Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 11 | Issue 4 Article 1

4-1936

The Ninth Amendment of the Federal Constitution

Knowlton H. Kelsey
Member, Huntington Bar

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons

Recommended Citation
Kelsey, Knowlton H. (1936) "The Ninth Amendment of the Federal Constitution," *Indiana Law Journal*: Vol. 11: Iss. 4, Article 1.
Available at: https://www.repository.law.indiana.edu/ilj/vol11/iss4/1

This Article is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.

JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

INDIANA LAW JOURNAL

Volume XI | APRIL, 1936 | Number 4

THE NINTH AMENDMENT OF THE FEDERAL CONSTITUTION

By KNOWLTON H. KELSEY*

Certain editorial comment on the death of California's "Little A. A. A." at the hands of the California Supreme Court, following closely upon the invalidation of the A. A. A. at the hands of the "Nine Old Men," led to the suggestion that a discussion of the Ninth Amendment would be of interest to this bar.[1]

The comment was to the effect that the power of regulation must reside somewhere and the implication was that all power must reside in either the Federal or State governments. The comment ignored the fact that powers are reserved to the people as well as to the states, and, further, that rights, which preclude power, are also reserved to the people.

To suggest that the power to regulate agriculture, industry, business or any other particular activity, must, of necessity, be in either the Federal or the State governments is to deny the whole philosophy of limited government created by and of individual rights recognized by the Constitution of the United States and under the constitutions of the several states.

* Of the Huntington, Indiana, Bar.

[1] Gen. Hugh E. Johnson: "the Nine Old Men in their black kimonos."

The subject here considered has to do with only a small part of the implications contained in the editorial comment above mentioned. We are here to consider only a small part of the limitations on the government of the United States—that limitation or prohibition contained in the *Ninth Amendment*

"The enumeration in the Constitution, of certain RIGHTS, shall not be construed to deny or disparage others restrained by the people."

That provision is a companion to and in a measure the complement of the Tenth Amendment "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*

Together, these articles of amendment express the fundamental theory of American government, National and State—the theory of reserved rights and of delegated powers. The former article specifies *rights,* the latter specifies *powers.* When the two provisions are laid beside each other, it becomes evident that there was some distinction in the minds of the framers of those amendments between *declarations of right* and *limitations on* or *prohibitions of power* If no distinction had been in mind, the Ninth Amendment would have been unnecessary The Tenth Amendment, reserving powers to states and people, would have been enough, when taken with certain limitations or on reservations of power and with certain reservations of rights in the body of the Constitution or in other Amendments.

In a consideration of the Ninth Amendment and an inquiry into the nature of the rights mentioned or suggested therein, we are concerned, not with rights at sufferance, not rights enjoyed by the failure to exercise powers granted, but with relatively absolute rights, if any right may be said to be absolute in any society, with natural, or inherent, or inalienable rights—whatever natural, inherent or inalienable rights may be. And particularly, our question here is as to what rights, if any, not enumerated, are retained by the people. A thorough consideration of the subject would involve a proc-

ess of determination and of elimination—determination as to what the rights of the people are or were, as considered by the framers of the Constitution and of the several Amendments, and elimination of those rights or portions of right which are referred to as being enumerated.

Rights may arise or rather appear by reason of limitations placed upon or by the limits of granted powers, as the right to uniformity or to apportionment of taxation.[2] Such rights may be pointed out by a prohibition against the exercise of power or by a specification of rights, as in Article I, Sec. 9, and by the several amendments among the first ten, and which may be difficult to classify as prohibitions of power or as enumerations of right. Rights may also exist in having the granted powers exercised, or in having them exercised in the manner and for the purpose for which granted, e. g. Article IV, Sec. 4, the guarantee of a republican form of government.

