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Unenumerated Rights

Under the United States Constitution

by Thomas B. McAfee

The most famous of modern constitutional law, for good or ill, is *Roe v. Wade*, the Supreme Court's abortion decision. From the beginning, the big question has been, where in the text of the Constitution do we find this "right of privacy" that secures the right to choose abortion? Some scholars have argued that such a right could not be found in the text or structure of the Constitution. One powerful counter-argument stems from a textual approach to giving effect to the Constitution. The argument is that, if we look carefully enough at the text and history, they both support the view that the framers were more deeply committed to protecting fundamental rights, rooted either in a moral reality or perhaps in the unwritten English constitution, than they were to the power of the people to adopt laws, or authorize the adoption of laws, that would invade the rights conceived of as "inalienable."

The centerpiece of this strategy for defending the modern Court's role in articulating unenumerated rights is the text of the Ninth Amendment. It provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Numerous modern commentators believe that this

language reaffirms that the origin of these rights is not the written Constitution itself; they are pre-existing rights that were retained by the people in the social compact by which they

formed their political relationship. At a national level, many contend that the Declaration of Independence formally enacted this fundamental relationship. This social compact

existed, in the minds of these advocates, prior to, and separate from, the adoption of the written constitution. This argument is based on history and can be judged historically. In my view, the better historical view suggests that the Constitution does not broadly grant unenumerated rights but merely requires nondiscrimination in the rights accorded persons under state law.

The text of the Ninth Amendment refers to other rights "retained by the people." While this language could refer to implied limitations on the powers granted the proposed federal

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government, in addition to the express limits specified in the Bill of Rights, it is also true that the "other rights 'retained by the people' could simply allude to the many rights and interests which the people did not [convey] when they granted limited, specifically enumerated powers in Article I of the Constitution." Madison and

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others were afraid that inclusion of a Bill of Rights would undercut the enumerated powers scheme of the new government. James Wilson in Pennsylvania contrasted the federal Constitution with the constitutions of the states because, under them, the people had "invested their representatives with every right and authority which they did not in explicit terms reserve." By contrast, under the proposed federal Constitution, because of the enumerated powers scheme, "the

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reverse of the proposition [found in the state constitutions] prevails, and everything which is not given, is reserved." This is why Madison could argue that the unamended Constitution provides that "every thing not granted is reserved," but could also contend that "[i]f an enumeration be made of our rights" it will be "implied that every thing omitted is given to the

general government." The people had "retained" as rights all that they had not granted as powers to the federal government; but the Federalists feared that specifying a group of rights would reverse the inference that flowed from their enumerated powers scheme.

The implied rights reading of the Ninth Amendment requires us to assume that there were inherent rights in the federal system, but not in the constitutional systems of the states. But those defending the Constitution did not assume that there were any inherent rights in the federal system because they did not need to; the people's rights stemmed from the obvious implications of a limited grant of federal powers.

It has also been suggested that unenumerated fundamental rights may have been conceived as among the "privileges or immunities of citizens of the United States" secured by the Fourteenth Amendment. Acknowledging that the Ninth Amendment originally "sounded in federalism," and was designed simply to secure the enumerated powers scheme that was thought to protect rights, Yale Law Professor Akhil Amar finds it significant that by 1867 fifteen states "had borrowed from the federal template and adopted 'baby Ninth Amendments.'" By 1866, Amar believes that those who drafted the Fourteenth Amendment construed these so-called baby Ninth Amendments as protecting unenumerated fundamental rights, and hence believed that these unenumerated rights would be among the rights "incorporated" in the Fourteenth and applied as limits on state government.

As early as 1788, George Mason, the draftsman of the Virginia Declaration of Rights, offered a proposed federal Bill of Rights that omitted the language of equality and expressly limited protection of specified rights to "freemen" (non-slaves) only. Proceeding with caution, Madison did not include this limiting language, but

omitted from his proposed Bill of Rights all specific reference to natural rights. The paraphrase from Virginia's Declaration of Rights that he did include not only did not expressly refer to natural rights, but was proposed for inclusion in a constitutional prefix and failed to move in the direction of the "harder" language of command and prohibition that could serve as legal limits on government. There is every reason to think the Madison drafted as he did because he wanted to pay appropriate lip service to basic principle while avoiding a potential for legally undermining slavery.

