In the Public Interest

Volume 8 | Number 1

4-1-1988

Unwritten Law: The Ninth Amendment and Communal Rights

Sara Nichols
University at Buffalo School of Law (Student)

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/itpi

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/itpi/vol8/iss1/6

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in In the Public Interest by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
UNWRITTEN LAW: The Ninth Amendment and Communal Rights

by Sara Nichols

Introduction

Despite its recent surge of popularity among a particular group of legal scholars and constitutional jurists, a mention of the Ninth Amendment even to lawyers usually draws a blank. "That's the really obscure one, isn't it?", "Is that about states' rights or something?" and "How does that go again?" are among the more frequent responses given. The answers to these questions are: (1) "Yes;" (2) "No. That's the Tenth;" and

(3) "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In the rare event that people actually listen to the third answer, a strange reaction occurs. People are intrigued by the idea of unenumerated rights. Lawyers wonder why they haven't heard much about this amendment before. What does it mean? How has it been interpreted? Ever since Justice Goldberg explicitly invoked the Ninth Amendment to include the right of privacy in his 1965 concurring opinion to Griswold v. Connecticut, comparatively much has been written and discussed about the formerly obscure amendment. For many lawyers and jurists, the Ninth Amendment is now synonymous with the right to privacy and little else. Others believe that the amendment was never intended to limit government power in any way, thus it is inappropriate to invoke the amendment at all. Although it has rarely been explicitly considered apart from the "penumbra of privacy" created by the Bill of Rights, the controversy surrounding the right to marital privacy as developed in the Griswold case and its progeny adheres to the Ninth Amendment. Because the Roe v. Wade decision supports a woman's right to abortion based largely upon her and her doctor's right to privacy, the Ninth Amendment has come to be associated with the right to abortion as well. Because of its link with the controversial right to abortion, the interpretation of this amendment has become a litmus test for conservatives and liberals alike and has been the source of much debate in the recent confirmations hearings for Supreme Court nominees Robert Bork and Anthony Kennedy. Judge Bork and his compatriots read the amendment narrowly as neither an expansion nor a contraction of federal power, merely a redundant statement. Like the Tenth, "a meaningless truism." Kennedy too reads the amendment narrowly. Conservative critics, as we shall see, disagree strongly with any implication that the amendment was intended to apply as a limit on governmental and in particular state power.

Until now, property and liberty have been inextricably linked in our legal system. Rights are based on and conceived of as the property of individuals. For those of us who would like to redefine rights as communal and sever liberty from property, the due process clause presents a dilemma — it explicitly links the two. The Ninth Amendment, in its simple affirmation of the people as the ultimate source of liberty, may be better equipped to further our new conception of rights than is the due process clause. The Ninth Amendment may represent the gap between the United States Constitution and the unwritten law of the people. The questions presented by this paper are: how do we close that gap? How do we determine the law of the people? How do we use the federal Constitution and Courts to enhance our rights without infringing on local and community control?

For clarification's sake, I also feel the need to state what this paper is not attempting to accomplish. This paper is not intended to be a close, thorough report of Ninth Amendment case law since Griswold v. Connecticut. That goal has been accomplished sufficiently by other legal scholars, upon whom I will rely. Nor is this paper intended to be a re-investigation of the true subjective intent of the framers. In 1955, Bennett Patterson valiantly attempted to do this in The Forgotten Ninth Amendment. Others have quibbled with his interpretation. Certainly, in order to wield it adequately, we must be aware of the history of the amendment and examine it in context. Nonetheless, this paper is not as concerned with what has been, as with what might be.
**Legislative History**

It is difficult to forge blithely ahead presenting the history of the Ninth Amendment without being aware that every choice we make in telling this story will skew the way in which we view the amendment today. There is particular scholarly concern focused on the intent behind the Ninth Amendment now because of its recent surge of popularity primarily in the line of privacy cases but also in other constitutional contexts. Unquestionably, most of the first eight amendments to the Constitution have had their application and scope expanded over the years of interpretation by the Supreme Court. But the Ninth was not explicitly used for the first century and a half of its existence. Moreover, as is clear by its wording, the Ninth provides no explicit limitation on federal powers. It is for these reasons that the intent behind the Ninth Amendment is as important and controversial as it is today. Many better qualified historians than I have ploughed painstakingly through the First Annals of Congress and James Madison’s correspondence in search of the amendment’s “true meaning.” Except for R.H. Clark, most improve little on the amendment’s history as exhumed by Bennett Patterson in 1955.

