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Recommended Citation

Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 Cornell L. Rev. 139 (1992)
Available at: <http://scholarship.law.cornell.edu/clr/vol78/iss1/4>

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EXPOUNDING THE CONSTITUTION: LEGAL FICTIONS AND THE NINTH AMENDMENT

INTRODUCTION

This Note examines the uncertain and fluid status of the Ninth Amendment.¹ As various scholars have noted, this amendment, in sharp contrast to other open-ended amendments such as the Fifth, the Fourteenth, and the First, lacks legal stature,² and has been called the “stepchild of the Constitution.”³ Fewer major cases are associated with the Ninth Amendment than with the Fifth and the Fourteenth Amendments.⁴ Even when the Ninth Amendment is invoked, as in *Griswold v. Connecticut*,⁵ it plays at best a supporting role.⁶

One is initially tempted to ascribe this absence of judicial judgments to the open-ended nature of the Ninth Amendment. This

¹ The Ninth Amendment reads, in its entirety, as follows: “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, e.g., BENNETT PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 6-18 (1955); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 3-9 (1980); Laurence Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARVARD C.R.-C.L. L. REV. 95, 101-03 (1987). For the judicial history of the Ninth Amendment, see Norman Redlich, *The Ninth Amendment*, in 3 THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1316-20 (Leonard W. Levy et al. eds., 1986).

³ John Hart Ely refers to the Ninth Amendment as “that old constitutional jester.” JOHN H. ELY, *DEMOCRACY AND DISTRUST* 33 (1980).

⁴ Raoul Berger conducted a Lexis search of cases citing the Ninth Amendment and found 1,296 such cases arising since *Griswold v. Connecticut*, 381 U.S. 479 (1965). Berger, *supra* note 2, at 1 n.2 (discussing result of Lexis search).

⁵ 381 U.S. 479 (1965).

⁶ A possible exception to this claim is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (stating that the First and Fourteenth Amendments guarantee the right of the public and press to attend criminal trials). The Court based its opinion in part on the Ninth Amendment:

Madison’s efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others. . . . [A]rguments such as the State makes here have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. . . . The concerns expressed by Madison and others have thus been resolved; fundamental rights . . . [are] indispensable to the enjoyment of rights explicitly defined.

Id. at 579 n.15, 579-80.

Note will argue that this rationale, however, is decisively invalidated by the monumental significance of, *inter alia*, the Fifth, the Fourteenth and the First Amendments, all of which share this open-ended feature. The issue is not open-endedness per se, but rather what makes it possible for legal texts that are open-ended, and hence not declarative regarding rights, to support clear and precise rights. That is to say, how is it that amendments such as the Fifth and the Fourteenth, and not the Ninth, generate rights that might appear extraneous to the letter of the text?

The generation of rights in the absence of explicit textual reference to such rights is not uncommon to the history of constitutional interpretation. To understand why the Ninth Amendment has not generated such rights, it is necessary to understand how legal texts generate legal fictions. The artificing of rights in the absence of explicit textual reference to such rights is where the concept of a legal fiction becomes operative.⁷ This Note addresses two questions: (1) What makes a legal proposition fictional? and (2) What is the best way to understand the Ninth Amendment to the U.S. Constitution? Legal fictions and the Ninth Amendment are linked in a way that makes their study mutually illuminating.

The following discussion is divided into three sections. Part I examines various definitions of legal fictions and proposes an alternative approach to understanding how legal fictions function. Part II discusses specific constitutional legal fictions and examines how courts mobilize the text of the Constitution to create various specific rights in the absence of clearly demarcated guarantees. Part III focuses on the Ninth Amendment, briefly outlining the history of judicial and scholarly debate surrounding the amendment, before analyzing the amendment in reference to the preceding discussion of legal fictions. This last section also suggests, in response to the question of what meaning to impart to the Ninth Amendment, two possible interpretations.

I

LEGAL FICTIONS

A. Introduction

The formulation—What makes a legal proposition fictional?—is intentionally designed to avert a more direct and familiar question, namely, what is a legal fiction? Legal fictions depend on a host of extra-legal contextual considerations necessary to understand their

⁷ This partially explains why those who have been most disparaging of the very concept of legal fictions also tend to deny the existence of any rights other than those explicitly adumbrated in constitutional texts.

functionings. The question—What is a legal fiction?—focuses on the legal text and hence overlooks, or at any rate understates, the centrality of such extra-legal considerations that go into the making of a legal fiction. As part of this focus on the legal text, those who have addressed the question of what is a legal fiction tend to be overly preoccupied with the issue of legal falsity in such fictions.⁸ They overlook the important and relevant sense in which the word “fiction” has a double meaning. It refers, on the one hand, to issues of falsity, but on the other, to a narrative that gives meaning and coherence to a particular set of events. While the former meaning appears relevant to an understanding of legal fictions, the latter meaning explains their functioning and demonstrates the history of neglect suffered by the Ninth Amendment.

The answer to the question—What makes a legal proposition fictional and why the Ninth Amendment has not supported rights through the device of legal fictions?—is that legal fictions function, in part, through the existence of an extra-legal context that animates the legal text. The process of animation or interpretation turns on both the extra-legal context and the legal text itself. Interpretation of legal texts emerges from the interplay between these two components. In this sense, legal fictions emerge from an act of interpreting legal texts and are therefore no different than rights and legal judgments associated with more or less explicit legal texts. Both, that is to say, require interpretation.⁹ The point of this Note is not to deny this convergence between texts that, when interpreted, generate legal fictions and those that do not. The emphasis on the question of what makes a legal fiction, i.e., on how legal fictions function, reveals that they are simply not that special or distinctive.

To say that legal texts require interpretation and that it is on the basis of such interpretation that they sustain rights and legal judgments does not mean that the interpretations are wholly free and undetermined by the text being interpreted. Texts set limits on, even if they do not precisely define, the interpretations that can reasonably be offered for them and the legal fictions that they can generate.¹⁰ This point is crucial because, contrary to popular be-

⁸ See JEREMY BENTHAM, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 59 (1977 ed.); LON FULLER, *LEGAL FICTIONS* 9 (1967); HENRY MAINE, *ANCIENT LAW* 26 (1897).

⁹ This view derives from the generally accepted dichotomy between the “interpretivists” and “non-interpretivists.” While the latter explicitly acknowledge the need to read beyond the text, even the former believe that the task of constitutional adjudication involves a fair amount of interpreting. There is no situation in which the text and the reader do not interact, whether it be in the analysis of an open-ended phrase or a more definitive phrase. See *ELV*, *supra* note 3, at 1-9.

