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THE NINTH AMENDMENT: RIGHTING AN UNWRITTEN CONSTITUTION

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As the recent Symposium in these pages indicated, the preliminary debate over the meaning of the ninth amendment is essentially over. Despite the diversity of views expressed in the Symposium, all but one contributor agreed that the ninth amendment does protect judicially enforceable unenumerated rights. The real question now must be how to identify those rights.

Only Professor Michael McConnell disputes the conclusion that the ninth amendment allows judges to enforce unenumerated rights. He suggests that neither the history of the Constitution nor sound political theory supports such a reading of the ninth amendment.¹ Using his article as a focus for this Essay, I would like to do two things: (1) to add to the historical work demonstrating the framers' commitment to judicially enforceable unenumerated rights; (2) to comment generally on the New Right insistence on strict textual limits to judicial activism, which I believe stems from a mistaken view of the judicial process.

I.

As Sanford Levinson points out,² the fascination with the ninth amendment began largely as a reaction to the New Right insistence that constitutional interpretation can legitimately rest only on the specific written text and its history—a sharp change from the traditional practices of, and canonical commentary on, the Supreme Court. Until “originalism” became the vogue, there was no need to delve into the forgotten amendment or its history in order to support “non-originalist” review. This reactive foray into the origins of the ninth amendment—and to an even greater extent, into the eighteenth century idea of unenumerated rights generally—has rewarded historically-minded non-originalists beyond their wildest dreams. And, to the surprise of no one,

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1. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988).

2. Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 134-39 (1988).

the New Right is now at great pains to refute the essentially irrefutable historical conclusion that those who wrote, ratified, and initially interpreted American constitutions believed that judges should enforce not only rights specifically enumerated in those written constitutions, but also unenumerated natural rights.

The standard New Right historical argument comes in many guises, but all reduce to the essential contention that the retained rights referred to in the ninth amendment are either redundant or judicially unenforceable. Lawrence Sager persuasively refutes the notion that the ninth amendment is redundant.³ I will focus on the alternative thesis: that the ninth amendment does refer to additional rights, but that they are not judicially enforceable. New Right theorists sometimes suggest, as Professor McConnell does, that such rights are unenforceable because they are merely aspirational, and sometimes that they are unenforceable because they are political rather than legal.⁴ Both of these arguments are historically untenable.

The evidence in favor of attributing to the men who wrote and ratified the United States Constitution a belief in judicially enforceable natural rights is well-rehearsed in several contributions to the Symposium.⁵ Virtually the only evidence to the contrary is a few scattered statements in the Federal Convention, in support of a Council of Revision, that judges might not otherwise be able to strike down unjust laws.⁶ Two additional arguments are relevant.

First, Professor McConnell's suggestion requires us to view the framers as virtually dimwitted. As McConnell recognizes, the framers viewed their new written Constitution as a form of law. As he also apparently recognizes, they followed Coke in endorsing the idea of judicial review: judges should enforce the law, including the Constitution. Finally, he does not dispute that the framers believed in something that they themselves denominated the law of nature, but he urges us to find that they did not believe *that* law to be enforceable. He thus requires us to believe that the framers drew a distinction between one kind of law and another: the written Constitution was legal and enforceable, but natural law was neither.

3. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239 (1988).

4. Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 (1988); Sager, *supra* note 3.

5. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211 (1988); Sager, *supra* note 3; see also Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

6. Professor McConnell quotes these scattered references and labels them "substantial evidence against" the unwritten rights position. McConnell, *supra* note 1, at 94 n.32.

These men were, by and large, lawyers, and they were careful with language and with ideas. For them to speak of the written, judicially enforceable Constitution and unwritten natural law in the same breath—as they so frequently did—without distinguishing between the two, strongly suggests that they thought of unwritten rights as analogous to the written Constitution: legal rights, enforceable through the mechanism of judicial review. To attribute to them any other conclusion strains credulity.

There is also even more significant evidence that the founding generation recognized judicially enforceable unenumerated rights. For the first thirty or forty years after the Constitution took effect, judges *did* enforce unenumerated rights. At both the state and federal level, courts consistently invalidated statutes that conflicted with unwritten rights. Sometimes they also cited provisions of the written constitution, sometimes they did not. Sometimes there were no written provisions that could even arguably apply.

