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The Forgotten Ninth and Tenth Amendments

by Roger Pilon

It is unremarkable that a section of the American Bar Association, even the Section of Individual Rights and Responsibilities, should title the final session of its program commemorating the bicentennial of the Bill of Rights "The Forgotten Ninth and Tenth Amendments." As Randy Barnett and Suzanna Sherry have reminded us, those amendments were meant to secure the higher law that stands behind the Constitution.[1] Yet within 30 years of the drafting of the Bill of Rights, adjudication based on the concept of a higher law all but disappeared in this country.[2]

It was something of a surprise, then, when Justice Goldberg drew upon the Ninth Amendment in 1965 to find a right to privacy, which helped the Court to strike down a Connecticut statute forbidding the sale of contraceptive devices.[3] Although the Ninth Amendment has since been cited in over 1,000 cases, in all but one of those cases it has played only a supporting role.[4] As for the Tenth Amendment, after a brief revival in 1976, the Court reversed itself only nine years later.[5] Thus, if not entirely forgotten, the Ninth and Tenth Amendments today are hardly alive and well.

Our ambivalence toward the demise of those amendments could not be better illustrated than by comparing the debate that four years ago surrounded the nomination of Judge Robert Bork to the Supreme Court with the debate that today surrounds the nomination of Judge Clarence Thomas. When Bork likened the Ninth Amendment to an inkblot that afforded judges no guidance in interpreting the Constitution, he was supported by conservatives but roundly condemned by liberals. Unlike Bork, Thomas believes that the Ninth Amendment points to the higher law that ought to guide judges in their adjudication, yet he too has been generally supported by conservatives but eyed with suspicion by liberals.

Although a large part of that ambivalence is simple politics, there are deeper issues that help to explain why the Ninth and Tenth Amendments and the higher law they reflect have played so limited a role in our legal history. Before examining those issues, however, we need first to review briefly what the amendments meant to the men who wrote them. We will then be in a position to ask what led to their demise and what must be done to restore them.

The Original Understanding

Addressed to our rights, the Ninth Amendment states, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." By contrast, the Tenth Amendment speaks to powers: "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."

Coming at the conclusion of the founding period—and, quite literally, at the conclusion of the original Constitution and the Bill of Rights—the Ninth and Tenth Amendments can be thought to have summed up that period and those documents. In the Declaration of Independence, the Founders set forth the essence of the higher law: the primacy of the individual; the principle of moral equality, defined by our equal natural rights; and the idea that government, resting on consent, is created not to give us rights but to secure the rights we already have. Through a written constitution, the founding generation then authorized the institutions and powers of government they thought would best secure their rights. Finally, to help ensure that end, they added a bill of rights. And they concluded that document by returning to first principles. Thus the Ninth Amendment makes it clear that the rights enumerated in our founding documents are not the only rights we have, while the Tenth Amendment makes it equally clear that the powers delegated to the federal government are its only powers. Rights were both enumerated and unenumerated; powers, intended to secure those rights, were strictly enumerated.

The debates that surrounded the adoption of the Bill of Rights only reinforce this plain reading of the document's final members. As calls for a bill of rights intensified during the ratification period, those who opposed such a bill objected that it was unnecessary because the Constitution was already a bill of rights. "Why declare that things shall not be done which there is no power to do?" asked Alexander Hamilton.[6] James Wilson reinforced that point by observing that "every thing which is not given is reserved."[7] Moreover, a bill of rights might even prove dangerous, the opponents continued. First, since it is impossible to enumerate all of our rights, enumerating certain rights might be construed as surrendering the rest. And second, declaring as rights what everyone knows to be rights might trivialize all rights, even those that are enumerated.

When a bill of rights proved necessary to ratification, the Ninth and Tenth Amendments were written to guard against those dangers, making it clear that the enumeration of certain rights was not meant to deny or disparage others and that powers were meant to be limited to those that were enumerated. After reviewing the ratification debates, Sherry concludes that "the founding generation envisioned natural rights beyond those protected by the first eight amendments" and that "the framers of the Bill of Rights did not expect the Constitution to be read as the sole source of fundamental law."[8] Indeed, if the Framers intended unenumerated rights to be protected *without*

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a bill of rights, how can we imagine that those rights were meant to be any less secure *with* a bill of rights?