With the end of slavery, it is clear that the reconstruction era members of Congress sought to extend basic civil rights guarantees as limits on state power. The most fundamental question is whether by 1866 they would have equated fundamental civil rights with natural, and hence unenumerated, rights, or were simply trying to prevent racial and other forms of invidious discrimination in state decisions about the scope of rights. Professor Amar's unenumerated rights interpretation of the Privileges or Immunities Clause, that hooks up the Fourteenth Amendment and the concept of rights that are inalienable, is usefully contrasted with the one adopted by Virginia Law Professor John Harrison. Harrison contends that, once we are beyond the protections guaranteed by the relatively specific guarantees of the federal Bill of Rights, and are referring to what might be described as "common-law rights," our focus becomes whether a law "abridges" the protected privileges or immunities. In his view, then, the basic rights of citizens are given only "antidiscrimination" protection. "In textual terms, this means that the term 'abridge' in the Privileges or Immunities Clause has an antidiscrimination rather than a prohibitionist meaning, just as it has in Section 2 of the Fourteenth Amendment and in the Fifteenth Amendment."

A central motivation of those who drafted and ratified the Fourteenth Amendment was to combine federal empowerment to protect the civil rights of the freedmen with a structure that did not altogether shift the basic power to regulate those rights away from the states. Responding to an argument that proponents of the Civil Rights Act of 1866 would effectively grant general legislative powers to Congress, Representative Shellaburger of Ohio contended that the law "neither confers nor defines nor regulates any right whatever," but only requires "that whatever of these enumerated rights and obligations are imposed by State laws shall be for and upon all citizens alike without distinctions based on race or former condition in slavery." The Congressman's statements supports Harrison's analysis and undermines Amar's view.

Furthermore, the Senators on whom Professor Amar relies for a "broad rights" understanding of the Ninth Amendment actually lend even stronger support to an anti-discrimination reading of the Privileges or Immunities Clause. Thus Senator Nye of Nevada referred to the privileges or immunities of citizenship as "[t]hese natural and personal rights" that "are State rights, and all the legitimate sovereignty the States have, or can have, is to protect them under equal laws." The Senator acknowledged the need for a remedy for the problems in securing rights in the South, but argued that the "remedy lies in equalized protection under equal laws."

If the Ninth Amendment were read as limiting state governments, the already existing wedge between this view of the Constitution and the views held by Thomas Jefferson would become an unbridgeable gulf. In 1819 and 1820, the nation experienced the crisis of the Missouri Compromise. In the midst of this crisis, it was clear to Jefferson that the threatened rejection of Missouri's bid for statehood unless it abandoned its slave system or opened its borders to free blacks represented a violation of the original federal bargain and threatened to undermine Missouri's

sovereign power to determine its own domestic affairs. Jefferson may well have been a natural rights thinker, but there is little doubt that he was also a "states' rights" thinker who in 1787 as well as 1820 would have put states' rights ahead of natural rights in the context of resolving any clash of values. We have every reason to believe that the framers of the Constitution would not have purposely left the door open to this result.

When John Bingham, the principle draftsman of the Fourteenth Amendment, argued for incorporation, he described the "privileges and immunities of citizens of the United States" as "chiefly defined in the first eight amendments to the Constitution of the United States." Similarly, Senator Jacob Howard said the phrase included "the personal rights guaranteed and secured by the first eight amendments of the Constitution." Even Amar acknowledges "both Bingham and Howard seemed to redefine 'the Bill of Rights' as encompassing only the first eight rather than ten amendments, presumably because they saw the Ninth and Tenth Amendments as federalism provisions." But the positions of Senator Howard and Congressman Bingham cannot be surprising. The reason we debate the "incorporation doctrine" today is precisely that defenders of the Fourteenth Amendment consistently referred to the idea that the Privileges or Immunities Clause secured the rights already protected by the Constitution—often enough, with some acknowledgment that the federal Bill of Rights initially did not limit the states or grant enforcement power to the national government.

In many ways, to fall into the temptation to read the Privileges or Immunities Clause as an unenumerated rights guarantee is to fall into the same trap as that facing interpreters of the Ninth Amendment as originally drafted. Precisely because those who framed the federal Constitution, as well as the Fourteenth Amendment, were by and large people who believed in a moral reality that justified the effort to limit government, we are tempted to think

that we, as interpreters, have been conveyed the task of determining what limits on government moral reality requires. But the framers of the Constitution and Fourteenth Amendment confronted the difficulties of limiting government by a written Constitution. In the process, one has to face not only the question of what limits should be imposed, but also institutional questions about how the precise scope of those limits are to be determined as well as enforced. Disappointing though it might be, there is no room for doubt that the founding generation displayed a willingness to sacrifice the Lockean ideal of human equality to establish the union they saw as vital to the development of the nation. They compromised on the issue of slavery.

The issue of human equality as haunting our constitutional order, in significant part because the law and Constitution stood behind human slavery; Jefferson may have done us a great favor, even if the ideals he stated were significantly ignored, in giving voice to a model of government and man's role in the scheme of things that couldn't be reconciled with slavery over the long haul. But even if we say a silent thank you to Jefferson for drafting the language that became the Declaration of Independence, we would do him a disservice in thinking that he stated the ideals that animated our constitutional system through most of the Nineteenth Century or that what he said in the Declaration constituted binding fundamental law – or that a purpose of the Fourteenth Amendment was to give legal and constitutional voice to the concept of inalienable rights. ■

The author is a Professor of Law at the William S. Boyd School of Law, UNLV. He is one of the Law School's founding faculty members coming from Southern Illinois's law school where he taught for nearly two decades. He is a nationally recognized scholar of constitutional law and history.

