 1 n.3 (1968) (citing only two pre-1900 cases and concluding that “[i]n the few cases where anything more than a cursory reference to the ninth appeared, it was lumped with the tenth, as an innocuous rule of construction limiting the federal government to its delegated powers”).

3. 381 U.S. 479, 490 (1965) (Goldberg, J., concurring).

4. *Id.* at 490 n.6.

Founders. After quoting Madison's speech introducing the Bill of Rights to the House of Representatives and Joseph Story's *Commentaries*, Goldberg concluded that "[t]hese statements of Madison and Story make clear that the framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people."⁵ Although Justices Hugo Black and Potter Stewart dissented, they agreed that the Ninth had been little used, and they derided their fellow Justice's "recent discovery" of the Clause.⁶ Since *Griswold*, a lively scholarly debate has emerged over the meaning of the Ninth. All sides in this debate believe that the Amendment received little judicial construction prior to 1965.⁷

In fact, there is a surprisingly rich history of legal interpretation and judicial application of the Ninth Amendment prior to *Griswold*. Beginning in 1789 and extending to 1964, the Ninth Amendment played a significant role in some of the most important constitutional disputes in our nation's history, including the ratification of the Bill of Rights, the constitutionality of the Bank of the United States, the scope of exclusive versus concurrent federal power, the authority of the federal government to regulate slavery, the right of states to secede from the Union, the constitutionality of the New Deal, and the legitimacy and scope of the incorporation doctrine.

In the first of two articles on the lost history of the Ninth Amendment, *The Lost Original Meaning*,⁸ I presented previously missed or mislabeled evidence regarding the adoption and early understanding of the Ninth Amendment. Responding to calls from state conventions, including those from his home state of Virginia, Madison's draft of the Ninth Amendment expressed a rule of interpretation preventing the constructive enlargement of enumerated federal power.⁹ Although the final draft used the language of retained rights, Madison insisted that the provision continued to protect the

5. *Id.* at 490.

6. *Id.* at 518–19 (Black, J., dissenting). Justice Black noted: My Brother Goldberg has adopted the recent discovery that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks violates "fundamental principles of liberty and justice," or is contrary to the "traditions and (collective) conscience of our people."

Id. (citing PATTERSON, *supra* note 2, at 4).

7. See *supra* note 2. Occasionally, some scholars acknowledge historical references to the Ninth Amendment, but these references are dismissed as not really involving the Ninth Amendment. See PATTERSON, *supra* note 2, at 32 ("There are a number of cases which briefly mention the Ninth Amendment by grouping it with the Tenth Amendment. However, these decisions do not actually discuss the Ninth Amendment, but actually discuss the Tenth Amendment."); Van Loan, *supra* note 2, at 1 n.3 ("In the few cases where anything more than a cursory reference to the ninth appeared, it was lumped with the tenth, as an innocuous rule of construction limiting the federal government to its delegated powers.").

8. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEXAS L. REV. 331 (2004) [hereinafter Lash, *The Lost Original Meaning*].

9. *Id.* at 360–62.

states from unduly broad interpretations of federal power.¹⁰ In a critical speech before the House of Representatives, Madison linked the Ninth Amendment to the demands of the state conventions and explained that the purpose of the Ninth was to “guard[] against a latitude of interpretation” while the Tenth Amendment “exclude[d] every source of power not within the constitution itself.”¹¹

This second Article, *The Lost Jurisprudence*, takes up where the first left off. It takes a comprehensive look at the Ninth Amendment jurisprudence that flourished from the early nineteenth century to the mid-twentieth century. This jurisprudence is divided into three periods: Founding to Civil War, Reconstruction to the New Deal, and post-New Deal to *Griswold v. Connecticut*.

During the first of these periods, Founding to the Civil War, courts interpreted the Ninth Amendment precisely along the lines anticipated by James Madison and insisted upon by the state ratifying conventions. Instead of being read as a source of individual rights, courts deployed the Ninth as a tool for preserving state autonomy. Of particular concern was the degree to which states could exercise concurrent authority over matters falling within the scope of enumerated federal power. In a previously unrecognized discussion of the Ninth Amendment, Justice Joseph Story described how the Ninth mandates a limited construction of federal power in order to preserve the concurrent powers of the states. Story’s reading of the Ninth Amendment echoed that of James Madison, and his opinion, though lost to us today, remained influential for more than a century.

Given its role in preserving states’ retained rights, the Ninth Amendment inevitably became entangled with the struggle over the southern institution of slavery. Both slave and free states attempted to use the Ninth Amendment to defend local regulations regarding slavery. No one, however, attempted to use the Ninth as a source of individual rights on behalf of the enslaved. Given their common application as states’ rights provisions, it is no surprise that John Bingham left both the Ninth and Tenth Amendments off his list of privileges or immunities protected from state action by the Fourteenth Amendment.