¹⁰ This point can be illustrated, for example, by examining the history of the First Amendment. Freedom of speech is not an absolute right, and the text controls the right

lief,¹¹ it is simply not the case that the Ninth Amendment *need be* a superfluous appendage to the Bill of Rights, inserted only for a host of historical reasons, nor is it the case that the Ninth Amendment is too vague to protect a meaningful set of rights. The set of possible reasonable interpretations of the Ninth Amendment is limited; this Note will offer two such interpretations: (1) the Ninth Amendment could sanction an unlimited range of individual rights; or (2) the Ninth Amendment could sanction a single general right of "the people."¹² Especially in the absence of any coherent and limited conception of the antecedent rights that individuals had, the Court has been loathe to open the door to the first of these possibilities.¹³ The second possibility refers to a revolutionary predicament, i.e., a situation in which a right or a set of rights is either demanded by a *group* of individuals who identify themselves as "We the people,"¹⁴ or granted to the people through the Court or the legislature.¹⁵ The absence of a legal fiction associated with the Ninth Amendment may ultimately be linked to the absence of such a revolutionary predicament in American political and social development.¹⁶

from ever becoming absolute: "Congress shall make no law. . . ." It is not a right granted in self-executing fashion to the people, although courts can and have construed it that way. It is, rather, a mandate to Congress, and, when there is a need to control the right of free speech, the text can aid in such control. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (striking down statute that "impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendment"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that "constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood. . . .").

¹¹ See discussion *infra* part III.

¹² These two options and the debates surrounding them are discussed *infra* part IV.B.

¹³ Imagine a state in which individuals have numerous well-defined natural rights that exist prior to and apart from the political commonwealth. In such a state, one could reasonably see the Ninth Amendment as simply referring to these antecedently held and well-defined rights. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1960) (especially chapters 1, 2 & 8).

¹⁴ U.S. CONST. pmbl.

¹⁵ My reasons for calling this a revolutionary predicament will be elaborated further, *infra* part III.B. Moreover, the main point is not to detail the rights involved in such a predicament but to make clear that they are rights that are attached to "the people" and hence are rights that attach to a group.

¹⁶ The Court's partial reliance on the Ninth Amendment in *Griswold*, 381 U.S. at 479, *Roe v. Wade*, 410 U.S. 113, 152-53 (1972), and *Richmond Newspapers*, 448 U.S. at 555, to locate certain specific rights within the Bill of Rights, should not be read as creating legal fictions resting on the Ninth Amendment, because the Ninth is used only tentatively in these cases, playing second fiddle to other Amendments. In fact, it is only in *Richmond Newspapers* that the text of the Ninth Amendment appears in the opinion of the Court itself. See *supra* n.6.

B. Historical Legal Fictions

At this point, it is important to distinguish the legal fiction with which this Note is concerned from the historical legal fiction. During the fifteenth and sixteenth centuries, English courts often invoked legal fictions to enlarge their jurisdiction and to arrive at substantive and determinate legal remedies.¹⁷ The courts would simply pretend that a given fact existed, thus enabling them to arrive at the desired result under the existing laws. Perhaps the best known example is the Bill of Middlesex¹⁸ and the Writ of *Latitat*,¹⁹ in which the jurisdiction of King's Court was extended by allowing plaintiffs to bring actions on false allegations that defendants were not allowed to challenge.²⁰ This false allegation created the jurisdiction required to get the defendant into King's Court. Once there, the Court would allow the plaintiff to press the real cause of complaint.²¹

The fiction involved in such actions often started out timidly and then, facing encouragement from courts, grew more and more outrageous. An example is the action of ejectment. In its original form, the claimant to Blackacre would lease the land to a willing accomplice who, in attempting to take possession of Blackacre, would be thrown off the land by the sitting tenant.²² Being physically thrown off the land gave the claimant-lessor a right to bring an action of ejectment on behalf of his tenant against the sitting tenant. Over time, the actual need to draw and sign a lease, to find an accomplice, and to get thrown off the land became too burdensome.²³ The solution was to retain the original form of the fiction but to

¹⁷ Although many historical legal fictions are concerned facially with procedure, their effect on the evolution of the law has been one of substance and not simply of procedure. JAMES H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 50-51 (1990); see also *id.* at 57-59 (discussing *quominus*).

¹⁸ The Bill of Middlesex was a procedural dodge that allowed King's Bench to short-circuit Chancery altogether by fictitiously claiming that the alleged trespass occurred in the county of Middlesex over which King's Bench had original jurisdiction. *Id.* at 50.

¹⁹ The Writ of *Latitat* was the natural outcome of the fictional Bill of Middlesex. See *supra* note 18. After falsely claiming that the trespass occurred in Middlesex, King's Bench would allow the plaintiff to further claim that the defendant was "lurking and roaming about" (*latitat et discurret*) in some other county. The Writ of *Latitat* would then be issued, authorizing the sheriff of the county where the defendant in fact resided to bring the defendant before King's Bench. See BAKER, *supra* note 17, at 50-51.

²⁰ The fictional allegation was that of trespass in Middlesex. The real cause of action could be wholly different from trespass, but King's Bench had original jurisdiction over trespass in Middlesex county. Without the Bill of Middlesex and the Writ of *Latitat*, the case would ordinarily fall within the jurisdiction of the courts of Chancery. See *id.* at 50.

²¹ *Id.* at 50-51.

²² *Id.* at 341.

²³ *Id.*

allow the claimant to *pretend* that he had a lessor who had been thrown off the land.²⁴ The claimant would then bring suit against a fictitious lessor of the sitting tenant; the threat of this non-existing tenant being in default and of summary judgment going to the claimant was enough to force the sitting tenant to come and defend on behalf of his non-existent tenant.²⁵ Regarding these and similar procedural legal fictions, there is little controversy;²⁶ the false allegation of fact in such instances was clearly driven by a narrow expediency.²⁷

C. The Debate over Legal Fictions

The concept of legal fiction today is not limited merely to such self-contradictory and counter-factual examples. While the legal system today may no longer be capable of sustaining such explicitly false narratives, legal fictions are alive and well, even if in less obvious manner.²⁸ However, the contemporary debate on legal fictions is still limited by a focus on the issue of falsity. This debate has its roots in the nineteenth century. At that time, Jeremy Bentham²⁹ and Sir Henry Maine³⁰ were the main protagonists in the debate

²⁴ *Id.* at 341-42.

²⁵ *Id.* at 342.

²⁶ See Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 1 (1990) (noting that interest in legal fictions has dwindled and that such scholarly debate should be revived).

²⁷ A Lexis search of United States Supreme Court cases reveals at least four fictitious lessees in fictitious ejectment suits: *Doe, Roe, Jackson and Den*. See, e.g., *East Ala. Ry. v. Doe ex dem. Visscher*, 114 U.S. 340 (1885); *Doe, ex dem. Mann v. Wilson*, 64 U.S. 457 (1859); *Doe ex dem. Dickins v. Mahana*, 62 U.S. 276 (1859); *Den, ex dem. Murray v. Hoboken Land Improvement Co.*, 59 U.S. 272 (1856); *Den, ex dem. Russell v. Association of the Jersey Co.*, 56 U.S. 426 (1854); *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449 (1836); *Kelly v. Jackson, ex dem. the President, Directors and Co. of the Bank of the U.S.*, 31 U.S. (6 Pet.) 622 (1832); *Ex parte Crane, in Jackson, ex dem. Astor v. Crane, ex dem. Astor*, 30 U.S. (5 Pet.) 190 (1831); *Thompson v. Roe, ex dem. Carroll*, 63 U.S. 422 (1860). There also appears to be a fictitious Denn (as opposed to Den): *Wright v. Denn, ex dem. Page*, 23 U.S. (10 Wheat.) 204 (1825).