Elder Law: The Emerging Practice

by James M. O'Reilly
Elder Law Chairman

At its August meeting last year, the Board of Governors of the State Bar of Nevada approved the formation of an Elder Law Section.

However, the cradle of Elder Law as a distinct practice specialty was a panel discussion sponsored by the American Bar Association Commission on Legal Problems of the Elderly at the 1984 ABA Annual Convention in Chicago. The panel topic was "*Doing Well By Doing Good, Working With Older Clients.*" More than 15 years later, this theme continues to resonate in elder law offices and has been variously phrased as:

- "Serving the client first."
- "Dealing with family dynamics."

- "People - oriented attorneys."
- "The holistic practice."
- "Sharing and caring."
- "Going above and beyond."

Manifestly, Elder Law practices are different from other law practices. The mission of the Nevada State Bar Elder Law Section is to assist attorneys to identify and meet client needs through the exchange of ideas and information on substantive elder law issues and the management of successful practices.

In managing our practices, each of us has experienced the following:

- the high expectations of well-educated, aging baby boomers,
- the ability of baby boomers to use the internet to gather information,
- the demand for instantaneous

- response and accurate information,
- the expectation of one-stop holistic shopping,
- the need for guidance on legal, financial and social investments and
- the decreased need for "legal" information and the increased emphasis on "problem solving."

This last one, a shift from a legal orientation to one of problem solving is perhaps the most significant paradigm shift that we are experiencing in our practices.

There is an unmistakable movement towards multidisciplinary practices in all of the professions. The American Institute of Certified Public Accountants has been promoting the "Elder Assurance" program for the last several years. The American Bar Association

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- Entertainers & Sports Professionals
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- Consular Processing
- Employer Sanctions
- Family Related Petitions

All Nevada State legal matters are referred out; our attorneys are not licensed to practice Nevada State law.

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previously proposed relaxing the Model Rules on ownership of law firms by non-attorneys. While this has not been acted upon, this dialog is not going to end any time soon. Additionally, geriatric care managers, insurance agents, financial planners and health care professionals all now work to meet the many and varying needs of our aging population. The question is not, "Is there enough work to specialize in elder law?" but rather "Who will be doing all this work?"

The elder law attorney is the natural center for this activity. There is a growing awareness of the need for the skills that lawyers bring to the table as clients search for the person who provides an unbiased, objective judgment that respects the individual client, yet recognizes the client's interdependence with his/her family and close friends. While it is recognized that lawyers provide guidance and services, as do other professionals, it is the lawyers who provide the emphasis on personal rights and client autonomy.

By definition, the function of the elder law attorney is to assist older families in their efforts:

- to maintain their independence, autonomy and dignity even when facing increased physical limitations and diminished mental capability,
- to assist older families in managing and conserving their finances over the period of their retirement which now spans more than twenty-five years, and
- to address the health care concerns of older families, particularly the access and availability of health care and payment for necessary and essential health care.

It is the elder law attorney who is in the anchor position to analyze and direct all aspects of aging issues and to build and maintain the trust and confidence of the aging client and his/her family.

There is a second paradigm shift in our practices. This second shift is away from transactional legal work and towards full-service, relationship-oriented practices. This is a combination

of high-tech and high-touch. Clients expect efficiency, expediency and a wide spectrum of expertise and they demand this in the context of mutually respectful relationships. Elder law attorneys are counselors, advocates, problem solvers and providers of services and products. Elder law attorneys are the center of the aging network with care managers, insurance agents, financial planners,

accountants and health care professionals as involved counterparts to facilitate the most practical, reasonable and satisfying decisions for clients.

We hope that you will join the Nevada State Bar Elder Law Section in the excitement of this new and challenging practice.

Free Report Shows Lawyers How to Get More Clients

Why do some lawyers get rich while others struggle to pay their bills? "It's simple," says lawyer David M. Ward. "Successful lawyers know how to market their services."

A sole practitioner who once struggled to attract clients, Ward credits his success to a referral marketing system he developed several years ago. "I went from

dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

"Lawyers depend on referrals," Ward says, "but without a system, referrals are unpredictable — and so is your income."

Ward has written a new report, "How to Get More Clients In A Month Than You

Now Get All Year!" which reveals how any lawyer can use his marketing system to get more clients and increase their income.

Nevada lawyers can get a FREE copy of this report by calling 1-800-562-4627 (a 24-hour free recorded message), or by visiting Ward's web site at www.davidward.com.

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