Patterson’s *The Forgotten Ninth Amendment* appears to be the first serious treatment of the Ninth Amendment since its inclusion in the Bill of Rights. The greatest contribution of Patterson’s work is that it provides a legislative history of the amendment, invaluable in constructing a vision of what it can mean today. Patterson sees great liberatory power in the amendment, although he would restrict its protection to individuals and individuals only, perhaps the biggest limitation of his work.

Most of the debate about the Bill of Rights at the time of making of the Constitution was not about the content of the bill, but about whether to include it at all. The federalists, led by James Madison, conceived of a government of limited enumerated powers as sufficient without specifying the rights of men. Since rights and power were conceived of as inhering in the people and the sovereign people willingly gave up some of their power to form a republic, it was thought that those rights were implicit in the very existence of the Constitution. But Jefferson and the other Virginian anti-federalists feared the centralized power that was being created and wanted to ensure that the newly-formed federal government would not tread upon their liberties and rights. They sought an assurance that the federal government would not go beyond its delegated authority. Because he believed that rights were natural, inhered in the people, and were therefore implicit in the Constitution, Madison argued that the inclusion of a Bill of Rights was worse than redundant — it was potentially dangerous. A specific recital of liberties upon which the federal government could not intrude would strongly imply that, but for the enumeration of rights, the government could have, for example, abridged or denied the freedom of speech. By extension, any right which was not enumerated in the document, for whatever reason, could be intruded upon, even if the power to do so was not explicitly given up by the people. As a compromise measure, the Ninth and Tenth Amendments were drafted. In final form, they read:

**Ninth.** The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

**Tenth.** Powers not expressly delegated in this document are retained by the states, respectively and the people.

Originally, the Bill of Rights was to be incorporated into the body of the Constitution rather than tacked onto the end. At one point, there was a specific plan for integration of each of the amendments. The Ninth Amendment was to be inserted under Article I, Section 9, between the provisions relating to a “Bill of Attainder” and the clause with respect to a “capitation or other direct tax” and would read:

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 to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Patterson places great emphasis on the phrase “here or elsewhere,” omitted in the later and final version of the amendment. He reads that phrase as dispositive of the framers’ intention to apply the principle embodied in the Ninth Amendment to the entire Constitution. But the amendment on its own terms seems clear in that regard.

What is less clear is whether the amendment was intended to represent a limitation on state as well as federal government. Patterson painstakingly examines the various drafts of the Bill of Rights and the debate surrounding its exact wording and emerges with a concept of the Ninth and Tenth Amendments as distinct from the first eight. He reads these two amendments as affirmative declarations of human liberty, rather than limitations on the powers of government like the other eight. The courts too have recognized a distinction between the first eight and the latter two amendments. In *Eilenbecker v. the District Court of Plymouth County, Iowa*, the Court held that only the first eight amendments to the Constitution were intended to be narrowly construed as limitations on the federal government. On their own terms, the first eight are indeed limitations on the powers of government: “Congress shall make no law . . . “, “the right of the people to be secure . . . shall
Unfortunately, not only is it difficult to read the Ninth and Tenth exclusively as limitations on federal power, but many jurists have found it impossible to view one or the other as a limitation on the power of government at all. Rather they are viewed variously as declarations of principles which are fundamental to the formation of our system and redundant. Patterson’s vision of the two amendments as mutually reinforcing declarations of human rights which may be invoked as limitations on any government, is distinctly in the minority. Lately the two amendments have become set in opposition to each other. Ironically perhaps, right-wing groups and members of the Court have embraced the Tenth Amendment as declarative of state sovereignty and affirmatively limiting federal power to regulate states, while rejecting the expansive vision of the Ninth Amendment offered by the Griswold case. But many conservative jurists do not see their interpretation as conflicted at all. They see the Ninth Amendment as limited by the Tenth. Recently appointed Supreme Court Justice Anthony Kennedy, for example, believes that to enforce unenumerated rights against the states would be to expand federal power. That power, he argues, may not be expanded because of the limitation in the Tenth Amendment. Supreme Court reject Robert Bork maintains that to expand our notion of some rights, for instance to create “welfare rights,” would necessarily diminish other rights and therefore expand federal power. Conservative jurists, Berger and Caplan raise the same objections and further assert that the Ninth Amendment was intended to refer to only those rights already enumerated elsewhere, particularly in states constitutions of the time. Thus, conceptually, the amendment could not be expanded to include “new” rights not contemplated in the mid-eighteenth century. Furthermore, because these rights are part of state rather than federal law, legal defenses asserting them do not “arise” under federal law and therefore federal courts have no jurisdiction to hear these claims.