The “*ex dem.*” stands for “from the demise of.” This represents an additional stage in the evolution of ejectment. One brought suit on behalf of or against a non-existent tenant whose inability to prosecute or to defend himself arose, not from his non-existence, but from his demise.

Many actions of ejectment were brought in the names of unnamed lessees. A Lexis search revealed over one hundred United States Supreme Court cases brought against or on behalf of fictitious lessees. The most famous example of this is probably *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

²⁸ Many claim that since the legal system today is more honest than it was in centuries past, there is no space within the system to create legal fictions. Lon Fuller, in a discussion of contemporary fictions, dispels this argument by pointing to numerous modern examples of fictions, particularly in the field of contract law. See FULLER, *supra* note 9, at 15.

²⁹ See JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* (1843).

³⁰ See SIR HENRY MAINE, *THE ANCIENT LAW* (1897).

over legal fictions. For Maine, a legal fiction was “any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.”³¹ He believed that legal fictions were emblematic of conservative societies motivated by the double impulse of wanting both to change the law and to conceal the evidence of such changes: “They [legal fictions] satisfy the desire for improvement, which is not quite wanting, at the same time they do not offend the superstitious disrelish for change which is always present.”³² Maine’s discussion is primarily historical in approach and sociological in orientation.

Jeremy Bentham was surely the most strident critic of legal fictions specifically, as well as fictions more generally. Regarding legal fictions, he said: “[I]n English law, *fiction* is a *syphilis*, which runs in every vein, and carries into every part of the system the principle of rottenness.”³³ In contrast to Maine and conspicuously in contrast to Sir William Blackstone,³⁴ the most sympathetic interpreter of legal fictions and the common law generally, Bentham defined legal fictions as a “willful falsehood, having for its object the stealing legislative power, by and for hands, which could not, or durst not, openly claim it—but, for the delusion thus produced, could not exercise it.”³⁵ For Bentham, apparently, legal fictions were ruses through which the King of England and his judges hoped to enforce and monopolize the norms of morality, truth, and legality. Paraphrasing Karl Marx’s views on religion, Bentham might very well have said that legal fictions were the opiate of the masses.³⁶

More recently, Roscoe Pound defined legal fictions in broad terms that included equity, natural law, and interpretation,³⁷ but his attention is still focused on the question of what is a legal fiction.³⁸ Lon Fuller, in his definition, revives and draws attention to the old

³¹ *Id.* at 26.

³² *Id.*

³³ JEREMY BENTHAM, *Elements of Packing as Applied to Juries*, in 5 THE WORKS OF JEREMY BENTHAM, *supra* note 29, at 92.

³⁴ See SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS (1979).

³⁵ JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES 509 (1845).

³⁶ See KARL MARX, COMMUNIST MANIFESTO (1970). Another nineteenth century protagonist, John Austin parted company with Bentham on the issue of legal fictions, even though he otherwise shared many of Bentham’s views. Austin identified legal fictions in much the same way as Henry Maine. Legal fictions represented rules that had lost their social utility but nevertheless helped conserve a system of a rule of laws. JOHN AUSTIN, LECTURE ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 308 (1874). The utility of legal fictions lay in “1st, a respect for the law which they virtually changed; 2ndly, a wish to conciliate the lovers of things ancient.” *Id.*

³⁷ See ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 131-34 (1923).

³⁸ *Id.*

issue of falsity. For him, a legal fiction is "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."³⁹ Fuller is at pains to differentiate the falsity inherent in the fiction from a lie. He believed that the fiction is a conscious construction, a pretense that often has the implicit consent of the community; a lie, in contrast, presupposes a desire to mask the truth from a particular audience.

Even though no clear thread unifies these various definitions or suggests a particular line of development, the definitions do indicate, in various ways, a preoccupation with determining what is a legal fiction, rather than with determining what makes a legal proposition fictional. In Fuller's definition, this emphasis is indicated by his concern with falsity, while in Maine and Austin, it is evident through the sociological emphasis that sees fictions in the nostalgic impulses of conservative societies.⁴⁰ Similarly, one has the clear impression that for Maine, Austin, Fuller, and conspicuously for Bentham, legal fictions are the marks of societies in an early stage of legal development. The legal culture's reliance on such fictions appears analogous to a pre-modern reliance on totemic symbols of cohesion.

The historical debate and the various definitions of legal fictions make clear that legal fictions have been defined narrowly, without consideration to extra-legal considerations that may inform the functioning of such fictions.⁴¹ The question of what makes a legal fiction is thus intended to indicate an altered emphasis in which such extra-legal considerations can, at least in principle, be recognized as relevant, even if not determinative.⁴² The proposed re-focus on the question of what *makes* a legal proposition fictional suggests: (i) barring narrow questions of procedure and jurisdiction, legal fictions do not turn on issues of truth or falsity; (ii) while legal fictions may have been emblematic of nostalgic impulses in certain societies, this conception in no way exhausts their utility and the conditions under which they are generated; and (iii) legal fictions are not lim-

³⁹ FULLER, *supra* note 8, at 9.

⁴⁰ See *supra* part I.A.

⁴¹ The sociological preoccupation of Maine and Austin is not necessarily synonymous with an acknowledgement of extra-legal considerations. Their sociological orientation leads them to view societies as a whole, identifying specifically the role that legal fictions may play in the cohesion of these societies. Put differently, they ask the question: "What do the existence of legal fictions tell us about this society?" In contrast, the focus here is on how the textual and extra-legal facts of a society determine the legal choices in that society and, by doing so, how they generate and sustain legal fictions.

⁴² The claim that extra-legal considerations are not determinative is simply meant to signal that the focus here is not exclusive of the legal text itself, which can also play a significant role.

ited to unusual situations but, rather, are implicit in the act of legal interpretation.

These claims will become clear in the course of discussing the Ninth Amendment and the absence of legal fictions deriving from it. The preceding discussion is meant both to distinguish and to elaborate the conception of legal fiction with which this Note is operating.

II

CONSTITUTIONAL LEGAL FICTIONS

Before proceeding to a discussion of the Ninth Amendment, a consideration of various constitutional legal fictions will help to distinguish them from other legal fictions. As discussed above, legal fictions are not helpfully defined through categories of truth or falsity. Rather, the analogy of fiction as narrative is more conducive to an understanding of how legal texts generate legal fictions. If legal fictions are viewed as narratives controlled by the narrator and by the extra-legal context of which they are a part, then the fear of having no control over the text itself is not particularly poignant.⁴³ Constitutional legal fictions provide a good example of how text and context interact, and serve as mutual constraints upon the interpretive possibilities available to the narrator.