The early Supreme Court's role in endorsing unwritten natural law is well known. But that Court was not unique, nor is it even the most illustrative example. In state after state, judges invalidated retroactive laws, uncompensated takings, and other interferences with the natural rights of citizens. Some of these states had no written bill of rights at all; others had written constitutions that lacked *ex post facto* or takings clauses. Nevertheless, judges used unwritten law to invalidate legislative actions. A review of constitutional opinions in four states provides significant evidence of the prevailing view of enforceable unwritten rights.⁷

Virginia affords the best illustration of the use of unwritten law. Despite the existence of an extensive written bill of rights, Virginia judges relied on unwritten law as well. Moreover, Virginia's well-developed court system, its long-established tradition of reporting decisions, and its outstanding jurists make it an ideal representative state for studying constitutional decisionmaking in the early nineteenth century. Outstanding Virginia judges and lawyers—men such as John Marshall, Edmund Pendleton, Edmund Randolph, George Wythe, Spencer Roane and St. George Tucker—were influential in the overall development of American

7. The following discussion is a brief summary of my ongoing research into early (1788-1830) state constitutional decisions in four states: Virginia, Massachusetts, New York and South Carolina. Those states were chosen in order to examine both Northern and Southern states, and states both with and without a written bill of rights. One portion of that research, focusing exclusively on Virginia, is forthcoming as S. Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, in *Toward a Usable Past: An Examination of the Origins and Implications of State Protections of Liberty* (P. Finkelman & S. Gottlieb eds., University of Georgia Press 1990).

constitutional law.⁸

It is thus enlightening to find that Virginia judges not only enforced unwritten rights, but they also forthrightly declared their obligation to do so. In the 1809 case of *Currie's Administrators v. Mutual Assurance Society*,⁹ counsel for the insurance company had defended a retrospective statute by arguing that the Virginia Constitution of 1776 did not prohibit retrospective statutes:

No doubt every government ought to keep in view the great principles of justice and moral right, but no authority is expressly given to the judiciary by the Constitution of Virginia, to declare a law void as being morally wrong or in violation of a contract.¹⁰

Judge Spencer Roane vehemently rejected that textualist assumption. After noting that the legislature's authority was limited by "considerations of justice" as well as by the written constitution, he continued:

It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boasted omnipotence of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted?¹¹

In other Virginia cases between 1788 and 1828, judges also relied on such unwritten fundamental law as "principles of natural justice,"¹² and "Natural Law, Civil Law, Common Law, and the Law of every civilized country."¹³

Judges in Massachusetts—another state with an extensive written bill of rights—also recognized their obligation to measure laws against both the written constitution and unwritten law. In *Foster v. Essex Bank*¹⁴ in 1819, Chief Judge Parker of the Supreme Judicial Court indulged in a long dissertation on the nature of fundamental law. He began by noting that laws that "manifestly infringe some of the provisions of the constitution, or violate the rights of the subject," should be invalidated by the judiciary.¹⁵ As an example of the first type of invalid stat-

8. They were also among the best-educated: the College of William and Mary established, in 1779, the first American chair in law.

9. 14 Va. (4 Hen. & M.) 315 (1809).

10. *Id.* at 341.

11. *Id.* at 346-47.

12. *Elliott's Ex'r v. Lyell*, 7 Va. (3 Call) 268, 283, 285 (1802); *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 556 (1799).

13. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 265 (1828).

14. 16 Mass. 244 (1819).

15. *Id.* at 269.

ute, he cited a hypothetical legislative declaration that a citizen was guilty of treason; that statute would be in violation of article XXV of the Massachusetts Declaration of Rights. As an example of the second type of invalid statute, he cited a hypothetical law that would "destroy or impair the legal force of contracts." Such a statute, he noted "would be unconstitutional, although not expressly prohibited; because, by the fundamental principles of legislation, the law or rule must operate prospectively only."¹⁶

The Massachusetts court also invalidated laws on the basis of unwritten fundamental principles. In 1799, the Supreme Judicial Court considered the validity of the same Georgia statute eventually overturned by the United States Supreme Court in *Fletcher v. Peck*.¹⁷ The Massachusetts court held the statute to be "a mere nullity—a flagrant, outrageous violation of the first and fundamental principles of social compacts," and then added as an afterthought that it was "moreover declared void, because it was considered directly repugnant to" the contract clause of the federal Constitution.¹⁸ Similarly, in 1814, a Massachusetts court invalidated a statute purporting to extend the statute of limitations in a particular case only, noting that the statute was "manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws."¹⁹

Unlike Virginia and Massachusetts, New York lacked a written bill of rights until 1821. Nevertheless, rights were not left unprotected in that state. The most significant unwritten right was the right to just compensation for the public taking of private property. Despite the absence of any written takings clause in the New York Constitution of 1777, a series of cases beginning in 1816 relied on natural justice to require compensation when private land was taken. In 1816, Chancellor Kent held that depriving an owner of property without compensation would be "unjust, and contrary to the first principles of government."²⁰ Similarly, in 1822, Justice Spencer found an uncompensated taking to be "against natural right and justice."²¹ Although he pointed to takings clauses in both the United States Constitution and the not-yet-effective

16. *Id.* at 270-71. Judge Parker never mentioned the contract clause of the United States Constitution, and apparently believed that his hypothetical statute would not violate it, since he noted that the statute was "not expressly prohibited."