Rights, whether asserted, indicated, or set out as prohibitions of or as limitations on power, may be assumed to be enumerated. Thus the limitations on taxation,[3] on suspension of the writ of habeas corpus,[4] on trial of crimes[5] and conviction of treason,[6] and the prohibitions against bills of attainder,[7] ex post facto laws,[8] corruption of blood[9] or forfeiture,[10] are probably among those referred to in the Ninth Amendment as being enumerated. Those which with more certainty can be classed as being enumerated are set out by the other Amendments and include freedom of speech,[11] religion,[12] press,[13] assemblage,[14] petition,[15] to keep and bear

---

[2] Art. I, Sec. 8, Sub. 1, Art. I, Sec. 9, Sub. 4 & 5.

[3] See note 2, Sub. 1, Art. 1, Sec. 9, Sub. 4 & 5.

[4] Art. 1, Sec. 9, Sub. 2.

[5] Art. 3, Sec. 2, Sub. 3.

[6] Art. 3, Sec. 3.

[7] Art. 1, Sec. 9, Sub. 3, Art. 3, Sec. 3, Sub. 2.

[8] Art. 1, Sec. 9, Sub. 3.

[9] Art. 3, Sec. 3, Sub. 2.

[10] Art. 3, Sec. 3, Sub. 2.

[11] Amendment I.

[12] Amendment I.

[13] Amendment I.

[14] Amendment I.

[15] Amendment I.

arms,[16] on quartering troops,[17] from search and seizure,[18] of presentment and indictment,[19] against double jeopardy, against self incrimination,[20] against deprivation of life, liberty or property,[21] against taking of property,[22] for fair and speedy trials in criminal matters,[23] for jury trials in civil suits at common law,[24] against excessive bail,[25] and against cruel and unusual punishments.[26] As against the state's individual rights, specified in the constitution, but not necessarily included in the scope of the Ninth Amendment, include freedom from bills of attainer,[27] ex post facto laws,[28] laws impairing the obligation of contract,[29] abridgement of privileges and immunities,[30] deprivation of life, liberty or property,[31] for equal protection of law,[32] and against denial of sufferage.[33]

The list seems imposing. A recital of the rights in this manner enumerated or pointed out seems like a catalogue of human rights. But do the rights, surrender by the grant of power, express or implied, or expressly reserved by enumeration, prohibition or limitation, exhaust the list of human rights? Are no other rights retained by the people? Is the Ninth Amendment, and is the closing phrase of the Tenth Amendment as well, merely like the words of a sale bill specifying "other articles too numerous to mention" on the improbable chance that something worth while may have been forgotten?

It has been held that in interpreting the Constitution, every word must have its due force and meaning; that no word was unnecessarily used or needlessly added, that no word can be rejected as superfluous and unmeaning.[34]

---

16 Amendment II.

17 Amendment. III.

18 Amendment IV

19 Amendment V

20 Amendment V

21 Amendment V., 22 Amendment V., 23 Amendment VI., 24 Amendment VII, 25 Amendment VIII, 26 Amendment VIII, 27 Art. I, Sec. 10, Sub. 1, 28 Art. 1, Sec. 10, Sub. 1, 29 Art. I, Sec. 10, Sub. 1, 30 Amendment XIV, 31 Amendment XIV, 32 Amendment XIV, 33 Amendments XV & XIX, 34 Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606. Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969. Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579. Blake v. McClung, 172 U. S. 239, 43 L. ed. 432. Cohens v. Virginia, 6 Wheat 264, 5 L. ed. 257. Myers v. U. S., 272 U. S. 52, 71 L. ed. 160.

With this rule in mind we must therefore assume that in the minds of the framers of this amendment, other rights than those "enumerated" did, and supposedly do now, exist.

