The Original Purpose And Present Utility Of The Ninth Amendment

Wilfred J. Ritz

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The Ninth Amendment has been reported "forgotten," and its language has been described as "a mystery" and "almost unfathomable." Until its revivification by the United States Supreme Court in 1965 in Griswold v. Connecticut, it had been almost totally ignored by the legal profession and the courts, and attracted but scant attention from scholars.

In view of this attitude of long-standing neglect, there is no history of an interpretative development, as with most of the other provisions of the Constitution. Instead, there is only the original purpose and the present potentiality. The original purpose must be sought for in the meager records that have survived of the work of


381 U.S. 479 (1965).

4Id. at 491 n.6.

The only significant pre-Griswold writings directed specifically to the Ninth Amendment, besides the monograph by Patterson, supra note 1, are Dunbar, James Madison and the Ninth Amendment, 42 Va. L. Rev. 627 (1956); Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L.J. 309 (1936); and Rogge, Unenumerated Rights, 47 Calif. L. Rev. 787 (1959), reprinted as a part of O. Rogge, The First and the Fifth (1960).

The Griswold case has brought forth a spate of scholarly activity, much of it directed at the Ninth Amendment: Abrams, What Are the Rights Guaranteed by the Ninth Amendment?, 53 A.B.A.J. 1033 (1967); Franklin, The Ninth Amendment, 40 Tul. L. Rev. 487 (1966); Comment, The Ninth Amendment, 30 Albany L. Rev. 89 (1966); Note, The Ninth Amendment, 11 S.D.L. Rev. 172 (1966). In addition, there have been many student case notes published in the law reviews.
the First Session of the First Congress, which meeting in New York in 1789 proposed the Amendment, and in the even more meager records indicative of the understanding of the eleven states that by the end of 1791 had ratified the Amendment, so as to make it part of the Constitution. Since then there has been a century and three-quarters of constitutional development, which in itself is almost barren of any reference to the Ninth Amendment, but whose very proliferation affects and limits the present utility of the Amendment.

I. THE NINTH AMENDMENT AND THE BILL OF RIGHTS

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." The reference is to the Constitution, not to the amendments alone.

Common use of the phrase "Bill of Rights" as a shorthand, convenient, and descriptive name to refer to the first ten amendments has led to some confusion regarding their history and purpose. This term, "Bill of Rights," is not found in any of the amendments, in the congressional debates, in the congressional resolution submitting them

6This is another example of the danger of using shorthand labels, there being a tendency to interpret the label, rather than the thing labeled. Mr. Justice Black, dissenting in Griswold v. Connecticut, 381 U.S. 507, 509 (1965), points out, "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning." He illustrates by referring to the substitution of the "broad, abstract and ambiguous concept" of a right of privacy for the Fourth Amendment's more explicit guarantee against unreasonable searches and seizures.

The Justice himself, though, sometimes violates his own admonition. He and the other members of the Supreme Court are particularly fond of using "the Framers" to refer to the draftsmen of both the original Constitution and the first ten amendments, as though the same body of men framed both. Actually, of the 81 members of the First Session of the First Congress, only 18, 10 of 22 Senators and 8 of 59 Representatives, had been members of the Federal Convention of 1787.

The term "Bill of Rights" was used frequently in the debates, but not to refer specifically to the amendments proposed. These debates are set forth in ANNALS OF THE CONGRESS OF THE UNITED STATES, FIRST CONGRESS, published in 1834. Excerpts covering the history of the amendments are reprinted as an appendix to B. Patterson, The Forgotten Ninth Amendment 93-217 (1955). Patterson also publishes, at 98-99, a letter from the Library of Congress pointing out that the first two volumes were printed in two sets, with the same title and text, but from different settings of type and with different paginations. One set has the running head "History of Congress" and the other has "History of Debates." These debates will be cited hereinafter as ANNALS, by volume and column number, each page having two numbered columns. The citations will be to the set with the running head, "History of Congress."
to the states,\textsuperscript{7} or in any of the state instruments of ratification.\textsuperscript{8} As descriptive of these ten amendments, the term did not come into general use until sometime after 1833, for in that year John Marshall in \textit{Barron v. Baltimore}\textsuperscript{9} simply denied the application of "these amendments" to the states, without once referring to them as a Bill of Rights,\textsuperscript{10} and Joseph Story in his \textit{Commentaries} said no more than that "the amendments... principally regard subjects properly belonging to a bill of rights."\textsuperscript{11}