**Judicial History**

Patterson also traces the scant judicial interpretation of the Ninth Amendment. As of 1955, the Ninth had not been used as an affirmative limit on federal power. But the principle embodied in the Ninth Amendment was the deciding factor in Calder v. Bull and in Citizens’ Savings and Loan Association v. Topeka. In both cases the Court rejected the notion that the Constitution is the sole source of human liberty and instead limited state intrusion on “fundamental liberty” as broadly defined to include the rights asserted. If indeed the Ninth Amendment embodies the principle that rights inhere in the people and do not spring from the document, then it would follow that those rights are enforceable against state as well as federal government. Could the framers have intended the federal courts to enforce and identify claims against the state governments?

After 150 years of disuse, Justice Douglas resurrected the Ninth Amendment in his majority opinion to *Griswold v. Connecticut* to buttress his finding of a “penumbra of privacy” created by the Bill of Rights. While Douglas saw it more as an enabling amendment than a source of law *per se*, the Ninth nonetheless formed a necessary part of his skillful creation of a right to privacy. In a concurring opinion to the same case, Justice Goldberg relied explicitly on the Ninth, seeing it as an affirmation of a vital principle of liberty: we retain certain fundamental rights; among them is the right to privacy in the marital relationship. Goldberg seems to rely on little else than his strong hunch that marital privacy is a fundamental right. He takes some care to draw his opinion narrowly so as not to risk flooding the courts with claims to other unenumerated rights of a fundamental character. But, other than suggesting we look to American tradition, he offers little guidance as to how those rights might be found or discovered — a question which has plagued all students of the Ninth Amendment, before and after Griswold. Even more problematic than his lack of guidance in future findings of right is Goldberg’s application of the amendment to the states. Although he explicitly denies that the Ninth Amendment can be funnelled through the Fourteenth to limit state government, he nonetheless applies the Ninth as a limitation on state power. He writes fondly of an expanding notion of liberty under the due process clause, one which would be protective of those liberties which are necessary to a free and just society. The dissents to the Griswold case are reflective of the conservative positions as outlined infra.

The penumbra of privacy invented in Griswold has since been invoked in a variety of cases. The line of law leading up to and following the 1973 abortion decision is unquestionably the most well-known and controversial of the penumbra’s progeny. In no Supreme Court decision since Griswold has the Ninth Amendment been invoked by the majority to protect a right beside privacy, nor has the amendment ever provided the sole basis for a decision by the Court. Aside from the line of privacy cases coming directly out of the *Roe v. Wade* decision and involving the extent to which states may regulate abortion, the Ninth Amendment has achieved little attention by the Supreme Court since it first bored its teeth in the Griswold case. In the landmark abortion decision of *Roe v. Wade*, Justice Douglas reemphasized his belief that, “the Ninth Amendment obviously does not create federally enforceable rights.” In *Griswold*, Douglas saw the Ninth only as an enabling amendment, never an independent source of rights. But in a dissenting opinion to another case, Douglas suggested that “the right of the people to education or to work or to recreation . . . , like the right to pure air and pure water, may well be rights ‘retained by the people’ under the Ninth Amendment.”