Natural rights, such as are declared to be inalienable and which, as such, are personal to every individual as a citizen of a free community, include the right to personal liberty, to personal security, to acquire and enjoy property, to religious liberty, to freedom of conscience, to freedom of contract, to freedom of press, speech, assemblage, petition, to freedom to engage in profession, trade, business, or calling, and the right of privacy [35] Natural rights have been defined as (1) Such rights as appertain originally and essentially to man, such as are inherent in his nature, and which he enjoys as a man, independent of any particular act on his side, also (2) Those which grow out of the nature of man and depend upon personality as distinguished from those created by law; also (3) Those rights which are innate, and which come from the very laws of nature, such as life, liberty, pursuit of happiness, and self preservation.[36] Natural rights, arising, if they do arise, from the nature of man or from the laws of nature, may be as indefinite as the law of nature which Bentham says is but a phrase to justify some individuals in their personal classification of what is right and what is wrong.[37] But Bentham's philosophy of utility, of pain and pleasure, had little if any influence upon the American thought which framed the Constitution and the first Ten Amendments. The Colonists had argued, petitioned and contended, and finally waged war, not for philosophic perfection of any utilitarian doctrine of rights, but for the rights of Englishmen. These rights were best expressed by and most familiar to the colonists in Blackstone's Commentaries, whether the work of that writer was a reliable guide to philosophic or historical jurisprudence or not.

According to Edmund Burke (Conciliation Speech, Mar. 22, 1776), nearly as many of Blackstone's Commentaries were sold in America as in England. It would not seem im-

---

[35] 12 C. J. Constitutional Law.

[36] 45 C. J. 394, n. 96.

[37] Bentham, Principles of Morals and Legislation, Ch. II, Sec. XV, note 6. See Bentham, Principles of Legislation, p. 82 & p. 84.

probable that the natural and inherent rights of Englishmen listed by Blackstone and fought for in the War of Independence, are more exact statements of the rights set out in the Constitution and referred to under the Ninth Amendment, than any theoretical or philosophic classification by Bentham, Austin or any other critic, on whose opposition to the teaching of Blackstone the more modern school of jurisprudence seems based.[38]

It has been held that "The first ten amendments were not meant to lay down any novel principles of government, but simply to embody certain guarantees and immunities, which we had inherited from our English ancestors, and which had been from time immemorial subject to well recognized exceptions."[a] Further it has been held that "As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and the limitations that should be put upon them."[b]

Blackstone[39] classifies the fundamental rights of Englishmen under three heads (I) Personal Security, (II) Personal Liberty, (III) Private Property, with numerous subdivisions and refinements of and limitations of each classification and with certain subordinate rights. To these, Chancellor Kent adds, as a specific and characteristic contribution of American law, (IV) Religious Freedom.

By certain of the States the Constitution, like the Covenant of the League of Nations, was ratified with certain reservations, certain "impressions," certain suggestions.

With specified "impressions" Virginia ratified.[40] These "impressions" may be summarized as follows that the powers granted under the Constitution, being derived from the peo-

---

[38] Hicks, Men and Books Famous in the Law, p. 129.

[a] Robertson v. Baldwin, 165 U. S. 281.

[b] Brown v. Walker, 161 U. S. 600, 40 L. ed. 819.

[39] Blackstone's Commentaries Book 1, pp. 129-145.

[40] Formation of the Union, p. 1027.

ple, may be resumed by them whenever perverted to their injury; that every power not therein granted remains in the people at their will, that no right of any denomination can be cancelled, abridged, restrained or modified except in the instances and for the purposes for which power is given, and that among other essentials, liberty of the press and of conscience cannot be abridged. And to the ratification by Virginia was added. "That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable rights of the people." This addition suggested that. "there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety," and further "that the doctrine of non-resistance to arbitrary authority is absurd," and to these were added no hereditary offices, separation of powers of government, free and frequent elections by general sufferage, no suspension of laws, jury trials with unanimous verdict, due process, jury trials in cases involving property or character, free complete and speedy justice, reasonable bail and punishment, freedom from unreasonable search and seizure, freedom of assembly, petition, press, religion, conscience, and to bear arms, and subjection of the military The document reads like an excerpt from or summary of Blackstone on the subject of rights, or like a list of concessions demanded from a tyrant sovereign.

New York[41] ratified under similar reservations or "impressions," adding double jeopardy and habeas corpus to the list. The Bill of Rights suggested by South Carolina[42] followed closely that of Virginia as did also that of Rhode Island.[43] (See Formation of the Union.)