The following discussion will provide examples of various Constitutional legal fictions. This discussion will also focus on how legal fictions are generated out of the Constitution through the process of animating the text, and on how the process of animation is itself controlled by the text.⁴⁴

Consider, for example, the Court's construal of the liberty clause and the First Amendment in *NAACP v. Alabama*:⁴⁵ "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause . . . which embraces freedom of speech."⁴⁶ Note the Court's stridently dogmatic language. Surely the history of the freedom to engage in association has never been

⁴³ Privacy rights provide a good example of how fictions are not merely tools for "liberals." The power to *expand* what is in the text coincides with a power to *shrink* what is in the text. However, I would point out that "conservatives" are just as guilty, if that is the proper term, of expanding the content of the text. One need only look as far as *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), or *Bowers v. Hardwick*, 478 U.S. 186 (1986), to see that, in narrowing the reach of privacy rights, a "conservative" Court reached heavily outside the text.

⁴⁴ Recall Chief Justice Marshall's oft-quoted statement: ". . . we must never forget, that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

⁴⁵ 357 U.S. 449 (1958).

⁴⁶ *Id.* at 459.

as uncontroversial as Justice Harlan would have us believe.⁴⁷ Freedom of association has been created through unabashed linguistic fiat.⁴⁸

Or consider the more familiar set of privacy rights, which the Court all but admits to having created *ab novo*.⁴⁹ Privacy rights provide a good example of how the fear of an uncontrolled proliferation of rights is a misplaced concern. Privacy rights, potentially the source of an unlimited set of rights, have been construed narrowly so as to encompass primarily contraceptive rights. In *Skinner v. Oklahoma*,⁵⁰ the Court announced that procreation is "one of the basic civil rights of man."⁵¹ In *Roe v. Wade*,⁵² the Court went further and declared that there is a right of privacy broad enough to protect a woman's right to terminate her pregnancy "whether [that right] is founded in the Fourteenth Amendment's concept of personal lib-

⁴⁷ During the years when the Justice Department gregariously prosecuted Communists, the Court never acknowledged that freedom of association was an inviolable part of a citizen's First Amendment rights. In fact, if freedom of association were so straightforwardly protected by the liberty clause, the entire line of Communist cases would take on farcical proportions. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

⁴⁸ Henry Maine's thesis that legal fictions arise out of conservative impulses in the face of a need for change is well illustrated by this example. See discussion *supra* part I.C. The use of dogma and of counter-factual language seems to help Justice Harlan deny the fact of what he is doing, namely creating a new set of rights. As stated above, Maine, however, would emphasize the lie inherent in Justice Harlan's statement.

⁴⁹ Justice Douglas' opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), is notable for the manner in which various amendments are mobilized for a specific cause:

Various guarantees create zones of privacy. The right of association contained in the *penumbra* of the First Amendment . . . The Third Amendment in its prohibition against the quartering of soldiers . . . The Fourth Amendment explicitly affirms the "right of people to [be free of] unreasonable searches and seizures" . . . The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy . . . The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484. Justice Douglas mentions the Ninth Amendment only to quote it *verbatim* without any further elaboration.

Compare, however, Justice Goldberg's concurring opinion:

While this Court has had little occasion to interpret the Ninth Amendment, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." . . . The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.

Id. at 490-91 (footnote omitted); see also Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 2 (1980) (characterizing Justice Goldberg's position by writing that the Ninth Amendment is not "a bottomless well in which the judiciary can dip for the formation of undreamed of rights in their limitless discretion").

⁵⁰ 316 U.S. 535 (1942).

⁵¹ *Id.* at 541.

⁵² 410 U.S. 113 (1973).

erty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people."⁵³ By the time of *Bowers v. Hardwick*,⁵⁴ the right of privacy had been so narrowed that the sex life of homosexuals appeared clearly outside the narrative of privacy rights being fashioned.⁵⁵

Numerous other examples that could be pointed out. The civil rights cases that find their basis in the commerce clause⁵⁶ and the expansion of the Equal Protection Clause to allow courts to police desegregation of schools⁵⁷ are two examples of how text and context meet each other to generate rights and obligations. Consider *Bolling v. Sharpe*⁵⁸ a case in which the Court held the Equal Protection Clause applicable to the federal government through the Due Process Clause of the Fifth Amendment.⁵⁹ Even the drive to rid the Constitution of fictions, the "original intent" argument, cannot help but find itself at some point quagmired in fiction.⁶⁰ The argument that the Ninth Amendment is an opaque "inkblot" cannot be given much weight in light of the history of various other constitutional clauses.

Another clause in the Constitution that has suffered similar neglect is the "Privileges or Immunities" Clause.⁶¹ It is not so much the case that "privileges or immunities" cannot be accorded a controllable and workable meaning, but there is a similar kind of fear regarding the interpretation of that clause.⁶² The *Slaughter-house*

⁵³ *Id.* at 153.

⁵⁴ 478 U.S. 186 (1986).

⁵⁵ The Court says that "none of the rights announced [in the privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in sodomy." *Id.* at 190-91. The use of the term "sodomy" rather than "sex" is a way in which the narrative gets refashioned and controlled. This is what I mean by stating that fictions, at least in the common law, are simply not that distinctive or unusual. *See supra* part I.B. Another method of controlling narrative is the historical one: "Homosexual sodomy was a capital crime under Roman law." 478 U.S. at 196.

⁵⁶ *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that Congress had basis upon which to find that racial discrimination at restaurants receiving a substantial portion of their food from out of state had a direct and adverse effect on interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that public accommodations provisions of the Civil Rights Act of 1954 are valid under the Commerce Clause).

⁵⁷ *See, e.g.*, *Brown v. Board of Educ.*, 349 U.S. 294 (1954) (holding desegregation of public schools unconstitutional).

⁵⁸ *Bolling v. Sharpe*, 347 U.S. 497 (1953). It is interesting to note that the extension of the equal protection clause to the federal government has been effectively mobilized by the right wing.

⁵⁹ *Id.*

⁶⁰ *See FULLER, supra* note 9, at 9.

⁶¹ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1.

⁶² Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa., 1823), gave specific and non-exhaustive content to the clause:

*Cases*⁶³ “eviscerated” the Privileges and Immunities Clause by “trivializing its meaning.”⁶⁴ One can otherwise read this clause as another constitutional source for unenumerated rights. As Senator Trumbull stated with reference to the Privileges and Immunities Clause: “To be a citizen of the United States carries with it some rights; and what are they? They are those inherent, fundamental rights which belong to free citizens as free men in all countries. . . .”⁶⁵ Like the Ninth Amendment, the phrase “privileges and immunities” has a revolutionary potential to it that would explain its neglect.⁶⁶

The right of a citizen of one state to pass through, or to reside in any other state . . . ; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise

Id. at 552.