Some of the Justices see the amendment neither as a source of liberty nor as an enabler. It is simply, like the Tenth, a “meaningless truism.” This has been the posture
of the majority of the Court. Although the Court in *Roe v. Wade* extended the zone of privacy to encompass a woman's right to an abortion, this zone did not expand sufficiently to create a right of funding for impoverished women who could not otherwise afford to pay for an abortion. Moreover, in the recent case of *Bowers v. Hardwick*, the Court refused to find that consensual adult homosexuality fell within the penumbra of privacy, deciding instead in favor of the states' right to regulate this area of homosexuality.

One scholar identified a 1963 decision by the Colorado Supreme Court as containing the broadest pronouncement on the meaning of the Ninth Amendment:

> We have no hesitancy in stating that there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions.

The constitutions of the state and nation recognize unenumerated rights of natural endowment. These God-given rights should be protected from infringement or diminution by any person as well as any department of the government.

Natural rights — inherent rights and liberties — are not the creatures of constitutional provisions either at the national or state level. The inherent human freedoms with which mankind is endowed are "antecedent to all early governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."

More often, however, the amendment has been invoked in the lower federal courts with varying degrees of failure. Any successful case has used the amendment in the sense in which it was employed in the *Griswold* case, to enable a protection based on the "penumbra of privacy." These cases include: protection of the right to wear long hair; the exclusion of otherwise admissible evidence at the pre-trial hearing. Distressingly, although all of the many attempts to use the Ninth Amendment to protect protestors and demonstrators have failed, in *People v. Doorley*, the District of Rhode Island affirmatively applied a *Griswold* rationale to suppress a demonstration. It was held that the protestors in a residential neighborhood invaded the residents' right to privacy. Ironically, while the Nebraska courts declined to reach the Ninth Amendment privacy claims of an unmarried female public schoolteacher after being fired for "spending the night" with men, a California court has, on Ninth Amendment grounds, ordered the reinstatement of a male postal worker fired for the equivalent reason. The amendment has also been used successfully to challenge laws forbidding interstate transport of obscene materials.

Often the courts have refused to reach a Ninth Amendment claim, rather than deny it on the merits. In 1947, the Supreme Court held that if Congress exercises a granted power it has by definition not violated the Ninth or Tenth Amendment. This principle has been used to deny many Ninth Amendment claims against Congressional action. From time to time the amendment has been unsuccessfully invoked to cover a variety of creative affirmative protections including: the right to family life as a challenge to the Social Security Act's income exclusion provision; a prisoner's right to be free from sexual attacks and assaults; a military woman's right to bear children; and, especially interesting, a right for people to have a decent environment. In one such case, the plaintiffs wanted to enjoin the construction of a dam. "They pointed to the fifth, ninth, and fourteenth amendments as authority for a right to 'enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life.'"

This last example is illustrative of the typical manner in which the Ninth Amendment is invoked. For excellent tactical reasons, it is rarely solely relied on but is sometimes thrown into the constitutional stew for good measure. Prior to *Griswold*, the legal actors in a case might have relied exclusively on the due process clause of the Fifth and Fourteenth Amendments to protect any right which they characterized as "fundamental to liberty." Now, the legal argument takes much the same form, its substance yielding to include the principle of Ninth Amendment — begging the question: what does the Ninth Amendment really have to offer?

