EDITORIAL

Discovering the Ninth Amendment

Every clause and article of the United States Constitution has been studied, pored over, and interpreted countless times--every one, that is, but the Ninth Amendment, which until very recently, has stood in lonely splendor, unacknowledged, uninterpreted, ignored. And yet, since it is part of the Bill of Rights, one would think it deserving of some attention. 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.

This crucial yet neglected clause says, then, that beyond the specific rights guaranteed in the other clauses and amendments (freedom of speech, press, due process, etc.) there are other rights retained by the people, which the federal government--and state governments--may not infringe.

At the very least, the Ninth Amendment provides explicitly a wide-open door for judicial "activists" to affirm individual rights that government may not violate. Those literalist jurists, who believe that judges must be mere file clerks applying the letter of the law or the Constitution and not straying beyond that letter, are here hoist upon their own petard. For the letter of the Ninth Amendment is an open invitation, indeed a command, to affirm numerous individual rights which the government may not violate: and these are affirmations which only the judges can make.

Instead of exploring and developing the rights guaranteed in the Ninth Amendment, the courts have, until this year, buried it thoroughly as simply a pale

shadow of the more familiar Tenth Amendment, which states that "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." And since the Tenth Amendment had been reduced to a meaningless truism by construing it as saying merely that all powers not granted to the Federal or State governments are reserved to the states or the people, the Ninth Amendment had been implicitly eliminated as well. But the Ninth Amendment does not say that all powers not granted are reserved to the people; it says positively that there are rights which the people do retain beyond the Bill of Rights and which cannot be infringed by anyone, in short by either federal or state governments. What, then, are those rights?

To anyone who understands the terminology of the eighteenth century, it is clear in general what those rights are and what they must be: the natural rights of each individual. And these natural rights in essence mean that every individual has the inherent right to dispose of his person and his property as he sees fit, with no infringement on that right by government. Thus, Justice Oliver Wendell Holmes, when he sneered at the activist judges of his own day for allegedly enshrining the social philosophy of Spencer's Social Statics in the Constitution, did not realize that the last laugh may well be on him; for that is just about what the Ninth Amendment does imply.

But the task of unfolding and applying the unenumerated and inherent natural rights of the individual belongs to the courts; and until this year the courts, having conveniently reduced the Ninth Amendment to a mere repetition of the Tenth, had never bothered to decide a single case on the basis of this Amendment. Here was truly a gross dereliction of judicial duty.

Then, this year, in the important case of Griswold v. Connecticut, the United States Supreme Court confronted the infamous Connecticut law prohibiting the dissemination and use of birth control devices. Here was evidently a monstrous law, a clear-cut invasion of the most intimate and personal area of liberty and action of the individual, an invasion of the most deep-seated right of privacy. But under

what clause, specifically, could the law be declared unconstitutional? Not under the Fourteenth Amendment, which has done such heavy duty as applying the first eight amendments to state action, for the anti-birth control law does not violate any of those enumerated areas of freedom. In response to this problem, Mr. Justice Douglas and Mr. Justice Goldberg, in one of the monumental advances of constitutional law, discovered the totally forgotten Ninth Amendment, and realized that that Amendment provides for an inherent, and therefore constitutional, right of marital privacy which cannot be invaded by any arm of government.

Bennett B. Patterson, in the only treatise ever written on the Ninth Amendment, eloquently rediscovered and emphasized its meaning as a general declaration of inherent individual rights, and predicted that someday the right of privacy would be acknowledged as such an inherent right.[1] Now the Supreme Court was suddenly ready to make just such an advance.

Mr. Justice Douglas, in his majority opinion, laid down on June 7, 1965, affirmed the existence of an inviolable "zone of privacy" around the individual, a zone that existed as a right of man before the Constitution:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

More explicit in resting his decision on the Ninth Amendment was the concurring opinion of Mr. Justice Goldberg, agreed to by Mr. Justice Brennan and Chief Justice Warren. Goldberg affirmed his decision that the Connecticut law "unconstitutionally intrudes upon the right of marital privacy". Resting his deci-

1. Bennett B. Patterson, The Forgotten Ninth Amendment (Indianapolis: Bobbs-Merrill, 1955). For an appreciation of the importance of the Griswold decision in discovering the Ninth Amendment, see James D. Carroll, "The Forgotten Amendment", The Nation (September 6, 1965), pp. 121-122.

sion largely on the Ninth Amendment, Goldberg continued:

> The concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of the Court. . . and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected. . . the Court refers to the Ninth Amendment. . . I add these words to emphasize the relevance of that amendment to the Court's holding. . .
>
> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery, but since 1791 it has been a basic part of the constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . .
>
> Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgement by the Government though not specifically mentioned in the Constitution. . .
>
> In sum, I believe 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. Connecticut cannot constitutionally abridge this fundamental right. . .

In dissent, Mr. Justice Black declared the redis-

covery of the Ninth Amendment "shocking doctrine", and Mr. Justice Stewart repeated the old canard that the Ninth Amendment simply repeated the meaning of the Tenth. "Until today," wrote the bewildered Stewart, "no member of this court has ever suggested that the Ninth Amendment meant anything else." Correct, but conservatives will simply have to get used to the discovery, at long last, of a highly radical and potentially explosive clause which happens to be part of their cherished original Constitution.

What, then, are the standards that the judges must use in discovering and setting forth the fundamental rights protected by the Ninth Amendment? Mr. Justice Goldberg, in his opinion, finds them in the "traditions and collective conscience of our people" which can determine whether a principle is "so rooted. . . as to be ranked as fundamental." But if these rights are, as the framers intended, natural rights, they are of much broader scope. Indeed, they may be so construed as to restrict government to Mr. Spencer's prescriptions and thus virtually to eliminate governmental power altogether. Thus, Lysander Spooner, the only constitutional lawyer in history who was also an individualist anarchist, wrote as follows of the Ninth Amendment:

> What then, were these "other rights", that had not been "enumerated"; but which were nevertheless "retained by the people"?
>
> Plainly they were men's natural "rights"; for these are the only "rights" that "the people" ever had, or, consequently, that they could "retain."
>
> And as no attempt is made to enumerate all these "other rights". . . and as no exceptions are made of any of them, the necessary, the legal, the inevitable inference is, that they were all "retained"; and that Congress should have no power to violate any of them.
>
> Now, if Congress and the courts had attempted to obey this amendment, as they were constitutionally bound to do, they would soon have found that they had really no lawmaking power whatever left to them; because they would have found that they could make no law at all, of their own invention, that would not violate men's natural rights. [2]

2. Lysander Spooner, A Letter to Grover Cleveland (Boston: B. R. Tucker, 1886), p. 97.