Simply stated, the first ten amendments do not qualify as a Bill of Rights, as that term was understood in the Eighteenth and early Nineteenth Centuries. The contemporary understanding, as exemplified by the state constitutions of the period,\textsuperscript{12} was that a Bill of Rights was a declaration having three characteristics: (1) In form, it was a declaration that preceded or prefaced the Constitution. (2) In substance, it contained positive statements of general principles, which affirmed that the people are the source of all power, and that when they transfer some of their powers to government, all other powers and rights are retained. (3) In light of these general principles, it lists certain specific rights retained by the people, which in phraseology may be stated as restrictions on the powers of government.\textsuperscript{13}

As measured by this definition, the first eight amendments satisfy

\textsuperscript{7}1 Stat. 97.
\textsuperscript{8}Annals 1883-90, 3 Annals 30, 54, 75.
\textsuperscript{9}32 U.S. (7 Pet.) 243 (1833).
\textsuperscript{10}The Chief Justice did refer to the ninth and tenth sections of Article I of the Constitution as containing an enumeration of rights "in the nature of a bill of rights." Id. at 248. An examination of Supreme Court cases prior to 1833, cited in Shepard's United States Citations: Statute and Department Reports Edition (1949) does not reveal any instance of a judicial reference to the first ten amendments as the Bill of Rights.
\textsuperscript{11}12 J. Story, Commentaries on the Constitution of the United States § 1869 (2d ed. 1851). See also § 984 of the Abridged Edition (1833).
\textsuperscript{12}Only six states adopted new Constitutions between 1776 and 1789 which contained provisions expressly called Declarations or Bills of Rights. They were: Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia. Delaware, Georgia, New Jersey, New York, and South Carolina adopted new Constitutions during this period, but without incorporating any declaration or bill of rights as such. Connecticut and Rhode Island did not change their form of government during this period to the extent of adopting new Constitutions. See 1-7 F. Thorpe, The Federal and State Constitutions (1909).
\textsuperscript{13}There is nothing unique about the rights listed in the first eight amendments that make them more appropriate for inclusion in a Bill of Rights than in the body of a Constitution. The guarantee of trial by jury in criminal cases is equally appropriate in Article III, Section 2, and in the Sixth Amendment. The prohibitions against bills of attainder and ex post facto laws in Article I, Sections 9 and 10, would be equally appropriate as clauses in a Bill of Rights, as John Marshall pointed out in \textit{Barron v. Baltimore}, 32 U.S. (7 Pet.) 243 (1833).
the third test, the Ninth and Tenth satisfy the second one, but none
satisfy the first test. The impossibility, in theory at least, of adding a
prefatory declaration of general principles to an already ratified Constitu-
tion presented a real problem in developing these ten amendments.

Furthermore, it is sometimes forgotten that the First Congress
submitted twelve, not ten, separate and distinct amendments to the
states. The congressional resolution said that when "any or all" of
the proposed amendments were ratified by three-fourths of the states,
the ones so ratified would become valid as a part of the Constitution.
Since the first two were not ratified, only the third through the
twelfth proposed amendments became a part of the Constitution, as
the First through the Tenth.14

II. THE PURPOSE AND HISTORY OF THE NINTH AMENDMENT

The problem that gave rise to the Ninth Amendment is simple
to state and difficult to correct. Article I, Section 8, of the Constitution
lists the powers that Congress shall have and concludes with a grant to
make all laws which shall be necessary and proper to carry the
enumerated powers into execution. Article I, Section 9, enumerates
prohibitions imposed on Congress. Does Congress then, as a matter
of construction of the instrument, have the unenumerated powers,
whatever they may be, which are neither granted in Section 8 nor
denied in Section 9?

The point was clearly made during the ratification debates by
Brutus, an Antifederalist writer, who asked rhetorically what might
be the source from which the federal government obtained the power
to suspend the writ of habeas corpus, to make ex post facto laws, to
pass bills of attainder, and to grant titles of nobility, that is, the acts
expressly prohibited by Section 9. According to Brutus:

The only answer that can be given is, that these are implied
in the general powers granted. With equal truth it may be
said, that all the powers which the bills of rights [in state consti-
tutions] guard against the abuse of, are contained or implied
in the general ones granted by this Constitution.15

Brutus was applying to the Constitution the same rule of construction
that Alexander Hamilton used in No. 84 of The Federalist Papers to
argue that the addition of a Bill of Rights to the Federal Constitution
would be dangerous, for it "would contain various exceptions to

14The First Amendment is first by accident and not because the First Congress
gave it primacy because of the value of the rights protected.
powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?16 Brutus had scored a good point.