**Unwritten Law**

The first and most obvious stumbling block in interpreting the Ninth Amendment is the very idea of unenumerated rights. If rights are not granted by the government, but inhere in the people, where do these rights come from? According to Gordon Wood, under English law "the constitution" was made up by the total body of government and ordinary law, "that assemblage of laws, customs and institutions which form the general system; according to which the several powers of the state are distributed, and whose respective rights are secured to the different members of the community." It was unimaginable for Parliament to act in violation of the Constitution because every act of Parliament was by definition part of the Constitution. Thus the rights of the people were simply whatever was commonly believed and held by the courts and the legislature. And, to this extent, those rights would be protected. If, however, a particular right failed to be protected, that was a sign of tyranny. Rather, it was an indication that the right did not exist. The terms "illegal" and "unconstitutional" were synonymous. By the same token, these "rights" were revokable at will by the Parliament.
In the colonies, appeal began to be made to fundamental principles which transcended human-made law. By appealing to higher principles, Attorney General James Otis argued against the general writs of assistance which the Crown used to search colonists’ homes at will. He believed that the whole purpose of law was the preservation of "men's rights." There was a need to articulate the collective understanding of the people. "Something must exist in a free state, which no part of it can be authorized to alter or destroy, otherwise the idea of a constitution cannot subsist." Thus the notions of constitutionality and legality were severed. There emerged two conceptions of law, lex scripta and lex non scripta. Lex scripta was the written statutory law passed by government and described as "legal." Lex non scripta was the unwritten common law emanating from principles and described as "constitutional." The call for a written constitution seemed oxymoronic at first — how could unwritten law be written? This contradiction was lessened by conceiving that the constitution, as written, was a representation of the body of unwritten law which is our "real" constitution. The United States Constitution (hereinafter "The Constitution") is the recognition not the source of the people’s liberties. The unalterability of The Constitution was to be its great strength; The Constitution would act as a foundation for this great new republic. This view of The Constitution may give rise to conflicting interpretations of the Ninth Amendment. On the one hand, it emerges as a powerful affirmation of the existence of the real unwritten constitution (hereinafter "the CONSTITUTION"). As such, Ninth Amendment claims should be seriously considered by the courts in order to insure that The Constitution is truly a recognition of the CONSTITUTION. On the other hand, the principle embodied in the Ninth may be interpreted as an escape clause to the contract of The Constitution. As long as The Constitution works, and our judicial, legislative and executive branches are fulfilling their compact with the sovereign people, we must obey the law as developed by those bodies — we will assume that The Constitution is in accordance with the CONSTITUTION. But if a discrepancy develops between the CONSTITUTION and The Constitution, we must amend The Constitution. Ultimately, the Ninth Amendment may represent the possibility of a gap between the two constitutions, one which if not bridged must be resolved in favor of the true CONSTITUTION. Seen this way, the Ninth is an amendment of revolutionary potential — it states that the people are the highest law and may destroy the republic as constituted if it does not comport with their principles.

In many ways, The Constitution has come to be construed more as the source than the recognition of our liberties. This is evident in conservative jurists' standard reliance on the text of the document to decide constitutional issues — if it ain't written down, you ain't got the right. By the same token, the decisions made by judges are in most instances informed by the body of current public conscience (as developed by judges) on the subject. As the public called for civil rights for blacks and other disenfranchised persons, the courts responded. Perhaps the result if not form of constitutional argument is precisely that envisioned by the founders — continuously reinterpreting The Constitution to make it in line with the CONSTITUTION.

But how do we determine the collective will? How do we prevent “backlashes” in public opinion and separate fads from “real” evolution in commonly held principle? What guiding principles do we have to interpret and protect our rights? It is not simply a matter of identifying rights, but determining how they can best be protected and when they have been violated. The search for a fixed point of reference, some articulable standard when dealing with rights, has plagued legal scholars throughout this century. Justice Goldberg suggests we look to tradition, the collective conscience of the American people and the requirements of a free society. Ronald Dworkin attempts to solve this problem by using rights themselves as the fixed reference point and deriving all rules for dealing with rights from what the existence of rights per se implies. Dworkin resurrects two familiar principles from which rights are derived: (1) the Kantian notion of human dignity and (2) political (not economic) equality. Dworkin sees the government and the individual as necessarily opposed to one another. Rights are limits on the government, enforced by the government for ultimate vindication of individual liberty. This approach has been criticized for taking rights too seriously, and, while internally consistent, not considering the exigencies of human society. But Dworkin maintains that both left and rightwing critics of “true” liberal rights theory are similar in their emphasis on community norms and values as the ultimate arbiters and protectors of human liberty. This emphasis risks elevating community concerns above those of the individual and does not seriously consider what it means to have a system based on rights.