Those conclusions are at direct variance with modern constitutional thought, of course, save for in a fairly limited range of cases. Today even liberals call upon judges to find rights within "the four corners" of the Constitution—admittedly, by interpreting its language liberally—while conservatives urge judges to read the document more or less literally—to guard against importing into it their own values. Almost never do modern judges, whether liberal or conservative, purport to go "beyond" the Constitution. When we add the general presumption, which has arisen over the years, that legislation is constitutional—and the expansion of that presumption, especially through the Commerce Clause, to a wide range of activities the Founders would never have imagined—the result amounts almost to the inversion of the Founders' presumptions: enumerated rights, unenumerated powers. Modern practice, in short, runs directly counter to the practice Sherry discerned in her review of the first 30 years of American constitutional jurisprudence: "there is no case during this period in which the courts have upheld an act contrary to natural law on the ground that the law was not in conflict with any constitutional provision."[9]

Legitimacy and the Loss of Confidence

How did we get to this point—where conservatives read the Constitution almost literally, save for the forgotten Ninth and Tenth Amendments, while liberals do the same, save to get the rights or powers they want by stretching the text to the breaking point? Why is it, in short, that the modern mind is so reluctant to repair to the higher law that the Founders thought would inform the broad language of the Constitution, including the Ninth and Tenth Amendments?

The answers to those questions are many, but they all come down to a concern for legitimacy and to a loss of confidence, especially among the judiciary, about the genuine foundations of legitimacy. In a nutshell, over the past two centuries we have seen the foundations of legitimacy shift ever so gradually but ever so clearly from reason to popular will. We have moved, that is, from a constitution of reason to a constitution of will.

Plainly, the Founders thought political legitimacy, including the legitimacy of judicial review, was rooted not in any conception of value or political ends, much less in democratic will, but in the theory of natural rights. The Declaration states that theory as succinctly as it has ever been stated, grounding its self-evident truths in "the Laws of Nature and of Nature's God." Couched in the language of the day, that was simply another way of saying, with John Locke, that the Declaration's principles were grounded in "Reason."

No sooner had those principles been declared, however, than they came under attack. Perhaps the most strident of the critics was Jeremy Bentham, the father of British utilitarianism, who wrote in 1791 that talk of natural rights was "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."[10] Bentham stood in a long line of moral skeptics, stretching from antiquity to today, each of whom argued the impossibility of legitimacy yet had his own second-best solution to the problem of legitimacy.

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In time, not surprisingly, those skeptics took their toll on the American judiciary. Playing upon the all-too-human tendency toward self-doubt, they undermined judicial belief in natural rights and propelled judges toward other rationales. With their faith shaken, judges turned naturally to the "clearest" source of law—the written text—and toward a theory that might lend legitimacy to that text. Plainly, the simplest such theory, the easiest to comprehend, held that the Constitution was legitimate because it represented the will of the sovereign, the American people. Thus did the twin premises of legal positivism and democratic rationale take root. Never mind that the Framers had restrained popular will at every turn. When construing the text not as reflecting higher law, which would require judicial understanding and insight to interpret, but as mere positive law, only a theory of sovereignty could lend legitimacy to that text, and the theory of popular sovereignty was as good as—in fact, better than—any other. It lent itself, moreover, to an ever-greater latitude for majoritarian will, which of course has been taken advantage of.

Those conceptual shifts took place only over time, of course. Moreover, they manifested themselves as a fundamental jurisprudential shift only much later, with the New Deal Court. Until then, majoritarian demands had not been so extensive as to lead to the kind of judicial crisis that arose during the New Deal. Nevertheless, the foundations for crisis were being laid all along, especially during the Progressive Era. It was then, in fact, that a crucial shift took place in our conception of government, when we stopped thinking of government as a necessary evil, created to secure our rights, and started thinking of it instead as an instrument for doing good.