While the Federalists said that the Constitution established a federal government of limited powers, having only those powers expressly or by implication delegated to it, the written Constitution itself did not say this. It was silent on the point. Moreover, a good case can be made that the framers intended the Constitution to be an integrated writing, to be interpreted solely on the basis of what was stated within the four corners of the instrument. In short, something in the nature of a parole evidence rule would be applied.17 The opinions written by the members of the Supreme Court, who had also been members of the Federal Convention,18 give no indication that they were relying on their first-hand knowledge in interpreting the instrument. Actually, more written materials are available today showing the intentions of the framers than when John Marshall and his associates were on the Court. The Journal of the Convention, of only limited value at best, was not published until 1819,19 and Madison's Debates, the most useful of all the materials, was not published until 1840.20 About the only source available prior to the publication of these materials was the Federalist Papers, the authority of which is usually overrated.21

16The Federalist 579 (Cooke ed. 1961). Hamilton is using the word "exception" here in the same sense as in the original legal maxim, "Exception proves (or confirms) the rule in the cases not excepted," that is, particular cases are excepted from the scope of a proposition. This maxim is now commonly given as, "The exception proves the rule," meaning that a particular case does come within the terms of a rule, but the rule is not applicable to it. The necessary implication from the recognition of "an exception" is that there is a contrary general rule. See definition of "Exception" in Oxford English Dictionary (1933).
17The theory of a social contract, or social compact, was one of the main tenets of Eighteenth Century political philosophy.
18Chief Justices John Rutledge (not confirmed by the Senate) and Oliver Ellsworth, and Associate Justices John Blair, William Paterson, and James Wilson. Paterson, last to serve, died September 9, 1806.
19The Federal Convention resolved that Washington should retain the Journal and other papers subject to the order of Congress, if it should ever be formed under the Constitution. After destroying "all the loose scraps of paper" the Secretary delivered the remainder to Washington, who in 1796 deposited them in the Department of State, where they remained untouched until Congress in 1818 authorized their printing. They were issued in 1819 under the title, Journal, Acts, and Proceedings of the Convention which formed the Constitution of the United States. 1 M. Farrand, Records of the Federal Convention xi-xii (1987).
20Id. at xv.
21There were three authors. One, John Jay, was not even a member of the Federal Convention. Another, Alexander Hamilton was a member, but his attend-
Brutus's penetrating criticism based on the inclusion of Article I, Section 9, in the Constitution, combined with the apparent use of a parole evidence rule in its interpretation, made it highly important to add some rules of construction to the instrument itself.

The Virginia ratifying convention was the first to propose an amendment embodying the substance of the Ninth, although by this time the Constitution had already been ratified by nine states, the number required to put it into operation among those so ratifying. Virginia proposed the following:

Seventeenth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise be inserted merely for greater caution.22

North Carolina called for the same amendment as a condition to ratification.23 New York's ratification included a declaration of impressions and understandings, of which this was one.24

The states, which in ratifying had called for amendments, had also enjoined upon their representatives in the new government the duty of exerting their influence to induce Congress to propose the desired amendments.25 Madison took the initiative in performing this duty, when on June 8, 1789, he addressed the House of Representatives on the subject of amendments.26

Madison undertook to deal directly with the problem of construction posed by the inclusion of Article I, Sections 9 and 10, in the Constitution. He set forth his proposed amendments in a series of nine resolutions of which the fourth proposed adding to the prohibitions in Section 9 an enumeration of most of the rights now found in

1 Id. at 1034-35.
2 Id. at 1044, 1050 (proposed amendment No. XVIII).
3 Id. at 1034-35. Rhode Island, following the lead of New York, included a similar statement in its ratification. Id. at 1052. It is fortunate that the legitimacy of the United States does not depend on the validity of these ratifications. A scholar studying the New York ratification has recently said, "The instrument of ratification adopted by the Poughkeepsie Convention on 26 July 1788 did not contain the word 'condition,' but in every other respect it was a conditional ratification." L. De Pauw, The Eleventh Pillar 257 (1966).
5 Documents, supra note 22, at 1034 (Virginia), 1039 (New York).
6 Annals 424.
the first eight amendments, concluding with a new clause in the following language:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

These proposals were eventually referred to a select committee, which reported the clause, still amendatory of Article I, Section 9, in this form: "The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." In this form, with the single exception of a change of "this Constitution" to "the Constitution" the clause was accepted by the House and, unchanged by the Senate, became the Ninth Amendment.