Communal Rights

The radical left has often been critical of rights as property-based cornerstones of liberal ideology, reinforcing existing economic inequities in our capitalist system. But most critical legal theorists are not disparaging of the content of many individual rights. Most believe in the freedom to speak, to dissent, to associate and assemble, the freedom not to be subject to unreasonable searches and seizures. We would not want it to be otherwise. Nevertheless, the left has balked at “rights” generally as tools of liberal ideology, reinforcing and legitimating the status quo. We observe the phenomenon of political debate being reformed and shaped into legal debate, using rights language. Until 1983 when Canada adopted the Canadian Charter of Rights and Freedoms modeled on the American Bill of Rights, the Canadian “constitution” was unwritten,
like the British “constitution” discussed above. Some argue that the adoption of the Charter has stripped Canadian public discourse of its political character, focusing instead on rights, and rights language. The perceived weakening of the trade unions and the feminist struggle in Canada has been of particular concern and highlights the dichotomy that has developed between rights and politics. Elizabeth Schneider writes on the dialectic of rights and politics in this country, speaking of ways that rights discourse can inform political discourse and vice versa. She gives examples from the feminist movement in which court battles for women’s reproductive freedom, and recognition of sexual harassment and woman-battering have used rights language to crystallize and give a name to “unspeakable truths” which in turn pushed the political movement, at the important level of consciousness-changing, further.

Staughton Lynd urges us not to fall into the very dichotomy we criticize — we can redefine rights in a positive way which reunites the legal and political instead of reinforcing their artificial estrangement. Rights need not be based on property. Nor need they be played in a “zero-sum” game — where if one right is protected another must yield. Lynd presents an expansive vision of rights where protection of individual rights reinforces those of the community and conversely. Indeed, Lynd cautions against conceptualizing rights as belonging to either the group or the individual. The freedom of the community is secured by the freedom of the individual — neither entity owns rights.

The Ninth Amendment may embody a similar principle: human rights are not finite in number nor are they granted by the government. Human rights precede the constituting of government and afterwards continue to inhere in the people. As Lynd observes about the First Amendment, the Ninth states that rights are retained by “the people,” rather than by individuals. Bork, Kennedy and other arch-conservative jurists read the Ninth Amendment narrowly, ignoring and disparaging it and the other rights it may stand for because they believe that the invocation of rights is a zero-sum game. To them, it is impossible to create or identify rights which inhere in the people without diminishing rights already possessed by others and increasing powers not delegated. Interestingly, at least one legal scholar maintains that the Ninth Amendment was Madison’s affirmation that he did not see powers and rights in opposition:

Madison was trying, in other words, to avoid an antithesis. Not powers versus rights, but powers and rights. And as the powers were not to be literally construed, but were to be sufficient for their purposes through the operation of the necessary and proper clause, so the rights were to be broader than those enumerated through the operation of his tenth proposition [the Ninth Amendment]. But this is only true if rights are conceived of as property and the individual and the group are set in opposition to each other. Lynd calls for a new conception of rights, not as possessed by either the individual or the community but as embodied in the relations between the two as mutually reinforcing.

Lynd’s conception of community rights is in many ways not dissimilar to that of the founders. At the time of the formation of the republic, it was assumed that citizens were commonly working for the public good. Private rights and interests were subsumed to the whole or community for the public welfare and safety of the people. To the Whigs, minority or individual rights were initially unintelligible because they implied that there was a sickness in the body politic. By definition the majority, as comprised of property-holding white male voters, could not tyrannize. It could be licentious or anarchical but not tyrannical. Similarly, Lynd perceives the conflict between individual and community interests to be unintelligible today. Unlike some founders of the republic, Lynd recognizes that tyranny of the majority can and does exist. Within this very real and often oppressive framework, Lynd calls for a practical application of rights, one which does not conflict with community, but instead with property. Interestingly, some of the Whigs of the time actually perceived the inherent conflict between protecting individual property rights and traditional republican theory. This conflict appeared all the more intractable given the commonly held belief that liberty depended upon protection of property.