In the period from Reconstruction to the New Deal, courts and commentators continued to cite the Ninth Amendment in conjunction with the Tenth as one of the twin guardians of state autonomy. Instead of reading the Ninth Amendment as foreshadowing the newly protected privileges or immunities of United States citizens, courts applied the rule of construction represented by the Ninth to *limit* the interpretation of Fourteenth Amendment rights. As the country moved into the new century and began to experiment

10. *Id.* at 361.

11. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), in JAMES MADISON: WRITINGS 489 (Jack N. Rakove ed., 1999) [hereinafter WRITINGS].

with greater centralized control of labor and industry, the Ninth and Tenth Amendments continued to serve as barriers against the expansion of federal power. So closely aligned were the Ninth and Tenth Amendments that courts regularly combined their language and treated them as expressing a single principle of limited federal power. More and more, the Tenth Amendment was read to contain its own rule of construction, obviating the need to separately analyze the Ninth. Nevertheless, in every case in which the Ninth was discussed, courts continued to follow the Madisonian reading of the Amendment.

In the third and final period discussed in this Article, the New Deal to *Griswold*, the traditional reading of the Ninth Amendment disappeared during the dramatic reconfiguration of federal power that occurred after 1937. Although initially relied upon by courts in resistance to President Roosevelt's attempts to regulate the national economy, both the Ninth and Tenth Amendments were reduced to no more than truisms by Justice Robert's "switch in time." Free from the restraining rule of construction previously associated with the Ninth Amendment, the Supreme Court expanded the scope of federal power without regard to the impact on state regulatory autonomy.

The expansion of regulatory power at the time of the New Deal required a concomitant reduction in the Court's previously broad interpretation of liberty under the Due Process Clause. After 1937, the issue became how to reconstruct that liberty in light of the New Deal Court's general deference to the political process. In particular, having limited due process liberty to the rights listed in the text of the Bill of Rights, the New Deal Court had to decide whether all of the Bill of Rights should be incorporated against the states. It was here that the traditional doctrine of the Ninth Amendment made its last stand. Applying a rule of construction based on the Ninth and Tenth Amendments, the Supreme Court initially resisted incorporation claims in order to preserve the states' retained rights to establish local rules of criminal procedure. As the Court gradually incorporated most of the Bill of Rights, this final application of the traditional Ninth Amendment also faded away.

By the time Bennett Patterson wrote his book, *The Forgotten Ninth Amendment*, in 1955, almost all traces of the traditional Ninth Amendment had disappeared. James Madison's speeches and the Supreme Court's early opinions dealing with the Ninth Amendment had long been lost, and the vast jurisprudence of the Ninth Amendment was dismissed as really having to do with the Tenth Amendment. Thus, when Justice Arthur Goldberg penned his opinion in *Griswold v. Connecticut*, the Ninth Amendment appeared to exist in a doctrinal and historical vacuum.

This Article concludes by considering the possibility that, even if the traditional understanding of the Ninth Amendment until now has been lost, the rule of construction represented by the Ninth lives on. Although

generally associated with the Tenth Amendment, the federalism jurisprudence of the contemporary Supreme Court echoes the same rule of construction originally associated with the Ninth. Thus, when contemporary courts rule in favor of state autonomy, whether in regard to commerce or state authorized medicinal use of marijuana, they are echoing the voices of countless judges who throughout our constitutional history have sought to protect the retained right of the people to local self-government.

II. Beginnings: The Ninth Amendment in Antebellum America

A. *The Federalist Reading of the Ninth Amendment*

The reader is presumed to have already read the first of these two articles on the lost history of the Ninth Amendment. However, because the history presented in the first article plays an important role in understanding the jurisprudence that this Article recovers, a brief review is in order.

The state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: One declaring the principle of enumerated federal power with all nondelegated power being reserved to the states, and the second declaring a rule of construction limiting the interpretation of enumerated federal power. Madison's proposed draft of the Bill of Rights included two provisions that mirrored the amendments suggested by the state conventions: a declaration of reserved nondelegated power and a rule of construction that prohibited the undue extension of federal power and preserved the people's retained rights.¹² Ultimately, these would become our Ninth and Tenth Amendments.

The final draft of the Tenth Amendment added the words "or to the people" but otherwise remained the same as Madison's original draft. The final draft of the Ninth Amendment, however, dropped the extension of power language while keeping the language of retained rights. Although Madison insisted that the meaning of the Ninth Amendment had not changed, the Virginia Assembly was not convinced and delayed its ratification of the Bill of Rights due to its concern that the demand for a rule limiting the interpretation of enumerated federal power had been ignored.¹³ Other states, however, quickly ratified ten out of twelve proposed amendments, including what we know as the Ninth and Tenth.

While the Bill remained pending in Virginia, James Madison delivered a speech on the floor of the House of Representatives in which he explained the origin and meaning of the Ninth and Tenth Amendments. According to Madison, these amendments were intended to limit the federal government's ability to interfere with matters belonging under local or state control, including mining, agriculture, and commerce. The Ninth Amendment in

12. Lash, *The Lost Original Meaning*, *supra* note 8, at 360.

13. *Id.* at 371–75.