One other significant action was taken during the legislative process. Madison's proposals involved striking out, substituting, and adding new language to the Constitution itself. Thus, the Ninth Amendment originated as a new clause to be added to Article I,
Section 9. However, the House voted to change this method so as to leave the language of the original Constitution intact, and to amend it by the use of new supplementary articles. As a result, the original intention as to the meaning and effect of each amendment can be determined by considering the amendment in relation to the whole of the original Constitution and the other amendments. This change, though, did not affect the meaning of the Ninth Amendment, which from the beginning applied to the whole Constitution. While Madison's original proposal was in form amendatory only of Article I, Section 9, it referred to "exceptions here or elsewhere in the Constitution."

III. THE NINTH AMENDMENT AND JUDICIAL REVIEW

The Ninth Amendment states a rule of construction and as such applies to the whole Constitution, including Article I, Section 10, with its enumeration of certain powers denied to the states. Ever since 1798, when the United States Supreme Court assumed jurisdiction in Calder v. Bull, involving the question of whether Connecticut had passed an ex post facto law in violation of Article I, Section 10, the Supreme Court has enforced against the states the prohibitions enumerated in this section.

Since the Supreme Court exercises jurisdiction to secure to the people from adverse state action the enumerated rights in Article I, Section 10, it follows that the Supreme Court has the power to secure to the people from adverse state action the unenumerated rights guaranteed by the Ninth Amendment.

A query may be raised as to whether the Federal Convention and the First Congress intended to give the Supreme Court such a broad control over the states, and the answer is most probably in the

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22 When the Committee of the Whole considered the report of the select committee, Roger Sherman, of Connecticut, who had been a member of the committee moved for a change in the method of amending the Constitution, but the motion was defeated. 1 ANNALS 507-17. When the House itself considered on August 19, the report of its Committee of the Whole, Sherman renewed his motion, and this time it carried by a two-thirds majority. 1 ANNALS 766.

23 Madison's fifth resolution proposed to amend Article I, Section 10, by adding a new clause protecting trial by jury in criminal cases, the right of conscience, freedom of speech and the press from state action. 1 ANNALS 436. The House adopted the resolution, but it was eliminated by the Senate.

24 U.S. (3 Dall.) 386 (1798).

negative. But it takes the conjunction of two doctrines—a broad power of judicial review of state action and the application of the Ninth Amendment to the states—to accomplish that result. It is at least as likely that the negative answer indicated should be based on an Eighteenth Century understanding of a limited function for the Supreme Court, rather than on a view that the Ninth Amendment does not apply to the states. After all, judicial review, as applied to the federal government, was not firmly established until the 1803 decision of Marbury v. Madison and, as applied to the states, until the 1816 decision of Martin v. Hunter's Lessee. Furthermore, in the Eighteenth Century it would have taken a seer to have foreseen the potentialities of judicial review, particularly in relation to the expansiveness inherent in the first ten amendments in conjunction with the Fourteenth Amendment, a subject left largely unexplored until the Twentieth Century.

The Ninth Amendment has been available from the time of its ratification in 1791 to accomplish, in relation to the states, the purposes of a pre-Fourteenth Amendment due process clause. If the Fourteenth Amendment had never been adopted, can it be seriously doubted that the Supreme Court would have found a way to accomplish due process and equal protection results? Given an expansive theory of judicial review, the Ninth Amendment, on the basis of both its language and historical purpose, would have provided the constitutional basis.