One Whig observed that “there can be no true liberty without security of property; and where property is secure, industry begets wealth; and wealth is often productive of a train of evils naturally destructive to virtue and freedom.” Accordingly, the people searched for something which would control amassing of wealth without inhibiting freedom — that something was virtue. Wood debunks the idea that self-interest was commonly believed to promote public virtue. Private vicious behavior could only diminish the public good. Thus, in some respect, the negative aspects of the public-private distinction as observed by political and legal theorists today, did not conceptually exist in 1787. The republic depended upon the morality of its people — private virtue collected was public virtue. Correspondingly, if there was damage to the public good, it affected the individual — “public good is not a term opposed to the good of individuals, on the contrary, it is the good of every individual collected.” A central tenet of Patterson’s faith in the Ninth Amendment comes in its affirmation of human rights at every level. Perhaps the Ninth Amendment may be used as a way around today’s public-private problems in which rights are only protected against infringement by state action not private action. Currently, discrimination against blacks is tolerated as long as it is not done under color of state law. If the Ninth Amendment applies to state government, perhaps it applies to all of us. None of us, jointly or severally, has the right to disturb or
infringe upon rights which are essential to our free society. In order to consider whether it may limit all of us, we must examine the Ninth's application to state government.

**Federalism**

Because of the broad implication inherent in a protection of unarticulated liberties, the issue of federalism always arises when discussing the Ninth Amendment. As Justice Goldberg recognized, if the Ninth Amendment is to have meaningful content then the Constitution must not be considered to be the sole “source” or grantor of rights. There are other equally important rights retained by the people. Implicitly, the people must be able to exercise these retained rights. But, as Ronald Dworkin points out, this exercise is meaningless if not enforced and protected by the government (or community). It is not sufficient to assert that I have a right to protest the United States intervention in Central America — if I am arrested and imprisoned for my actions, then the community has not recognized my right.68 Conservative interpreters of the Ninth Amendment cling to the vulnerable position that unenumerated rights need not be protected. A key and explicit motivating force behind this interpretation is the realization that enforcement of these as yet unarticulated liberties would most likely be accomplished through the federal, not state, courts. Moreover, the right might often be enforced, as it was in the Goldberg case, against state governments, not merely federal. Indeed, Patterson devotes an entire chapter of his treatise to the applicability of the Ninth Amendment to state governments. He sees the amendment as a general affirmation of human liberty which, had it been interpreted as he suggests, would have allowed the federal courts to strike down noxious state law long before the advent of the Fourteenth Amendment. Of course, this last supposition ignores the initial strength of state power and the fact that the framers explicitly rejected a constitutional amendment which would have made the first eight amendments enforceable against the states.69 Nonetheless, this component of Ninth Amendment interpretation must be given serious consideration.

The expansion of federal power urged and accomplished by liberal strategists in this century seems to be explained more by a focus on result rather than on any particular underlying principle. To wit, the federal courts appeared to be the more liberal and enlightened, the place where civil liberties would be most protected. Patterson summarized the attitude of many advocates of civil liberty when he said, “I believe that in the one hundred and sixty and more years of the history of our Federal Government, the quality of statesmanship of Federal officers has been on the whole of a higher character than those who administer State governments.”70

For advocates of a more communitarian society, reliance on the federal government may be both misplaced and dangerous: misplaced because it potentially undermines the alleged goal of increased community and local control of the political process; dangerous because the desired result of this reliance may be entirely dependent upon the political character of a particular Supreme Court, Congress or Presidential Administration. Indeed, there is evidence that state courts in recent years are in the vanguard of human rights advancement, particularly in the area of criminal law. In its last four terms, the Supreme Court has, with the aid of cases like *Michigan v. Long*, (where the Court, per J. O'Connor, granted federal jurisdiction and control on appeal of any case in which the state court was not explicitly relying exclusively on state law. Even an mixed reliance on federal and state law or an implicit invocation of federal law could trigger federal jurisdiction)71 reversed 72% of all criminal cases where the state courts upheld constitutional rights claims.72 Thus, gains accomplished through a gradual erosion of state power may be in the process of backfiring on those concerned with advancement of human rights. Moreover, a focus on federal protection of human rights with little regard to its diminution of state power may undermine local control of policy.