⁶³ 83 U.S. (16 Wall.) 36 (1872). A 5-4 Court stated that the “privileges and immunities” of United States citizens included those which “owe[d] their existence to the Federal government, its National character, its Constitution, or its laws.” *Id.* at 79. Arguing against this general position taken by the Slaughter-house Court, John Hart Ely writes:

[T]he most plausible interpretation of the Privileges or Immunities Clause is, as it must be, the one suggested by its language—that it was a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding. . . . These and many others which might be mentioned are, strictly speaking, privileges or immunities

ELY, *supra* note 3, at 28. From a different vantage point, Michael Conant relies on both the Ninth Amendment and the Privileges and Immunities Clause to argue that “freedom from government supported monopolies” is a right of citizens protected by the Ninth Amendment and made applicable to the states through the Privileges and Immunities Clause. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendment: Slaughter-house Cases Re-examined*, 31 EMORY L.J. 785, 789-90 (1982). See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that privileges or immunities clause is primarily an anti-discrimination provision intended to secure equal citizenship and incorporate Civil Rights Act of 1866).

⁶⁴ Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 145 (1988).

⁶⁵ Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 899 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866)) (emphasis omitted). Note that, in the abstract, Senator Trumbull’s language could be read as referring to the Ninth Amendment also.

⁶⁶ Sanford Levinson argues that the recent attention on the Ninth Amendment could be focused just as easily on the Privileges and Immunities Clause. The problem encountered by anyone trying to revive the Privileges and Immunities Clause, however, is “the smelly carcass of *Slaughter-house*.” Levinson, *supra* note 65, at 146. The argument that the Privileges and Immunities Clause is too vague to carry meaning is not, in my opinion, a tenable one. The Privileges and Immunities Clause can be mobilized in many ways, only one of which is the position taken by the *Slaughter-house* court. See generally,

III

CONTEMPORARY DEBATES ON THE NINTH AMENDMENT

Bennett Patterson referred to the Ninth Amendment as the "forgotten amendment."⁶⁷ Since 1965, when Justice Goldberg invoked it in his concurring opinion in *Griswold v. Connecticut*,⁶⁸ courts have cited this amendment to assert the right to enjoy a zone of privacy,⁶⁹ to challenge prevailing textbooks,⁷⁰ to protect against conscription,⁷¹ to immunize the transportation of lewd materials in interstate commerce,⁷² and to claim a right to a healthful environment.⁷³ Despite these and other claims with which the Ninth Amendment has been associated, Bennett Patterson's characterization still carries considerable force. Unlike the Fifth and the Fourteenth Amendments, the Ninth has not been viewed, either by litigants or by the courts, as a secure and sure basis from which to glean individual rights.⁷⁴ Similarly and more importantly, the Ninth Amendment, unlike the Fifth, the Fourteenth, and the First, has not spawned a legal fiction, such as "penumbral rights," to which more specific rights, such as contraceptive rights, are linked.

Despite its uncertain importance, Constitutional scholars and judges have powerfully debated the Ninth Amendment. Judge Robert Bork, whose confirmation hearings for the Supreme Court led to a resurgence of Ninth Amendment debate,⁷⁵ remarked during these hearings as follows:

supra note 63; WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES CLAUSE, Report to the Attorney General, Sept. 25, 1987, at 28-30.

⁶⁷ BENNETT PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955).

⁶⁸ 381 U.S. 479, 486 (1965).

⁶⁹ *Id.*

⁷⁰ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁷¹ *United States v. Uhl*, 436 F.2d 773 (9th Cir. 1970).

⁷² *United States v. Orito*, 413 U.S. 139 (1973).

⁷³ *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972).

⁷⁴ John Hart Ely writes of the Ninth Amendment: "In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh. ('What are you planning to rely on to support that argument, Lester, the Ninth Amendment?')" ELY, *supra* note 3, at 34.

⁷⁵ See, e.g., Levinson, *supra* note 65, at 134-35.

[T]he most important contributors, ironically enough, to the now cascading recognition of the presence of the ninth amendment in our Constitution are Edwin Meese and Robert Bork.

. . . I would argue that the most important result of the Bork hearings, beyond their leading to his rejection, was the embrace by many of the senators of the rediscovered amendment, which thereby gained a public prominence hitherto lacking.

Id.; Sotirios N. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67, 71 (1988) ("Bork's defeat came after his repudiation of the ninth amendment . . ."). But see Michael W. McConnell, *The First Amendment Jurisprudence of Judge Robert H. Bork*, 9 CARDOZO L. REV. 63 (1987) (sympathetic and different account of

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the court can make up what might be under the inkblot.⁷⁶

For Bork, the Ninth Amendment, when viewed with an eye to its contemporary utility, is clearly and simply a superfluous constitutional relic.⁷⁷ Its existence is explained by reference to a historical eventuality pertaining to the conditions of its provenance, but beyond that and since then it is nothing.⁷⁸ It does not itself cast any light on, nor is it illuminated by, the rest of the Constitution.⁷⁹

In contrast, Laurence Tribe points to the Ninth Amendment as "a uniquely central text in any attempt to take seriously the process of *construing* the Constitution."⁸⁰ For him, the rights and liberties

the Judiciary Committee Hearings on the nomination of Bork to the U.S. Supreme Court).

⁷⁶ *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22.

⁷⁷ "[For Bork] the ninth amendment is regarded as a mistaken attempt to secure rights, not another way of confining government to enumerated powers." Barber, *supra* note 75, at 71.

⁷⁸ "Bork's inkblot argument, the most publicized recent argument against honoring the amendment, . . . decides to treat the ninth amendment as a mistake." *Id.* at 76.

⁷⁹ This is the familiar interpretivist position. Judge Bork's original intent position is itself an example of the ubiquity of legal fictions. The drive to secure original intent can only lead to the generation of legal fictions. We cannot hope to lay claim to an original intent that could in turn lay greater claim to the true meaning of the Constitution than a legal fiction. What is the arbiter of true meaning? Does the fact that the Framers intended that schools be racially segregated mean that the extension of the Equal Protection Clause to desegregate schools—an interpretation that makes sense only in light of extra-legal and contextual factors—has less truth value as an interpretation? Moreover, even assuming we could determine the original intent of the Framers, how are we then to translate that original intent into something meaningful for us today? Presumably, the argument is that there would be fewer fictions if we could secure original intent, but that is a tenuous argument at best. ELY, *supra* note 3, at 1-19.