17. 10 U.S. (6 Cranch) 87 (1810).

18. *Derby v. Blake* (1799), *described at* 226 Mass. 618, 624 (1917).

19. *Holden v. James*, 11 Mass. 396, 403 (1814).

20. *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 168 (N.Y. Ch. 1816).

21. *Bradshaw v. Rodgers*, 20 Johns. 103, 106 (N.Y. Sup. Ct. 1822), *rev'd on other grounds*, 20 Johns. 735 (N.Y. 1823).

1821 New York Constitution, he noted that neither applied to the particular taking at issue—but he deemed both clauses “declaratory of a great and fundamental principle of government,”²² and ordered the payment of compensation.

By 1827, a compensation requirement was included in New York’s written constitution, but the New York court nevertheless tested a challenged ordinance against both the written constitution and the unwritten “fundamental principle of civilized society, that private property shall not be taken . . . without just compensation.”²³ And, as late as 1834, a New York court could write that taking for a private rather than a public purpose was “in violation of natural right, and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported.”²⁴

In South Carolina, the most interesting example of the enforceability of unwritten law is Judge Burke’s opinion in *Zylstra v. Corporation of Charleston*,²⁵ a 1794 case involving a fine imposed without a jury trial. Although the written constitution did guarantee a trial by jury, the City of Charleston had argued that the city Board of Wardens could impose fines without a jury because they had been doing so before the written constitution was adopted, and thus were implicitly exempted from the constitutional provision. Judge Burke declared this argument beside the point, in language striking for its affirmation of unwritten rights:

But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society.²⁶

Other South Carolina cases also repeatedly referred to such unwritten sources of law as the “fundamental principles of society,”²⁷ “justice, and the dictates of moral reason,”²⁸ and “immutable principles of justice and common law.”²⁹

These state cases confirm that the early United States Supreme Court was not alone in its vision of enforceable natural rights. Judges and lawyers throughout the new nation shared a common belief that both written and unwritten rights should be enforced by courts. The

22. *Id.*

23. *Coates v. The Mayor*, 7 Cow. 585, 606 (N.Y. Sup. Ct. 1827).

24. *In re Albany Street*, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834).

25. 1 S.C.L. (1 Bay) 382 (1794).

26. *Id.* at 395.

27. *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 56 (1796).

28. *Ham v. M’Claws*, 1 S.C.L. (1 Bay) 93, 98 (S.C. Super. Ct. 1789).

29. *Dunn v. City Council*, 16 S.C.L. (Harp.) 189, 199-200 (1824).

ninth amendment is itself merely further evidence of this belief; even without it, we would be forced to conclude that the founding generation intended judges to enforce rights beyond those enumerated in the written Constitution.³⁰

II.

Professor McConnell also raises another question about judicial enforcement of unenumerated rights. Ignoring the constitutional framework envisioned by the framers, he asks whether we now want a constitutional framework that allows for open-ended judicial review. Andrzej Rapaczynski persuasively suggests that this question is ultimately futile: the search for foundationalism, for rules that truly constrain judges, is bound to fail.³¹ Indeed, as Sotirios Barber suggests,³² McConnell himself appears to criticize only some results of judicial flexibility and to endorse others. It is, as always, a question of whose ox is being gored. Even if it were possible, however, McConnell's search for foundational—especially majoritarian—constraints is misguided.

Professor McConnell does not confine his criticism to the admittedly extreme "anti-constitutionalist" position he attributes to Barber. Most of us would agree—the clear contrary intent of the framers notwithstanding—that "courts are bound by the substantive principles of the Constitution."³³ But McConnell goes further: he would severely limit the methods by which judges may interpret that Constitution.