IV. GRISWOLD V. CONNECTICUT, 1965

The first and only significant judicial discussion of the Ninth Amendment came in 1965, in Griswold v. Connecticut. During the previous century and three-quarters no court had ever based a decision squarely on the Amendment. It had been subjected to discussion in no more than three Supreme Court cases and a handful of lower court cases, and then only in a cursory way. In Griswold, the Supreme Court, in a series of opinions and by a seven-to-two vote, held unconstitutional a state statute prohibiting the use of contraceptives by married couples, and to the "astonishment of many

365 U.S. (1 Cranch) 138 (1803).
3714 U.S. (1 Wheat) 304 (1816).
381938 U.S. 479 (1965).
observers" five justices used the Amendment as a basis for invalidating the Connecticut statute. Commentators seem to agree that the decision would have been the same, even though the Amendment had never been called to the Court's attention.

In Griswold, the Court's opinion was delivered by Mr. Justice Douglas, who said that the "specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." And then, after referring to several of the amendments and making a passing reference to the Ninth, he found a penumbral right of marital privacy which had been violated by the Connecticut statute.

Mr. Justice Goldberg concurred in order, as he said, referring to the Ninth Amendment, "to emphasize the relevance of that Amendment to the Court's holding." It is a matter of considerable difficulty, though, to determine exactly what the Justice considered the relevance of the Amendment to be, since he denied "that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government," while at the

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42 Professor Emerson, who was of counsel for the plaintiff, points out that no Ninth Amendment issue was raised at the trial, and that the Amendment was used only for a limited purpose in the Supreme Court.
43 Professor Emerson expresses grave doubt whether the Amendment has a "significant future," since the Court has frequently relied on the due process clause alone to protect fundamental rights. Id. at 227-28.
45 Professor McKay points out that Mr. Justice Goldberg, in relying on the Ninth Amendment, did not draw any distinction between the retained rights of the amendment and a flexible due process concept. McKay, The Right of Privacy: Emanations and Intimations, 64 Mich. L. Rev. 259, 270 (1965).
46 Professor Sutherland thinks the Griswold holding is "clearly right" because the statute involved was "inconsistent with the definable concept of reasonable liberty, which is due process of law and which the Supreme Court must apply." Sutherland, Privacy in Connecticut, 64 Mich. L. Rev. 283, 288 (1965).
47 Only Mr. Justice Clark joined without further comment or reservation. Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, concurred in a separate opinion. 381 U.S. at 486. Mr. Justice Harlan concurred in the judgment, but expressly noted that he was unable to join in the Court's opinion. Id. at 499. Mr. Justice White concurred in the judgment, but without expressly noting a nonconcurrence in the opinion. Id. at 502. Mr. Justice Black and Mr. Justice Stewart each dissented in an opinion in which the other joined. Id. at 507, 527.
48 381 U.S. at 484.
49 Id. at 487.
50 Id. at 492.
same time he believed "that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."\(^{44}\) Referring to the Connecticut prohibition on the use of contraceptives, he said that he did not think "that the Constitution grants such power either to the States or to the Federal Government,"\(^{45}\) but at the same time he did not mean "to imply that the Ninth Amendment is applied against the States by the Fourteenth,"\(^{46}\) and so "Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States."\(^{50}\) And so it appears that Mr. Justice Goldberg made a good case in *Griswold* for denying the relevancy of the Ninth Amendment, a proposition contrary to that which he started out to prove.

Mr. Justice Black, dissenting, could not agree to an extension of the Ninth Amendment to the states, since such an application would not be limited by the "particular standards enumerated" in the first eight amendments, and so would end in the Court having to use natural law concepts to determine the validity of state legislation.\(^{51}\)

The result is a paradox. Mr. Justice Black advocates total incorporation of the Bill of Rights into the Fourteenth Amendment, so as to have the particular provisions of the first eight amendments serve as limitations on an otherwise vague due process clause. But to accomplish this result the Justice must resort to the process of selective incorporation, that is, the selection of only the first eight amendments, and excluding the Ninth and Tenth, from the process of incorporation into the Fourteenth.\(^{52}\) On the other hand, Mr. Justice Goldberg, following a theory of selective incorporation, selects the Ninth for the process,\(^{53}\) and thereby incorporates much more than the whole of the first eight amendments. And so Mr. Justice Black's total incorporation turns out to be selective, and Mr. Justice Goldberg's selective incorporation turns out to be total.

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\(^{44}\) *Id.* at 499.

\(^{45}\) *Id.* at 496.

\(^{46}\) *Id.* at 492.

\(^{50}\) *Id.* at 499.

\(^{51}\) *Id.* at 525-26, quoting from the Justice's dissenting opinion in *Adamson v. California*, 332 U.S. 46, 90-92 (1947).