⁸⁰ Tribe, *supra* note 2, at 100. It is not clear exactly what Tribe means when he states that the Ninth Amendment should be used as a rule of construction guiding the process of interpretation. Even if we were to give the Ninth Amendment the status of a "rule of construction," it does not solve the fundamental problem of how one is to use it. This notion of the Ninth Amendment serving as the hand that guides constitutional interpretation is a familiar one. Edward Dumbauld writes in a similar but less sympathetic vein: "The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document It is destitute of substantive effect." EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63-64 (1957). Using language very much like Tribe, James F. Kelley writes:

[T]he ninth amendment is only a rule of construction applicable to the entire Constitution; it is a guidepost at the end of the Bill of Rights reminding courts of the existence of other rights not specifically enumerated. It is emphatically not the source of these rights, nor is it a vehicle for protecting them. Rather, it points to other parts of the Constitution—

associated with other amendments, such as the Fifth and the Fourteenth, themselves lean on the Ninth Amendment as their supporting ground. The liberties associated with these other amendments "may properly be regarded as resting on a Ninth Amendment pedestal, viewing the Ninth Amendment . . . as a rule of construction guiding the process of constitutional interpretation."⁸¹ While the notion of a pedestal does not clarify the content of such rights and liberties, it is nevertheless clear that Tribe views the amendment both as a rule for construing the Constitution as a whole and as a guarantor of certain specific rights.⁸²

Between the extremes that Bork and Tribe represent, there are a number of intermediate positions. Andrzej Rapaczynski associates the Ninth Amendment with individual rights but views the Fifth and Fourteenth Amendment as equally sure and clear founts for such rights.⁸³ For Rapaczynski, the Ninth Amendment is a clearer source for, *inter alia*, privacy rights, but he argues the Fifth and the Fourth Amendments already guarantee these rights. This clarity is, of course, not a feature of the amendments themselves, but of the Court's construal of the amendments. The Ninth Amendment, in other words, neither secures nor establishes rights not already derived from various other amendments. Rapaczynski's view comports with Bork's view of the Ninth as superfluous and potentially uncontrollable, without concurring with Bork on the fundamentally uninterpretable nature of this amendment.⁸⁴

particularly the due process clauses of the fifth and the fourteenth amendments—as the contexts within which unenumerated rights are to be determined, and the means by which they are to be protected.

James Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 815 (1986). The "rule of construction" notion of the Ninth Amendment, however alluring, is inadequate because it falls far short of explaining how one is to use the rule.

⁸¹ Tribe, *supra* note 2, at 102.

⁸² Randy E. Barnett makes a similar argument: "Given that the Fourteenth Amendment extends the protection of constitutional rights to acts of state governments, the Ninth Amendment stands ready to respond to a crabbed construction that limits the scope of this protection to the enumerated rights. . . ." Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 42 (1988).

⁸³ Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 *passim* (1988).

⁸⁴ Consider the following passage:

It is my view that much of the attention on the ninth amendment has been misplaced. Not because judicial review should be confined to crabbed literalism, but because there is no substitute for the hard work of deriving concrete decisions from the text of the Constitution. . . . Those who believe that the Constitution does not guarantee a basic individual immunity . . . [for various unenumerated rights] will be no more persuaded by references to the ninth amendment than they were by the invocation of the due process clause. Those who can be persuaded that these decisions are rooted in the Constitution will remain so, without the amendment.

From a decisively historical perspective, Raoul Berger sees the Ninth Amendment as an "affirmation that rights exist independently of government, that they constitute an area of no-power."⁸⁵ Even though Berger arrives at this position from an appreciation of the historical conditions surrounding the adumbration of the Bill of Rights and from the known opinions of the Founders, nothing in his position depends on this particular orientation. Indeed, the texts of the Ninth and Tenth Amendment,⁸⁶ if taken together, appear to lead straightforwardly to Berger's position.⁸⁷

This Note is not directly contesting any of the various theories outlined above regarding the Ninth Amendment. The issues of whether the Ninth Amendment can be of any use to us today and of whether there is any specific determinate meaning ascribable to the "other" rights "retained by the people" are not relevant to this Note. The discussion above reveals deep-rooted reservations regarding the Ninth Amendment, even among its supporters.⁸⁸ The following section will discuss the Ninth Amendment's link to legal fictions, and, in doing so, will reveal that such reservations are fundamentally misplaced.

IV

CHOICE, EXTRA-LEGAL CONSIDERATIONS, AND THE NINTH AMENDMENT

The various positions outlined above all flow from an attempt to answer the question: What does the Ninth Amendment mean? This Note approaches this question indirectly via the counterfactual of why the Ninth Amendment has not supported a plethora of individual rights?⁸⁹ The motivation for this alternative question derives

⁸⁵ Berger, *supra* note 2, at 9 (quoting Leslie Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 643 (1956)).

⁸⁶ The Tenth Amendment reads, in its entirety, as follows: "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." U.S. CONST. amend. X.

⁸⁷ Indeed, Rapaczynski arrives at this position from what he calls "logical" grounds. *Supra* note 83. "Logical" in this context, is a misleading substitute for what must surely be textual grounds.

⁸⁸ Note that even Laurence Tribe thinks that the Ninth Amendment can be used only as a "rule of construction." Tribe, *supra* note 2. It is a powerful way to think of the Ninth Amendment, but it falls far short of acknowledging that meaning can be ascribed to it.

⁸⁹ This point is not invalidated by the various rights associated with the Ninth Amendment, some of which are referred to at the outset of the previous section. First, even those rights which are associated with the Ninth Amendment are not thought of as Ninth Amendment rights *per se*. Second, in terms of the question being pursued here, what is more important than the limited number of aforementioned rights is why this list is not much longer and why all individual rights do not, at least, invoke the Ninth Amendment. Finally, the rights that are linked to the Ninth Amendment are, for the

squarely from the text of the amendment itself. Since the language of the amendment explicitly refers to the “other” rights “retained by the people,” one might—not merely plausibly but indeed straightforwardly—expect such language to be the basis for various rights.

It is tempting to respond with the cautionary injunction that since these rights are not clearly articulated by the amendment, there is nothing so straightforward in deriving specific rights from it. But lack of specificity is a feature that the Ninth Amendment shares with all open-ended amendments, and, in particular, with the Fifth and Fourteenth Amendments. Indeed, this lack of specificity attaches even to amendments such as the First, in which rights are generally considered to be well-specified. The First Amendment’s reference to specific rights does not mitigate the problem of identifying the context, the reach, and the bearers of these rights.⁹⁰ Yet these latter amendments have supported various legal fictions, which have themselves served as the basis of various specific rights.⁹¹

There is another clear response to the counter-factual question of why the Ninth Amendment has not served as the basis for a plethora of individual rights. Because this amendment, unlike the Fifth and the Fourteenth, refers to the rights “retained by the people” *simpliciter* (i.e. without any positive delimitation, such as equal protection, due process, privileges and immunities), its deployment as a basis for individual rights would open a Pandora’s box from which rights would proliferate endlessly. Moreover, in the absence of a positive delimitation, the courts would be unable to limit this proliferation.