By this brief review of the reservations, if so they may be called, of these four states to their ratifications of the Constitution, it is not implied that their enumerations of rights have or had any binding force. They are reviewed solely to get

41 Formation of the Union, p. 1034.

42 Formation of the Union, p. 1044.

43 Formation of the Union, p. 1052.

some possible suggestion as to what the authors of the Ninth Amendment may have had in mind when the amendment was proposed, and what the people who ratified that amendment thought, and what the words, as a part of our basic law, now mean, if they now mean anything.

The proponents of the Constitution, as drawn up and submitted by the Convention, argued as against the objection of the lack of any Bill of Rights (I) that all essential rights were already safeguarded by specific enumeration of many essential rights,[44] (II) that the government created was one of enumerated powers only,[44] [45] (III) that a positive declaration of some essential rights could not be obtained with the requisite latitude,[45] (IV) that the jealousy of the states against encroachment of their own powers was a safeguard,[45] and (V) that the teachings of experience proved the inefficacy of a bill of rights.[45] [44]

Hamilton,[44] in answering the advocates of a bill of rights, maintained that the Constitution did contain a number of provisions in favor of particular rights and privileges, but that "a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." His contention was, further, that a bill of rights would be dangerous because, containing various exceptions to powers not granted, the exceptions would afford a colorable pretext to claim more powers than were granted.[46]

Jefferson[45] maintained that a constitutive act, which leaves some precious articles unnoticed, and raised implications against others, makes necessary a bill of rights by way of supplement; that if a sufficiently comprehensive declaration could not be formulated to secure all rights, nevertheless such

---

[44] Federalist No. 84, Hamilton.

[45] Jefferson Works, Vol. III, pp. 4, 13 & 101, Vol. II, pp. 329, 358.

[46] See Kohl v. U. S., 91 U. S., p. 372. Power of eminent domain held implied by the prohibition in the Fifth Amendment against taking private property for public use without compensation, although no express power of condemnation was granted under the Constitution. (The power was afterwards asserted as a necessary attribute of sovereignty.)

as possible should be secured, that if the jealousy of states is to be a safeguard against encroachments of Federal power, a declaration of rights was needed upon which states could found their opposition, that the inconveniences, attending the limitations on government by bills of right which may cramp the government in its useful exertions, are short lived and reparable, while those inconveniences, resulting from the want of such a declaration of rights, are permanent and irreparable, moving from bad to worse. He adds "The executive, in our government, is not the sole, it is scarcely the principal, object of my jealousy The tyranny of legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn, but it will be at some remote period."

Justice Joseph Story says that the real point for argument is "not whether a bill of rights is necessary, but what such a bill of rights should contain", that a "bill of rights is important, and is often indispensable, whenever it operates as a qualification upon powers actually granted by the people to the government; that a bill of rights may be important even when it goes beyond powers supposed to be granted because "it is not always possible to foresee the extent of the actual reach of certain powers which are given in general terms", which "may be construed (and perhaps fairly) to certain classes of cases which did not at first appear to be within them." In such a case a "bill of rights, then, operates as a guard upon any extravagant or undue extension of such powers." "It requires more than ordinary hardihood and audacity of character to trample down principles which our ancestors have consecrated with reverence, which we have imbibed in our early education, which recommend themselves to the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force of constitutional sanction." [47]

Kent observes "The necessity of declaratory codes of rights has been frequently questioned, in as much as the government * * * is the creature of the people * * * and

---

[7] Story of the Consti ution, Vol. II, pp. 623-627.

made responsible for maladministration. It may be observed, on the one hand, that no gross violation of those absolute rights which are clearly understood and settled by the common reason of mankind is to be apprehended in the ordinary course of public affairs, and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty When the spirit of liberty has fled, and truth and justice are disregarded private rights can easily be sacrificed under the forms of law " [48]