He defines standard interpretivism—which he apparently endorses—as the view that "judges must look to the text, structure, history, and purposes of the Constitution" in order to determine its meaning.³⁴ Conspicuously absent from this otherwise unexceptionable list is any appeal to justice or moral reasoning. In fact, Professor McConnell explicitly rejects what he derisively calls the "ratiocination of the judge" as a source of constitutional interpretation.³⁵ He also notes that the Constitution's "appeal" derives from its congruence with natural right, but that

30. Cf. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (suggesting the existence of an unenumerated right to amend the Constitution by referendum despite the apparently limiting provisions of article V). It is still significant that, as Chief Justice Marshall noted in an analogous context, the Constitution "has not left [the logical conclusion] to general reasoning." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

31. See Rapaczynski, *supra* note 4, at 190-98; see also M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

32. Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 CHI.-KENT L. REV. 111, 112-15 (1988).

33. McConnell, *supra* note 1, at 97.

34. *Id.* at 92.

35. *Id.* at 95.

its authoritativeness comes from its popular ratification. He thus rules out moral truth as either an explanation of the Constitution's legitimacy or a method of illuminating its meaning. Notwithstanding his disclaimer that he is a moral realist, this attempt to limit interpretation is an attempt to elevate consent over truth, and to privilege will at the expense of reason.

Paul Kahn has noted that we share with the framers a basic conflict about what makes an exercise of power (including the commands of a constitution) legitimate.³⁶ Is a constitution legitimate because we have consented to it (will), or is it legitimate because, and to the extent that, it establishes a moral and just regime (reason)? A non-originalist, who would add justice to the list of things a judge may consult in interpreting the Constitution, would answer that a truly legitimate constitution requires both.

Professor McConnell, however, unequivocally casts his lot with pure will: only the Constitution's popular origins make it legitimate. His commitment to majority will is indeed so overwhelming that he also urges judges to ignore the text and history when those sources direct judges toward moral questions, as the ninth amendment clearly does. Once again, this is both inconsistent with the framers' own inclinations and politically unwise. Even Thomas Jefferson, no friend of activist judicial review, noted that "though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable."³⁷

Professor McConnell's theoretical choice of will over reason has clear practical consequences. If the Constitution is legitimate only because we have consented to it, then the only question judges may ask in interpreting it is what we have consented to. That conclusion, in turn, supports McConnell's restrictive definition of valid interpretive strategies, which focus exclusively on the text and its history.

Professor McConnell's attempt to defend the morality of the Constitution—to reconcile reason and will—fails in two distinct ways.³⁸ His

36. Kahn, *Reason and Will in the Origins of the American Constitutionalism*, 98 YALE L.J. 449 (1989).

37. First Inaugural Address, March 4, 1801, reprinted in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 321, 322 (A. Koch & W. Peden eds. 1944).

38. This is not to suggest that reconciliation is impossible. Kahn suggests one version of reconciliation, whereby "[a] popularly legitimated text lends its legitimacy to a science of politics." Kahn, *supra* note 36, at 483. Others have suggested another version: natural law gradually merged into what might be called "natural-law-infused-textualism". See, e.g., G. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 74-94 (1986); Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51 (1986); Snowiss, *From Fundamental Law to Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review*, in 2 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 1 (1987); cf. Rapaczyn-

preliminary argument is essentially just a defense of particular results: he notes that “[t]he most fundamental and important rights are protected either explicitly or by implication under traditional constitutional interpretive methods,”³⁹ and that his definition of the majoritarian regime established by the Constitution is in fact also the best regime, or at least “pretty good, and probably better than whatever a twentieth-century judge might come up with.”⁴⁰ He is simply restating an obvious but trivial point: his own vision of natural justice accords with the results reached by interpreting the Constitution through “traditional” methods. But what of a judge who finds the “traditional” result⁴¹ inconsistent with her carefully considered view of natural right? According to Professor McConnell, she is nevertheless precluded from entertaining moral considerations. That McConnell thinks his method of interpretation yields just results—in other words, that we have consented to what is, for him, a substantively just document—is not necessarily a reconciliation of reason and will for anyone else.

Professor McConnell’s primary mode of reconciling reason and will is more subtle. He contends, in essence, that legislative moral choices are likely to be both substantively better and more productive of public moral discourse—and thus of public moral development—than judicial moral choices. I happen to disagree, for reasons that I will return to at the end of this Essay.

But the more significant response is to point to McConnell’s concession that judges may override legislative choices when their (legitimate) interpretation of the Constitution requires them to do so. Our only quarrel is thus over what they may look at to determine whether a counter-majoritarian remedy is appropriate in a given case. He wants them to look to the Constitution. I want them to look to the Constitution and to justice.