This line of reasoning has considerable force as an explanation for the limited judicial conclusions that have followed from the Ninth Amendment. One might conceive of the Fifth, the Fourteenth, and the First Amendments as doors that function to facilitate and limit entry to particular rights, in which the openness of the doors can be varied by the judgments of courts. In contrast, the Ninth Amendment brings to mind the image of a door that can be

most part, very recent, most of them being post-*Griswold*. See *supra* notes 69-74 and accompanying text.

⁹⁰ See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (stating that right of association is part of Fourteenth Amendment guarantee).

⁹¹ See, e.g., *id.*; *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to privacy in one’s home); *Estelle v. Williams*, 425 U.S. 501, 503 (1976), and *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978) (presumption of innocence); *In re Winship*, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt); *United States v. Guest*, 383 U.S. 745, 757-759 (1966) and *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (right to interstate travel).

opened only by being unhinged and that, once off the frame, cannot easily be closed.⁹² Regarding such doors, the only issue is whether to open the doors or to leave them closed. The courts, as a general matter, have opted for the latter.

What, then, are we to make of this neglect? There appears to be, on some level, a conscious and nonarbitrary reason why the Ninth Amendment has for the most part been left alone. This section attempts to answer the question of why the Ninth Amendment has been ignored, and, in the process, spells out interpretive possibilities inherent in the text of the amendment itself. Pursuant to the suggestion in the first section, the following discussion will reveal how, through the animation of text and context, the Ninth Amendment can come to have meaning.

The line of reasoning outlined briefly in the previous subsection carries force only when the Ninth Amendment is viewed in isolation from the history of the rest of the text of which it is a part. There are a number of potentially uncontrollable clauses in the Constitution that the Court has not hesitated to use. The labyrinthine interpretive permutations emanating from the Liberty Clause, for example, have not stopped the Court from construing that clause, sometimes narrowly and sometimes broadly, to achieve a particular end.⁹³ The distinctive feature of legal fictions is that the Court can limit or enlarge the interpretation depending upon the extra-legal considerations inherent in and unique to each situation.

There is a further explanation for the relative neglect of the Ninth Amendment as a basis for both legal fictions and corresponding rights. This reason requires suspending the general interpretive predisposition towards the Constitution that the Bill of Rights is exclusively concerned with individual rights. If we set aside this view, the language of the Ninth Amendment can be seen as granting a right that is attached to "the people" as a whole—that is, to Americans as *a* people.

⁹² There are two broad aspects to the Ninth Amendment. First, the notion of "other" rights is potentially tremendous; there is no clear limit to it. Second, the notion of these same other rights being "retained by the people" has an element of natural rights in it, i.e. rights you cannot alienate from the individual. Once given content, such rights cannot be taken away. Many of the Framers of the Constitution were, arguably, sympathetic to natural law theory: "At the time the Constitution was drafted, nearly every political leader in the country was a disciple of the natural law school, first expounded in John Locke's *Of Civil Government* and embodied in the colonies in such documents as the Virginia Declaration of Rights and the Declaration of Independence." Kelley, *supra* note 80, at 815 (footnotes omitted).

⁹³ See discussion *supra* part II.

This perspective clarifies why the Ninth Amendment has not in fact been used to grant individual rights.⁹⁴ It also suggests that there may exist in the Bill of Rights, and specifically in the Ninth Amendment, an awareness that the entire constitutional edifice could, under some conditions, be challenged and that the people, under such conditions, may wish to start afresh.⁹⁵ Under this interpretation, the Ninth Amendment is a bridge that could be constructed from the Constitution as it is to an alternative framework of government that the people may wish to create. The Founders of the Republic believed that such exigencies were at least as important as laying out the governmental structure along with a system of rights. Less than a century after the founding, when the Republic was in peril and its wholesale reconstitution was an imminent possibility, Lincoln identified, with specific reference to the Ninth Amendment, precisely such a collective and revolutionary potential: “[The Founders] knew the proneness of prosperity to breed tyrants, and they meant when such should reappear . . . and commence their vocation they should find left for them at least one hard nut to crack.”⁹⁶

Lincoln’s understanding of the Ninth Amendment is prefigured by Publius in *The Federalist* No. 84:

[Our Constitution is] professedly founded upon the power of *the people*. . . . Here, in strictness, *the people* surrender nothing; and as they *retain everything*, they have no need of particular *reservations*. “WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” Here is a [clear] recognition of popular rights. . . .⁹⁷

Publius’s reference to popular rights, combined with the all but explicit reference to popular sovereignty in the Tenth Amendment,⁹⁸ makes clear that the Bill of Rights is not merely a bill of *individual* rights.

⁹⁴ To say that this reading clarifies the neglect of the Ninth Amendment with respect to individual rights does not mean that it was on the basis of this reading that individual rights were not linked to the Ninth Amendment. The reasons for this neglect may be wholly distinct from what makes this neglect clear.

⁹⁵ Since so much is made of the historical links between American constitutional democracy and the philosophy of John Locke, it is worth mentioning that this suggestion regarding the right of people to overthrow government and reconstitute themselves anew is a right that Locke explicitly recognized. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Cambridge University Press ed., 1960).

⁹⁶ RAY P. BASLER, *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* (1946).

⁹⁷ *THE FEDERALIST* No. 84, at 513 (Alexander Hamilton) (emphasis added).

⁹⁸ See *supra* note 86, for the text of the Tenth Amendment.

More recently, Akhil R. Amar has proposed precisely such an interpretation of the Ninth Amendment.⁹⁹ He acknowledges that the Amendment refers to the collective rights of the people and specifically to their right to transform fundamentally the governmental and/or constitutional structure: "the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention."¹⁰⁰ For Amar, the Ninth and the Tenth Amendments taken together refer to popular sovereignty and, therefore, comport with the generally acknowledged Lockean thrust of the Constitution as a whole.¹⁰¹

Viewed as a legal text, the Ninth Amendment makes possible, at the least, two broad choices. The first choice would serve as the basis for potentially innumerable individual rights, and the second limits its deployment to those rare instances when "the people" as a collectivity express themselves.¹⁰²

⁹⁹ Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1200 (1991).

¹⁰⁰ While I concur with Amar's general view of the Ninth Amendment, *id.*, his limiting the process of alteration or revolution with the "distinctly American device of the constitutional convention" strikes me as textually unwarranted. The Ninth Amendment is simply silent on the issue of what and how "we the people" may do with the rights retained by us. Moreover, the constitutional convention as a mechanism for altering government is hardly "distinctly American." See B.N. RAU, *INDIA'S CONSTITUTION IN THE MAKING* (1960) (discussing the means through which the Indian Constitution is altered).

¹⁰¹ Locke's social contract for the formation of political society specified that, notwithstanding the rights that individuals give up for the formation of such a society, the people nevertheless remain sovereign even when government has been established. This is what is meant by government being held "in trust." LOCKE, *supra* note 95.