Often this dichotomy of accomplishing communitarian goals through central control seems unavoidable. Lynd, a proponent of communal rights, also advocates using those mechanisms which are already in place as instruments to effect change. In particular, he examines “the right to engage in concerted activities for . . . mutual aid or protection” as identified by the National Labor Relations Act.73 This right, put forth in legislation created by Congress and ultimately enforceable by the federal courts, is at the heart of what is called for in Lynd's conception of communal rights.74 Likewise, Lynd and others advocate reliance on federal constitutional rights. But he also cautions against the “political schizophrenia” which has often been characteristic of the left. In the 1930s, “radicals talked about democracy in public and about socialism in private; the American people concluded that radicals could not be trusted to mean what they said.”75 Currently, radical lawyers use the language of rights in court while their academic counterparts disparage it in the classroom. This creates a dichotomy between the theory and practice of the left. Emphasis on federal control to achieve local communitarian goals may present a similar dichotomy. If so, we must also work to avoid that dichotomy and concentrate on true local community change and affirmation of human liberty whenever and wherever possible.

**Conclusion**

Every political and legal philosopher must have her own version of public virtue in order for the system, whatever it is, to work. Romantic appeals to a communal vision of society ring hollow if they do not have a component of public virtue. Even Dworkin, for all his scorn of “community,” appeals to principles of human dignity and equality, presumably in furtherance of the public good, that can only be achieved by individuals as a community. At
present, virtue seems to be that missing ingredient in our society; without which true equality cannot exist. Ironically, the founders saw virtue as a protection against unequal accumulation of wealth; instead, it is the unequal accumulation of wealth which has destroyed virtue. In fact, property and virtue are ultimately incompatible. Virtue cannot act as a pressure cap on a volatile property-based system. This thinking is circular. As William Moore Smith observed, security of property begets wealth and wealth can produce evils which destroy virtue — thus we cannot depend upon virtue to prevent its own destruction! Therefore, in order to encourage virtue to flourish and produce a free society, we must sever liberty from property and develop a new conception of rights, as called for by Lynd. The due process clause is simply inadequate to meet the needs of communal rights advocates because it explicitly links liberty and property and does not provide for a more communal-based conception of rights, as called for by Lynd. The due process rights advocate's conception of rights, as called for by Lynd. The due process clause is simply inadequate to meet the needs of communal rights advocates because it explicitly links liberty and property and does not provide for a more communal-based rights systems. It is here where the Ninth may be most helpful. Let us use the Ninth Amendment and the principles for which it stands to protect and further those rights which we retain.

NOTES

1. 1381 U.S. 479 (1965).
2. Griswold at 113.
5. 381 U.S. 479 (1965). The first Supreme Court case to explicitly invoke the Ninth Amendment.
7. See generally, Berger and Caplan.
45. Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971).
49. Id. at 263.
50. The Crisis, Number XI [NY 1775], 81-87 (as quoted by Wood at 266).
51. Wood at 265.
52. See Wendy Williams, The Equality Crisis: some reflections on culture, courts and feminism, 7 Women's Rights Law Reporter 175, 175 (1982) for a good discussion of the responsive nature of law.
53. Griswold at 496.
60. Lynd at 1417; Doemberg at 260.
61. Dunbar at 635 (as cited by Clark at 101).
62. Wood at 62.
65. Wood at 65.
68. Dworkin throughout, but especially Ch. 7.
69. Schwartz at 15.
70. Patterson at 43.
74. Lynd at 1423.
75. Id. at 1420.
76. Wood at 65.