The importance of that reconceptualization of government cannot be overstated. It led eventually to what Robert Summers has called America's leading theory of law, "pragmatic instrumentalism," which conceives law to be a practical instrument for accomplishing social goals.[11] With the rise of industrialization and urbanization and the social problems that ensued, with the influence of German idealism and progressive theories of good government conducted by career civil servants, the forces were in place for a fundamental transition in our conception of law—from rights-based to policy-driven law, from judge-made to statutory law, from the law of reason to the

law of will. Indeed, it remained only for the judiciary to catch up to modern, progressive thought.

But the New Deal Court was slow to catch up. In fact, not until President Roosevelt threatened to pack the Court with six additional members did it finally get the majoritarian message. Once it did, however, the floodgates were opened. With the Court stepping aside, with its systematic deference to the political branches, those branches were able to move on with their social agenda, unrestrained by any "rights" that might stand in the way of their pursuit of the social good. But to be thus restrained and deferential the Court needed a rationale. After all, for most of its history it had stood athwart the majoritarian engine, albeit by teasing rights out of the text of the Constitution rather than finding them in its higher law background. What now could justify the Court's doing not even that—and permitting unheard of powers besides? In short, what could justify its ignoring both the Ninth and Tenth Amendments?

Justice Stone provided that rationale in 1938 in *Carolene Products*, especially in his famous footnote 4, wherein he distinguished "fundamental" rights—relating to political participation and to "discrete and insular minorities" that might be restricted from such participation—from other, presumably "nonfundamental" rights.[12] Legislative interference with the former, he said, should receive strict judicial scrutiny, whereas interference with the latter, especially with rights exercised in ordinary commercial transactions, should be presumed to be constitutional if it rests upon some rational basis. That dual theory of rights and two-tiered theory of judicial review, aimed at enhancing political participation, are nowhere to be found in the Constitution, of course, nor are they any part of its higher law background. Rather, they were invented out of whole cloth, for political reasons, to enable the New Deal state, its roots in the Progressive Era, to proceed with its political and economic agenda. Unenumerated rights were ignored. Unenumerated powers were allowed—all in the name of the sovereign will.

The transition that had begun a century and more before was now nearly complete; what remained was simply the episodic expansion of "fundamental rights," drawn not from higher law but from "evolving social values." The democratic rationale that had lent legitimacy to a constitution conceived as mere positive law, as a product of sovereign will, now served as the filter through which the document's very terms came to be understood and given a largely political cast. No longer conversant with the higher law of reason, judges could at least understand the ordinary law of will, and whether the commands of that will conflicted with explicit restraints in the Constitution, constraints that were themselves construed as intended to enhance political participation. Defending that "politicization" of the Constitution, John Hart Ely has put the matter straightforwardly: "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[13] Indeed, the theory of *Carolene Products* has been called a "great and modern charter for ordering the relations between judges and other agencies of government."[14]

"A judge whose misguided 'restraint' precludes him from carrying out his full responsibilities is in fact an 'activist,' finding powers that have nowhere been given."

It is not a little ironic, of course, that modern liberals, who expanded the state through Progressive Era regulation, New Deal welfare programs, and Great Society egalitarian efforts, ignoring in the process the unenumerated rights of the Ninth Amendment and the limited powers of the Tenth Amendment, should today be searching the Ninth Amendment for pockets of protection from the ubiquitous state they created. Nor is it without irony that modern conservatives, purporting to rest their constitutional jurisprudence on the intentions of the Framers, should ignore the Framers' intent when it comes to the Ninth and Tenth Amendments and rely instead on the political jurisprudence of the New Deal Court to enable lawmakers at every level of government to regulate our personal lives in countless ways—the theory being that our rights to those lives are nowhere to be found in the Constitution. Because both liberals and conservatives have today bought into the will theory of constitutional legitimacy, neither privacy nor property is secure.

Restoring the Vision

The Founders got it right. They understood that in the end, legitimacy is a function of reason, not of political will. To be sure, it takes some act of political will—or at least some manifestation of political recognition—to get a legal regime going. In the American context, that is what ratification was all about. But that is *all* that ratification was about. That original consent could hardly have made legitimate the terms and relationships that were ratified—as consent to a contract makes legitimate, among the consenting parties, the terms and relationships that are thereby authorized. Ratification could not have done that because its effects, in establishing the legal regime, reached far beyond the ratifying parties. Indeed, the ratifiers purported to be binding not simply themselves but succeeding generations as well. They could not have done that if they had not gotten it right—right as a matter of *substance*. But that substantive legitimacy is a function not of process but of the higher law of reason. Freedom of religion and the right to property are legitimate not because the ratifiers *declared* them to be so—through an act of political will—but because they are *natural* rights. Indeed, those rights would be legitimate even if the ratifying generation had declared them *not* to be so.