\(^{52}\) A similar problem is involved in incorporating the due process clause of the Fifth Amendment into the Fourteenth. Its incorporation as an "unspecific" due process clause raises all the difficulties that Mr. Justice Black sees in relying solely on the due process clause of the Fourteenth Amendment. But unless this is done, the Fifth Amendment's due process clause becomes a redundancy in the Bill of Rights, a peculiar fate for a clause that has played such a large role in the development of the whole concept of due process of law.

\(^{53}\) The Justice actually denied doing this. Text accompanying note 49 *supra.*
With the accelerated extension of particular provisions of the Bill of Rights to the states, the whole controversy about selective versus total incorporation has become increasingly semantical and sterile, turning as it usually does upon ascertaining the intentions of the Congress that proposed the Fourteenth Amendment and the states that ratified it. When proper recognition is accorded to the history and true purpose of the Ninth Amendment—that the Amendment applies to both the federal government and the states—the whole controversy is bypassed. The Ninth Amendment covers everything that is in the Fourteenth Amendment's due process clause.

V. OTHER RIGHTS RETAINED BY THE PEOPLE

The history of the Ninth Amendment shows that it is suitable for accomplishing the same purposes as the due process clauses of the Fifth and Fourteenth Amendments. Consequently, the question arises whether, in light of the extensive judicial applications of those clauses, it is now simply a redundancy or whether it can accomplish useful purposes beyond those possible under the due process clauses.

Both the Fifth and Fourteenth Amendments apply to "persons"; the Fifth begins with the words, "No person" and the Fourteenth refers to "any person." The Ninth Amendment, by contrast, refers to the rights of "the people." While the word "people" can encompass both people viewed as a community or group and people viewed as individuals, the word "person" is limited to individuals. And so there is an area in which the Ninth Amendment can operate, but in which the due process clauses cannot, that is, in protecting the rights of the people, as the people, as distinguished from the people's rights as individuals.

If the Federal Bill of Rights is to be accorded the status of a true Bill of Rights in the Eighteenth Century sense, it must contain a declaration that safeguards the rights of the people as the people. Such a statement can only be found in the Ninth and Tenth Amendments, since the other eight amendments protect individual rights.

Madison thought that only one of his nine proposals for amending the Constitution was a true Bill of Rights. After introducing his

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54 The literature, both judicial and nonjudicial is voluminous. See, e.g., Adamson v. California, 332 U.S. 46 (1947); Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965).
55 See text following note 11 supra.
proposals on June 8, he told the House, "The first of these amend-
ments relates to what may be called a bill of rights." He did not use the phrase to refer to the other eight proposals. The proposed first resolution read as follows:

First. That there be prefixed to the Constitution a declara-
tion, that all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

Clearly, Madison was undertaking in this first resolution to safeguard the rights of the people, as the people, and not as individuals.

The failure of this proposal to survive the legislative process did not constitute a rejection of the principles it embodied. Rather it was the result of a technical problem. It is impossible philosophically, even if it is possible mechanically and verbally, to add a Bill of Rights as an amendment to a Constitution that has already been adopted, because an essential characteristic of a Bill of Rights is a reservation of rights and powers by the people out of a grant of powers to government, which is, of course, impossible to do once the grant has been made.

The Federalists in the First Congress did not wish to recognize any necessity for recapturing powers already granted, since to do so would have affirmed the validity of arguments such as those made by Brutus and denied the correctness of their own—that the federal government only had such limited powers as were expressly or by implication delegated to it. In the end, the First Congress, faced with an insoluble philosophical problem, abandoned the effort to add to the Constitution an express declaration stating the rights of the people in general principles.

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56 Annals 436.
57 Annals 433-34.
58 This is the best that can be done with a ratified Constitution. The Twenty-First Amendment represents such a recapture by the people of rights granted to the government by the Eighteenth Amendment.
59 See text accompanying note 15 supra.
60 The propriety of adding this amendment to the Constitution was inextricably tied to the question of the proper method of amendment. See text accompany-
Consequently, the three rights of the people which Madison included in his first resolution, but which were not expressly recognized in the amendments proposed and adopted, became other rights retained by the people within the meaning of the Ninth Amendment. The three retained rights, thus recognized during the deliberations of the First Congress, are: (1) the right to acquire and use property; (2) the right to pursue and obtain happiness and safety; and (3) the right to reform or change the government.