¹⁰² Even though the discussion of this latter choice has been limited to instances where the people would want to fundamentally alter government, nothing in the argument put forth here turns on the people invoking the Ninth Amendment for such revolutionary purposes. It is indeed possible from a textual standpoint, even though contrary to the historical concerns surrounding the Ninth and Tenth Amendments, for the people to invoke the Ninth for more prosaic collective enterprises.

Bruce Ackerman has recently made an interesting argument revolving around the concept embodied by "We the People." He distinguishes between ordinary politics and higher lawmaking. BRUCE ACKERMAN, *WE THE PEOPLE* (1991). Suzanna Sherry, in a poignant but critical characterization of his argument, writes as follows: "[Higher law-making] is a process of extended and thoughtful deliberation by a significant portion of the people, in which *private* citizens temporarily become *private citizens*. In this process, the people make a truly considered choice about the direction in which they wish the nation to go, and politicians implementing their choice *do* speak in the name of 'We the People.'" Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARVARD L. REV. 918, 918 (1992).

While Ackerman is not writing with specific reference to the Ninth Amendment, his thesis is both interesting and relevant to the argument of this Note. He calls for a modern Bill of Rights, one that would move "far beyond the first ten Amendments ratified in the aftermath of the Founding, one that builds on the achievements of Reconstruction, the New Deal, and the civil rights movement to give new substance to each American's right to pursue life, liberty, and the pursuit of happiness." ACKERMAN, *supra* at 319. He asks the question: "In seeking to move beyond our eighteenth century Bill, should We

The issue of which, if any, of these two options gets mobilized is not a matter of textual interpretation but, rather, of extra-textual considerations. Under conditions in which the relationship of individuals to government or to other major institutions (such as corporations) is heavily strained and fractious, individuals might demand of the Court, and the Court might grant, rights that it can justify only by reference to the expansive possibilities implicit in the Ninth Amendment.¹⁰³ In the face of such an exigency and to make possible the rights demanded by aggrieved and tenacious individuals, the Court might have to resort to the construction of a fiction such as natural rights. If such a predicament were to persist, and the Court were to respond by denying the rights demanded, the people might invoke the Ninth Amendment, not for various individual rights but, rather, to assert their collective sovereignty.

The history of American political development evinces no instance in which the people have collectively demanded from the Constitution and specifically from the Ninth Amendment the right to radically reconstitute themselves and their political institutions. This fact serves as testimony to the abiding hold of the liberal constitutional settlement of 1787-91.¹⁰⁴ Louis Hartz, in his well-known book, *The Liberal Tradition in America*,¹⁰⁵ identifies America with precisely such an absence of nonliberal (both reactionary and socialist) alternatives. This fact illustrates, on a panoramic historical canvas, the particular fate of the Ninth Amendment. Similarly, the fact that the Ninth Amendment has not been animated to grant a plethora of rights is testimony to the fact that, in America's political development, the particular rights demanded have been satisfied by more delimited amendments, such as the Fifth and the Fourteenth. The Ninth Amendment is not, to invoke Judge Bork's image, an ink-

the People seriously reconsider the Founders' failure to entrench fundamental rights against constitutional revision?" *Id.* at 320. He answers affirmatively, albeit polemically: "The choice, my friend, is yours." *Id.* at 322.

¹⁰³ The American Constitution, unlike, for example, the German one, does not entrench individual or basic rights against the government. The Constitution and the Bill of Rights can be revised formally through the process of the constitutional convention and informally through various fictions. Ackerman, in calling for an entrenchment of individual rights against the possibility of revision, claims that the American Constitution and guarantee of rights are that way because of a basic "revolutionary amnesia" in America. ACKERMAN, *supra* note 102, at 171. It is not clear, however, whether he views the amnesia as stemming from the framework of the Constitution or whether the Constitution is framed because of a prior tendency toward such amnesia.

¹⁰⁴ The obvious historical moment when this might not have been true is in the period of the Civil War. But in that instance, the radical demands afoot were husbanded by the Thirteenth, Fourteenth, and Fifteenth Amendments.

¹⁰⁵ LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1983). But see ACKERMAN, *supra* note 102, at 24-29, for a different reading of Hartz and the constitutional settlement generally.

blot.¹⁰⁶ It is, rather, an amendment brimming with individual and collective potential, and perhaps for that very reason it must be, or at any rate in the course of American political development has been, placed beneath an inkblot.

The possible alternative interpretations of the Ninth Amendment offered above are meant to indicate that the Amendment can be mobilized in ways that would not lead to dire consequences. Analyzing the Ninth Amendment through legal fictions reveals how the use of the Ninth Amendment need not lead to an endless proliferation of rights. Legal fictions, when understood not as consciously artficed falsehoods but, rather, as interpretations arising out of the interplay between text and context (i.e., not as pretense but rather as narrative) contain rules for their own limitation. The history of various other constitutional fictions makes clear that neither the Court nor litigants have used such fictions in fearful and exaggerated ways. Legal fictions depend upon a host of other extra-legal factors without which they would neither make sense nor be useful. There is nothing inherent in the text of the Ninth Amendment that would make the interplay between text and context impossible.¹⁰⁷

CONCLUSION

Legal fictions represent choices exercised by judges and legislators. The range of these choices is determined both by the extant legal text and the extra-legal contexts which impinge on and animate legal texts. In offering such an account, this Note challenges the view, most recently associated with Lon Fuller,¹⁰⁸ that professes to understand legal fictions through a conception of truth and falsity. Such an account is itself part of a broader theory of legal interpretation that sees such interpretation as also involving considerations of truth and falsity. Both in its understanding of legal fictions and in its view of legal interpretation, this perspective overlooks the interplay between text and context, which determines the choices that result in the need for legal fictions and legal interpretations more generally.

The fact that the Ninth Amendment, in contrast to the Fifth, the Fourteenth, and the First, has not generated legal fictions, is to be understood both by the text of the amendment and by the context in

¹⁰⁶ See *supra* note 76 and accompanying text.

¹⁰⁷ The argument is not that the Ninth Amendment might be a more honest basis for the foundation of certain individual or collective rights. Anything that goes into the Ninth Amendment is bound to be a fiction in any case. Again, the point does not revolve around honesty or dishonesty, falsity or truth. Rather, the point is that even if fictions rely on falsehoods, that is not a particularly helpful way of viewing them.

¹⁰⁸ See *supra* note 8 and accompanying text.

which it has been animated. In some future context, in which individuals demand rights that cannot be gleaned from other components of the Constitution or legislative decrees, or in which they demand radical alterations in the constitutional and governmental edifice, the Ninth Amendment might very well serve as the basis for a potent and far-reaching legal fiction. And, under such conditions, the Ninth Amendment, once it is invoked without the support of other amendments, is especially, if not necessarily, prone to generate legal fictions.

Tejshree Thapa†

† The author thanks Uday Mehta, Robert Ziff, and members of the Cornell Law Review for their help and support in the writing of this Note.

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