If we are to restore the vision of the Founders, the vision of individual liberty and limited government that the Ninth and Tenth Amendments were meant to secure, the first thing we must do is disabuse ourselves of the idea that democratic will per se imparts any real measure of legitimacy. Democratic process may decide an issue, with the majority prevailing over the minority. But that hardly makes the product of that

process legitimate. Majority decisions to redistribute property, for example, or to prohibit nonviolent associations, which so many modern statutes do, are simply illegitimate, however large the majority behind them. They are legally illegitimate because they violate the rights protected by the Ninth Amendment (at least) and proceed from powers the Tenth Amendment was meant to make clear were never given. And they are morally illegitimate because in no way do they conform to the higher law that stands behind the Constitution, the theory of natural rights that was meant to inform the document's broad language, guiding judges in their review of such political acts.

When properly understood, then, that review does not require judges to go "beyond" the Constitution. If the document is law by virtue of having been ratified, and if the original understanding was that the text was to be interpreted by reference to principles of a higher law, then judges who repair to those principles for guidance can hardly be said to be acting beyond the scope of their authority. So far is this from judicial "activism" as to be precisely the opposite: a judge whose misguided "restraint" precludes him from carrying out his full responsibilities—like a judge whose misguided "activism" takes him truly beyond the theory of natural rights—is in fact an "activist," finding powers, in effect, that have nowhere been given. The responsibility of the judge is to apply the Constitution as it was meant to be applied—indeed, as it was applied in the early years of the nation.

To do that, however, the judiciary must not only disabuse itself of its misguided belief in the legitimating power of majoritarian will; it must also affirmatively inform itself about the character and content of the higher law. In an age inclined toward moral skepticism, that will not be easy. Nevertheless, it can be done. Indeed, the Founders had a fairly consistent, correct, and confident understanding of that law. Nor is it surprising that they did, since they took their counsel from a fairly commonsense understanding and appreciation of reason.

The primacy of the individual. The idea of moral equality, defined by equal rights. The ultimate grounding of rights in property and promise—not in need, or want, or aspiration, or any other evaluative notion. The presumption in favor of the voluntary, private realm. The suspicion of public power. Those are the elements of the higher law, of the free society, of the vision the Ninth and Tenth Amendments were meant to secure. It is a vision the modern judiciary would do well to revisit. ■

Notes

[1]Professors Barnett and Sherry participated in the ABA program. See Randy Barnett, "Introduction: James Madison's Ninth Amendment," in *The Rights Retained by the People*, ed. Randy Barnett (Fairfax, Va.: George Mason University Press, 1989); Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (Fall 1987): 1127–77.

[2]Sherry, p. 1176.

[3]*Griswold v. Connecticut*, 381 U.S. 479, 491 (1965).

[4]That one case was *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

[5]*National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

[6]The Federalist no. 84 (Modern Library edition, 1937), p. 559.

[7]James Wilson, address to a meeting of the citizens of Philadelphia (1787), in B. Schwartz, *The Bill of Rights: A Documentary History*, vol. 1 (1971), p. 529. Quoted in Barnett, p. 5.

[8]Sherry, p. 1166.

[9]Ibid., p. 1167.

[10]Jeremy Bentham, "Anarchical Fallacies," in *Collected Works*, ed. John Bowring (Edinburgh: William Tait, 1843), vol. 2, p. 501.

[11]Robert Summers, "Pragmatic Instrumentalism: America's Leading Theory of Law," *Cornell Law Forum* 5 (1978).

[12]*United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

[13]John Hart Ely, *Democracy and Distrust* (Cambridge, Mass., and London: Harvard University Press, 1980), p. 117.

[14]Owen Fiss, "The Supreme Court, 1978 Term—Forward: The Forms of Justice," *Harvard Law Review* 93 (1979): 6.