Professor McConnell thus wishes to limit judicial review by means of interpretive devices that force judges to ignore reason and to focus

ski, *supra* note 4, at 188-90 (describing theories attributing similar reconciliative meaning to ninth amendment).

39. McConnell, *supra* note 1, at 107.

40. *Id.*

41. Talking about “the” result of traditional interpretive methods, of course, is counter-factual. See *infra* at 1011-13. As Part I suggests, examining the “text, structure, history and purposes” of the ninth amendment demonstrates that the “traditional” method gives no guidance at all on difficult questions: it tells us we’re on our own. Professor Rapaczynski similarly shows that any interpretive method can yield disparate results.

Professor McConnell, however, apparently believes that some cases are clearly indefensible using “traditional” interpretive methods, and I am therefore assuming *arguendo* that “traditional” methods of interpretation can sometimes point in a single direction.

exclusively on majority will as reflected in the written document. He fears that unconstrained judicial review will merely "substitut[e] the judge's understanding of natural rights for the Constitution's."⁴² Moreover, his strained reading of the ninth amendment suggests that he believes that any portion of the Constitution that itself directs judges to deliberate about justice is to be ignored.

This search for interpretive devices that eliminate judicial discretion is, at bottom, profoundly positivist and profoundly relativist. It treats the written Constitution as an absolute sovereign by excluding any examination of the moral dimensions of its language. Such a view is positivist in the sense that "it makes no difference . . . if the sovereign command is nothing but arbitrary will: order still requires capitulating to it."⁴³ It is relativist in that it denies the availability of any higher truth than what a particular society has already chosen to embody in its written fundamental law.⁴⁴

An appeal to the finality and exclusivity of the historical Constitution is also, like most positivist and relativist arguments, morally and politically dispiriting. It tells us that we as a society are not good enough to make our own moral decisions: we must instead adhere slavishly to the product of the better minds that went before. What Robin West has called the "authoritarian impulse" is a symptom of despair:

We turn to [the authoritative text] to tell us how to live, because we have abandoned the project of our own moral self-governance. . . . We crave obedience when we have despaired of our own moral competence, and hence self-governing moral authority.⁴⁵

A passively textualist approach to the Constitution is itself productive of despair: when we cede the community's moral authority to an external source, we give up a part of our humanity.

The desire to appeal to the absolute authority of the historical Constitution is also self-replicating. To the extent that we as a society relieve ourselves of the obligation to make difficult moral decisions, we further undermine our capacity to do so. Moral sensibilities, whether of an individual or of a community, are best developed by making moral choices.⁴⁶

42. McConnell, *supra* note 1, at 101.

43. D. Herzog, *Happy Slaves: A Critique of Consent* 201 (forthcoming).

44. See Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988); Barber, *supra* note 32; Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 187-88 (1988).

45. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 538 (1988); see also Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496-97 (1988).

46. See, e.g., Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988); S. Sherry, *Women's Virtue*, 63 Tulane L. Rev. (forthcoming 1989). The founding generation apparently agreed. See Kahn, *supra* note 36, at 467.

Let me anticipate Professor McConnell's probable response to this line of argument. He would contend, I suspect, that giving moral authority to unelected judges is an even more authoritarian solution. He would be wrong, for several reasons.

First, neither he nor any other New Right theorist denies that unelected judges should have some obligation to oversee the community's moral choices. The mere existence of judicial review is not itself controversial. Once we have ceded some moral responsibility to an unelected body, the only question is how they should exercise that responsibility. To tell judges that they must engage in "value-free" judging—to confine them to the unsupplemented text—diminishes the very definition of moral choice by curtailing the sources of moral authority. Moreover, once we recognize that the legislature should not always prevail, we must delegate final moral authority somewhere: should we entrust it to judges who can reason about both morality and consent, or to an ancient document simply because it reflects our erstwhile will? Federal judges, however unrepresentative, are a part of the community in a way in which dead founders and parchment under glass cannot be.

Most important, judges are both of the community and outside it. Their values are shaped by the community, but they are less susceptible to the distorting influence of politics. Moral reasoning is deliberative. To the extent that judges are better able than legislatures to engage in reasoned deliberation, they will both produce better results and provide an example and a catalyst for popular moral deliberation.⁴⁷ And when their reasoning—or their decision—is inferior to the legislature's, it will not prevail for long. Judges are replaced, constitutional amendments are ratified, and judges rethink their positions—at least partly in response to moral dialogue.