These three retained rights recognized by the First Congress, being illustrative of the original understanding, provide some guidance in determining what other rights were retained by the people. It is, therefore, appropriate to include a right of the people to knowledge, and a right of the people to observe the administration of justice in public trials. Beyond this, the very language and spirit of the Ninth Amendment shows that the retained rights of the people can never be definitely enumerated.

A. The Right to Acquire and Use Property

The right to acquire and use property, as now being considered, pertains to the right of the people to live under a system of private property, and not to the rights that individuals may have under the system itself. In Tennessee Electric Power Co. v. Tennessee Valley Authority, the Supreme Court was urged by counsel to recognize that "[u]nder the Ninth Amendment, the people have the right to earn a livelihood, and acquire and use property by engaging in the electric business, subject only to state regulation." This argument involves a mixing of the right of the people to live under a system, with the similar right of a person, here a corporation, to due process under the system.

The Ninth Amendment guarantees the system, the right of the people to live under a system of free enterprise, as distinguished
from the Communist system, or some other dictatorial or unfree system. Other provisions of the Constitution, particularly the due process clauses, guarantee specific rights to each person living under the free enterprise system.

B. The Right to Happiness and Safety

At the time the American nation was founded, its westward expansion had only begun. Since settlement precedes organized government, in the conquest of a continent the people initially had to provide for their own happiness and safety, whether threatened by hostile Indians, foreign foes, or domestic criminals. The story is too familiar to require elaboration.

Unfortunately, this right of the people to provide for their safety degenerated into mob injustice, represented by a wave of lynchings. There is a distinction, though, between the right of the people to provide for their safety and lynch law. Lynch law purports to provide an alternative system of justice, in reality a substitute system of injustice, for that which the organized government is able and willing to provide. The right of the people to provide for their safety, as retained under the Ninth Amendment, arises only when the government itself becomes impotent, or for some other reason fails to carry out its obligations in this regard. Then, the people have the right to take the necessary steps, which in the words of Madison, constitute "pursuing and obtaining happiness and safety."

The President’s Commission on Law Enforcement and Administration of Justice only recently has concluded that America "must recognize that the government of a free society is obliged to act not only effectively but fairly." The first eight amendments assure the individual, whether the accused or not, that government will act fairly; the Ninth Amendment assures society that unless the government acts effectively to provide for the public safety, the people have retained the right to provide for their own happiness and safety.

C. The Right to Reform or Change the Government

A nation that but recently had proclaimed its independence in a document that declared the causes which made it “necessary for one People to dissolve the Political Bands which have connected them with another,” could hardly fail to affirm that the people have a right of revolution. If American lawyers had celebrated Law Day-England

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on May 1, 1776, would the United States be celebrating Independence Day-USA on July 4?

However, the right of revolution is largely an abstraction. The winning rebel changes the government, and there are none who can deny his right to do so; but the losing rebel not only fails to change the government but often loses his head as well, and there are none who vindicate his right of revolution. An abstract right of revolution is, at best, a slender reed for the rebel to rely on. It is possible though to reform or change a government without revolution, and without following the established procedures for doing so.\(^6\)

The Articles of Confederation, according to their Thirteenth Article, were to be inviolably observed by every state and the union was to be perpetual. Alterations in the Articles were prohibited, except such as might be agreed upon by Congress and which were thereafter confirmed by the legislatures of every state.\(^6\) Under these Articles, the Federal Convention of 1787 was called by the Congress of the Confederation “for the sole and express purpose of revising the Articles of Confederation.”\(^6\)

Instead, the Federal Convention almost immediately abandoned any effort to revise the Articles and proceeded to draft an entirely new Constitution. Then, contrary to the express provisions of Article 13 of the Confederation, it authorized the establishment of the new government when conventions in only nine states had ratified. Thus the Articles were violated in two respects: in the number of states required to ratify and in the method of ratification. In light of this action, in which he had participated, it was only natural that Madison should seek to give express recognition to a right to change the form of government without following the procedures designated by the instrument establishing the government—the Constitution.