Opposition to the adoption of the Constitution on the ground of the lack of a bill of rights was so general and so determined, that the advocates of adoption were forced to the argument that the means and method of amendment were readily available, and it was only by the assurance of the speedy adoption of amendments embodying a declaration of all essential rights, that the assent of the requisite number of states was obtained. It may reasonably be said that the adoption of the first ten amendments was a condition on the ratification of the Constitution.[49]

And the preamble to the joint resolution of Congress, submitting twelve amendments (including the first ten) to the states for ratification, recited "The conventions of a number of States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. And as extending the ground of public confidences in the Government will best insure the beneficent ends of its institution." (1 Stat. L. 97)

The advocates of a Bill of Rights prevailed, and the first ten amendments were adopted. The Ninth and Tenth Amendments seem to be designed to meet the Hamiltonian argument and to deny specifically any unmentioned grant of power or any unnamed surrender of rights;[43] and also to meet the objection mentioned by Jefferson[45] and to quiet the fear that

[48] Kents Commentaries (12 Ed.), Vol. II, p. 8. (Followed by unacknowledged excerpts from Story.)

[49] O'Neil v. Vermont, 144 U. S. 370. 6 Am. & Eng. Enc. of Law 960.

a sufficiently broad and positive declaration could not be formulated to cover all essential rights.

Of the Ninth Amendment, Story[50] says "This clause was manifestly introduced to prevent any preverse or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others, and, *e converso,* that a negation in particular cases implies an affirmation in all others (citing Federalist, No. 83) The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights" (citing Federalist, No. 84)

Story further says "In regard to another suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis, and it could never furnish any just ground of objection that ingenuity might pervert or usurpation overleap the true sense. That objection will equally lie against all powers, whether large or limited, whether national or state, whether in a bill of rights or in a frame of government. But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." [51]

There seems to be no case that decides the scope of the Ninth Amendment even in part. In decisions where it is mentioned, it is either grouped with the Tenth Amendment in decisions based upon or involving the latter, and hence concerning reservation or denial of power, or it is merely classified as one of the first ten which are held to be limitations on national and not on state power No case has been found that uses the Ninth Amendment as the basis for the assertion or vindication of a Right.

---

[50] Story on the Constitution, Vol. II, pp. 623-627.

[51] Story on the Constitution, Vol. II, p. 626, Sec. 1867.

Yet the Ninth Amendment concerns rights and every word in the Constitution has meaning.

The paucity of judicial decision on the meaning and effect of the provision here considered may result from a number of causes. (1) All essential human rights may have been covered by the express declarations of right in the original Constitution or in the other Amendments. (2) All essential human rights, no enumerated, may be covered by the limits of or limitations upon the express and implied grant of powers. (3) Any additional rights thought to have been protected thereby may have been covered by judicial construction and extension of expressly enumerated rights, especially those under the Fifth Amendment, to cover not only the general classifications of rights catalogued by the great commentators, but also all proper subdivisions and refinements thereof. (4) Other rights may exist which have not heretofore been invaded, or which have not heretofore been vindicated by the ingenuity of the legal profession or the discernment of the courts. (5) Rights not expressly enumerated may have been extinguished by long acquiescence of the people in legislative extension of Federal power or by judicial decisions on the extent of power.

A survey of decided cases concerning the specifically enumerated rights leads to the conclusion that most general rights, if not each variation or refinement thereof, listed by English and American commentators, as well as rights discussed in connection with the adoption of the Constitution and Amendments, have been considered by the courts and, in a proper case, vindicated. Judicial decisions on the limits of or the limitations on granted powers have resulted in the vindication of rights. Decisions on due process have resulted in the words life, liberty and property being expanded to such a degree, especially as to property, that they seem to include much, if not all of that, which is included under the usual general classifications of rights.