Finally, to return to where we began, judges engage in moral reasoning whether or not they purport to be merely interpreting the written Constitution. Admonishing the judiciary to confine itself to interpretation of the majority's past will is a sham. Chief Justice Taney, whom Professor McConnell so castigates for imposing his own values on an unwilling community, explicitly based his decision in *Dred Scott v. Sandford*⁴⁸ on a careful (and probably accurate⁴⁹) interpretation of the history and text of the United States Constitution.

Arguing about the validity of interpretive strategies merely diverts

47. See Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

48. 60 U.S. (19 How.) 393 (1856).

49. See W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 62-83 (1977).

attention from the more important substantive question: did the Court read the Constitution in a morally justifiable way? A reinvigoration of the ninth amendment would force judges and their critics to argue about that question, and "an angry quarrel over right and wrong is superior to the silence of relativism."⁵⁰

Since the search for absolute constraints on judges—and the consequent rejection of open-ended judicial review—is historically inaccurate, politically misguided and intellectually unintelligible, why do some thoughtful scholars continue to insist on it? I would suggest that their insistence might stem from either of two sources. A few of those opposed to reinvigorating the ninth amendment are simply political strategists who wish "to curb civil liberties and restrict remedies for governmental wrongs by any available means."⁵¹ More serious scholars, however, including Professor McConnell, are obviously truly troubled by what they perceive as an unaccountable and irresponsible judiciary: "Power without responsibility is not a happy combination."⁵² This fear of a tyrannical judiciary stems, I believe, from a mistaken understanding of the judicial process, and especially of the art of interpretation.

Professor McConnell appears to believe that there is an inherent meaning in the Constitution: as he says of the ninth amendment, it "means precisely what it says."⁵³ He speaks of "*the* substantive principles of natural justice reflected in the Constitution" and "*the* political theory of the Constitution."⁵⁴ It is by now commonplace—but nonetheless accurate—to observe that meaning does not inhere in documents, but is created by an interaction between a document and its readers. This is not to say that a document has unlimited meanings; the language as well as the context make some meanings unimaginable and others implausible. The reader's own sensibilities necessarily influence which meanings she finds unimaginable and which she finds most plausible. McConnell fails to recognize either the inevitability of ambiguities of meaning or the inescapable role of the reader in supplying part of the context. He thus misunderstands the very nature of interpretation.

Professor McConnell also has a limited vision of the nature of judging. In that he is not alone: for at least several decades, scholars envisioned judging in constitutional cases as a rule-bound task, and have

50. Hirshman, *supra* note 44, at 200.

51. Wells, *Means, Ends and Original Intent: A Response to Charles Cooper*, 4 J.L. & POL. 81, 88 (1987) (attributing this motive to Cooper).

52. McConnell, *supra* note 1, at 106.

53. *Id.* at 94.

54. *Id.* at 107 (emphasis added).

searched for rules that will successfully constrain judges without leaving legislatures free to ignore the Constitution. In light of the failure of these “grand theories” to produce a useful and noncontroversial theory of constitutional constraints, many constitutional scholars have recently turned instead to anti-formalist, anti-theoretical approaches. In articles too numerous to mention individually, these scholars have begun to suggest that deciding constitutional cases requires what might be called judgment or practical reason, and to describe the exercise of that faculty. Because the literature is so extensive and impressive, I will describe it only very briefly, ignoring the differences between different writers and focusing instead on basic shared understandings.⁵⁵

Judging—especially in difficult constitutional cases—is not a mechanical exercise, but a learned and lived craft. The tools of the trade are a thoughtful life lived in American social and legal culture. A pragmatist finds no formula by which to decide the difficult questions, but instead internalizes legal precedents, cultural traditions, moral values and social consequences, creatively synthesizing them into the new patterns that best suit the question at hand. No single source will adequately address the hardest questions; answers to societal dilemmas must be crafted from the web rather than constructed from the tower.

Above all, judging is an act of controlled creativity. Like writing at its best, it both draws on and evokes memories of what has gone before, but by innovation rather than by mimicry. It simultaneously acknowledges our debt to the past and denies that the past should control the present. The task of the pragmatist decisionmaker is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither. We can argue about whether a particular judge does so well or badly, but we should recognize that neither her job nor ours can ever be mechanical.

The framers, in a century in which judges were expected merely to

55. See, e.g., Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1665 (1987); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541 (1988); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987); Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Minow, *Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983); Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1982); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

discover the law, somehow foresaw both the temptation to view judging as a mechanical act and the need to eschew that view. The ninth amendment was their safeguard.

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