This right may soon become of renewed significance. The legislatures of thirty-two states, just two short of the two-thirds required under Article V, have passed resolutions calling upon Congress to

\(^{6}\)The most important instruments of change in a government are the agencies of government itself. The substance of the American Union has been changing since its foundation, even without formal changes by amendment of the Constitution. These changes, some subtle and some not so subtle, take place in all branches of the government, but are most clearly seen in the decisions of the United States Supreme Court. E.g., compare Brown v. Board of Education, 349 U.S. 294 (1955), with Plessy v. Ferguson, 163 U.S. 537 (1896); compare Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964), with Colegrove v. Green, 328 U.S. 549 (1946).

\(^{6}\)DOCUMENTS, supra note 22, at 35.

\(^{6}\)Id. at 46.
call a constitutional convention to propose an amendment, which would permit the states to depart from the Supreme Court's one-man, one-vote rule of legislative apportionment. If Congress, in spite of the mandatory "shall" of Article V, refuses to call the Convention, would the people be remediless?

The issue so drawn is one that the framers of the Ninth Amendment would have understood: Shall government itself have the power to deny the right of the people to reform or change the government? The Ninth Amendment says "No."

D. The Right to Knowledge

If the people are to be able intelligently to determine when to reform or change the government, because, in the words of Madison, it has been "found adverse or inadequate to the purposes of its institution," the people must have access to reliable information on the operations of government. This is a right different from the individual rights of freedom of speech and the press protected by the First Amendment. It is the right of the people, as the people, to accurate and truthful information about the operations of their government.

This principle, the right of the people—as distinguished from the right of interested persons—to information on the operation of the government, was recognized in a 1966 amendment to the public information section of the Administrative Procedure Act. Under the amended Act, whenever public records are made available, it must be to "any person," and not, as in the original Act, just to a person "properly and directly concerned." The purpose of this

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69 See Black, The Proposed Amendment of Article V: A Threatened Disaster, 72 Yale L.J. 957 (1963), where this and other possible hurdles and objections to this method of amending the Constitution are discussed.
70 A right of knowledge is one of the unenumerated rights listed and discussed by Rogge, Unenumerated Rights, 47 Calif. L. Rev. 787, 811 (1959), later printed as part of O. Rogge, The First and the Fifth 295-98 (1960). The other unenumerated rights discussed by Rogge are in the nature of rights of the person rather than of the people. Accordingly, Rogge concludes that the Ninth Amendment adds little to the due process clauses, which "by virtue of their historic roots and historical role, will in most instances satisfactorily meet the demands on them." 47 Calif. L. Rev. at 827.
71 80 Stat. 250.
73 Compare 5 U.S.C. § 1002(c) (Supp. II, 1967) (Title 5, Appendix) with the original provision in Administrative Procedure Act of 1946, ch. 324, § 3(c), 60 Stat. 238.
change, as well as others, is to provide "the necessary machinery to assure the availability of Government information necessary to an informed electorate." 74

E. A Right to a Public Trial

The Sixth Amendment guarantees to the accused in criminal prosecutions the right to a public trial. 75 But does the public, as distinguished from the accused, also have a right to have criminal trials held in public? 76 There is more involved here than just the right of the accused under the Sixth Amendment and the right of the press under the First Amendment. The former's right can be waived and the latter has no enforceable right. 77 If the public does have a right that trials be held in public, it is because it is one of the retained rights under the Ninth Amendment.

Thus, the Ninth Amendment assures that the rights of the people, as distinguished from an interested person, on this, as well as other important questions, will be given full and adequate consideration.

F. Other Retained Rights

The express language, as well as the spirit, of the Ninth Amendment recognizes that the rights of the people can never be comprehensively enumerated. The enumeration above of four, possibly five, rights retained by the people is not, therefore, to be "construed to deny or disparage others retained by the people."

VI. CONCLUSION

The people referred to in the Ninth Amendment are the same as "We the People of the United States" who ordained and established the Constitution. The people are the body politic as distinguished from the government. The term does not refer to any majority or to any minority of the people. In a real sense, it is an affirmation that the people of the United States cannot be divided.

The Ninth Amendment's long period of somnolence does not establish that it is useless or has become obsolete. Quite the contrary.

75 In re Oliver, 333 U.S. 257 (1948).
76 See, e.g., Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965).
It is the best measure of the success of the American experiment in government.

It is well, though, from time to time, to remind government of the great rights retained by the people under the Ninth Amendment. The reminder may help to insure that American government will, in the words of Lincoln, continue to be a "government of the people, by the people, for the people," so that there will be no need to invoke these Ninth Amendment rights.