The general, undefined, and illusive right "to the pursuit of happiness," the elemental right of self preservation, and the general statement in the Virginian "reservations" as to the right to the "means of acquiring, possessing and protect-

ing property and obtaining happiness and safety," insofar as they are rights, and insofar as they contain elements not embraced within the enumerated rights, may be protected by the Ninth Amendment. The right of privacy may contain essentials beyond the prohibitions of the Fourth Amendment against unreasonable search and seizure, and as to such essentials may come within the category of unenumerated rights. In other words, there may be a right to freedom from persecution and annoyance by those temporarily intrusted with power, when no fraud, concealment or wrong doing is shown, as was recently held by the Circuit Court of the Third Circuit, which ruled that a second investigation into the business transactions of individuals, after the lapse of three years, for no other apparent cause than the order of superior officers, constituted not only a violation of the prohibition against unlawful search and seizure, but was also "a violation of the natural law of privacy in one's own affairs which exists in liberty loving people and nations, no right being more vital to 'liberty and pursuit of happiness' than the protection of a citizen's private affairs, their right to be let alone."

Property is directly mentioned three times in the Constitution—twice in the Fifth and once in the Fourteenth Amendment. Most of the other provisions which declare rights or set limitations on power are concerned with personal rights as distinguished from property rights. This fact should be remembered when criticism is made that the Constitution exalts property above human rights. The document was drawn by men of substance, and both it and its Amendments ratified by conventions or by legislatures elected for the most part by limited sufferage, and yet the fundamental declaration of law has little of property in it. Can it be that rights in property, its use, enjoyment, ownership—all the attributes of private ownership—were accepted as being so fundamental as to need no safeguard beyond the limits of or limitations on power, or beyond the Fifth Amendment? Or was Ninth Amendment designed to cover axiomatic rights to property as well as any unmentioned but axiomatic personal rights?

Rights, more or less abstract rights, may exist in having the government discharge its governmental function and also

in having the government refrain from undertakings outside of the sphere of governmental authority Such rights may be abstract rights because of the limits on the judicial function, which depends on the proper presentation of a justiciable issue, and the assertion of right by one having a substantial or ascertainable interest therein. Thus the right to challenge a questionable appropriation has been denied to a State as the representatives of its citizens and to one who could show no specific interest in the fund appropriated,[52] but has been granted where a specific and direct interest could be shown.[53]

The Ninth Amendment (as well as the Tenth) was invoked by the petitioners in the recent T V.A. Case, and the Court there held that the "Ninth Amendment, insuring the rights retained by the people, does not withdraw the *rights* which are expressly granted to the federal government." Under this case, as defined and limited by the Court, the exercise of governmental powers (to the extent) considered by the decision, did not violate any unenumerated right. The right of the government to use its almost limitless power to tax, and its constitutional right to spend, to compete with its citizens has not been settled. The power to tax and destroy has been long established. The power to spend and destroy has not.

The Fifth Amendment enumerates rights to which each great substantive power of Congress is subject.[54] Is this true, in a proper case, of each enumerated right? And are unenumerated rights weaker because unnamed? A right that yields to the exercise of authorized power, express or implied, is no right.

The legislative and the executive, throughout our history, have been, in the main, as zealous as the courts in their respect and regard of individual rights, and, as a consequence, courts, passing only on litigated matters of right, and binding themselves to resolve every reasonable intendment in favor of the constitutionality of the acts of a co-ordinate branch government—have seldom been under the necessity of exercising the

---

52 Massachusetts v. Mellon, 262 U. S. 447.

53 United States v. Butler, 80 L. ed. 287

54 Louisville Joint Stock Land Bank v. Radford, 295 U. S. 587, 589. 79 L. ed. 1593, 1604.

power of judgment to vindicate reserved rights, and have, doubtless, hesitated to raise up out of the past and to define any unenumerated right.

Yet the Ninth Amendment is not meaningless or superfluous. Surely it is more than a mere negative on implied grants of power that might otherwise be asserted because of the express enumeration of rights in respect of matters where no power was granted. It must be more than a mere net to catch fish in supposedly fishless water. It is certainly more than a mere emphasis on the doctrine of delegated and enumerated powers. It must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of "unenumerated rights."