FOREWORD: THE NINTH AMENDMENT AND CONSTITUTIONAL LEGITIMACY

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> Laws framed by man are either just or unjust. If they are just they have the power of binding in conscience . . . .[1]

INTRODUCTION: THE UNSPOKEN ASSUMPTION OF LEGITIMACY

Does the Constitution of the United States of America impart legitimacy on legislation enacted under its auspices? If so, how? Is a citizen bound in conscience to obey such legislation? If so, why? Does legislation create a duty of obedience simply because it was enacted by a group of persons calling themselves a "legislature," or is there some other reason? Would any constitution impart such legitimacy or is there something special about the character of those that do? If the latter, does the United States Constitution have the requisite character?

While I shall not definitively answer these questions in this Foreword, I hope to flesh them out enough to show that they belong in the ongoing debate concerning the proper contours of judicial review. For, while the proper method of interpreting the Constitution and the appropriate role of judicial review are hotly debated, few discuss whether and why a citizen has a moral obligation to adhere to legislation that results from constitutional processes. There is an unspoken assumption that legislation resulting from constitutional processes creates at least a prima facie duty of obedience in a citizen.

According to Thomas Aquinas, however, only a law that is legitimate or just creates an obligation that is binding in conscience on the individual. In Part I, I present Aquinas' criteria of legal legitimacy as a possible framework for assessing the legitimacy of legislation. Although it is a bit unusual to begin any contemporary legal analysis—much less one on the Constitution—with a discussion of the ideas of someone like Aquinas, I think his criteria of legal legitimacy are of great value to the

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1. Aquinas, *Summa Theologica*, in 20 GREAT BOOKS OF THE WESTERN WORLD 233 (R. Hutchins ed. 1952).

current debate over the proper interpretation of the Constitution. For, far from increasing in sophistication, modern notions about legal legitimacy operate much within his scheme.

In Part II, I suggest that the legitimacy a constitution imparts upon legislation depends upon the practical ability of the institutions it regulates to assure that legislation conforms to these criteria of legitimacy. I examine how selected aspects of constitutional processes—in particular judicial review—may in practice create a likely correspondence between these criteria of legitimacy and individual acts of legislation. In Part III, I consider whether the effort to impart legitimacy on legislation is enhanced or hindered by taking account of the unenumerated rights "retained by the people" mentioned by the ninth amendment. Finally, I conclude by introducing this Symposium on Interpreting the Ninth Amendment.

I. CRITERIA OF LEGAL LEGITIMACY

A. Aquinas' Three Criteria of Just Law

To decide how a constitution imparts legitimacy to legislation, we must first consider how it is that legislation ever creates an obligation that is binding in conscience. Such a question is by no means new. Traditionally, law has been thought to be legitimate or just if it had the "right stuff" in three ways: (1) its substance was right or good; (2) it was enacted or posited by the right persons; and (3) it took the right form. As Thomas Aquinas put it:

> Now laws are said to be just both from *the end*, when, that is, they are ordered to the common good; and from *their author*, that is to say, when the law that is made does not exceed the power of the lawgiver; and from *their form*, when, that is, burdens are laid on the subjects according to an equality of proportion and with a view to the common good.[2]

Aquinas argued that human laws not satisfying these tenets did not bind in conscience, unless, under the circumstances, disobedience would itself inflict "a more grievous hurt."[3]

> [Unjust laws] are acts of violence rather than laws . . . . [S]uch laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right . . . .[4]

We may interpret this view to suggest that there are three dimensions of justice that, taken together, give rise to a legal obligation that is

2. *Id.* (emphasis added).
3. *Id.*
4. *Id.*

binding in conscience: the correctness or justice of (1) the *substance* of the law, (2) the *jurisdiction* of the lawgiver, and (3) the *form* of the law. Further, prudential concerns may sometimes argue for obeying an unjust law if disobedience would create more harm than good.

It is important to note that, whether he was correct or incorrect, Aquinas did not maintain that human laws not satisfying the tripartite requirement of justice were not "laws" in some definitional or semantic sense. He repeatedly referred to them as laws. He was concerned, instead, with the actual (as opposed to the apparent) justice or legitimacy of human laws—with why and when individuals really had a morally binding obligation to obey a human law. In contrast, when academics today speak of legal legitimacy—as in the "legitimating" function of law—they usually mean the perceived or *apparent* legitimacy of social control mechanisms, rather than with the *actual* legitimacy of laws.

The contrast between the traditional and modern conceptions of legal legitimacy was most famously highlighted by the jurisprudential debate between H.L.A. Hart and Lon Fuller. Hart departed from John Austin by acknowledging that legal obligation was perceived by individuals as a reason for personal conduct and that this "internal" point of view could not be explained entirely by the physical coercion attached to noncompliance.[5] For Hart, this perception of obligation was based either on the widespread acceptance of the "primary rules" regulating individual conduct or on the widespread acceptance of the "secondary rules" that regulate the making of primary rules.[6] But what accounted for such popular acceptance?

> Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. . . . The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.[7]

Legal legitimacy in Hart's scheme, then, is largely, if not entirely, a matter of perception. Rules are legitimate and therefore binding when they are "*thought* important because they are *believed* to be necessary."[8]

In contrast, Lon Fuller tried to explain "fidelity to law" in the sense that obedience to an enactment was warranted or justified. Fuller did not deny that legality "depend[s] upon general acceptance and that to

5. *See* H.L.A. HART, THE CONCEPT OF LAW 86-88 (1961).
6. *See id.* at 77-96.
7. *Id.* at 84-85.
8. *Id.* at 85 (emphasis added).

make this acceptance secure there must be a general belief that the constitution itself is necessary, right, and good."[9] But for Fuller, such beliefs were the beginning rather than the end of the realization in practice of the ideal of fidelity to law. The inquiry must immediately shift to a consideration of what features of a legal system are truly necessary, right, and good—or, to use Hart's phrase, whether certain rules are truly "necessary to the maintenance of social life or some highly prized feature of it." For Fuller, Hart's stress on appearances and perceptions was simply too confining:

> What disturbs me about the school of legal positivism is that it not only refuses to deal with problems of the sort I have just discussed, but bans them on principle from the province of legal philosophy. In its concern to assign the right labels to the things men do, this school seems to lose all interest in asking whether men are doing the right things.[10]

The Hart-Fuller debate also illustrates that modern theorists generally operate within Aquinas' framework, though they tend to emphasize one or two of his criteria and to deny or disparage the pertinence of those that are omitted. Hart's approach to legitimacy, for example, places great stress upon the consensual jurisdiction of the lawgiver. Form and substance do not figure prominently, if at all, into his conception of legal legitimacy. Fuller, on the other hand, primarily stressed the formal characteristics of a legal system that he called the "internal morality of law."[11] He never made entirely clear how he viewed the relationship between legal legitimacy and what he termed "the external morality of law."[12]

In the balance of this Foreword, when I refer to legal legitimacy I mean the quality or qualities of justice that legislation must have to make it binding in conscience on the individual. I will assume for purposes of discussion that genuine, as opposed to perceived, legal legitimacy has a formal, a substantive, and a jurisdictional dimension. Of course, a complete assessment of legal legitimacy would require that actual content be given these substantive, jurisdictional, and formal dimensions of justice. Much of political and jurisprudential discourse concerns the appropriate content of these criteria and my conception of these criteria may differ

9. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 642 (1958).

10. *Id.* at 643.

11. *See* L. FULLER, THE MORALITY OF LAW 96 (rev. ed. 1969) ("As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law . . . .").

12. *Id.*

widely from that of Aquinas. While this is not the place to relate these debates, it would be useful briefly to consider how, when they are suitably elaborated, each of these criteria of legitimacy may relate to the others.

B. The Legitimacy of Means and Ends

The example of formal justice given by Aquinas is when "burdens are laid on the subjects according to an equality of proportion and with a view *to the common good*."[13] Yet the first substantive criteria also addresses the common good: "Now laws are said to be just both from the end, when, that is, they are ordered *to the common good*."[14] Is Aquinas being redundant? The answer is no—and also yes.

Theoretically, Aquinas' distinction between "end" and "form" can be viewed as reflecting the distinction between legitimate ends and means. That is, the end of a law must be directed toward the common good and the means chosen to effectuate this end must be suitable to the purpose. Viewed this way, Aquinas' distinction between the end and form of law is not redundant because his first criterion is primary and his third criterion is of only instrumental value. In this sense only an end could ever justify a means.

Whatever the theoretical merits of this interpretation,[15] I think it is better for present purposes to view these criteria of legitimacy as *operational* or practical guides to evaluating the legitimacy of legislation. Such a multifaceted analysis of legal legitimacy is required to cope with the errors in judgment and the willful deception that results from the distinct problems of knowledge and interest.[16] The "problem of knowledge" here refers to the fallible nature of our assessments of legitimacy (assuming the good faith of those rendering judgment). The "problem of interest" here refers to the willingness of human actors to argue for or against the binding nature of legislation, not on the basis of what they think in good faith is just, but on the basis of how they perceive it will affect their self-interest.

Because our assessment of substantive justice is susceptible to error

13. Aquinas, *supra* note 1, at 233 (emphasis added). Since I am not presenting particular conceptions of these criteria, we may consider "equality of burdens" to be a candidate for a formal characteristic of a just law, rather than as synonymous with formal justice.

14. *Id.* (emphasis added).

15. For an appraisal of the theoretical relation between means and ends, see L. FULLER, *Means and Ends*, in PRINCIPLES OF SOCIAL ORDER 47 (K. Winston ed. 1980).

16. Elsewhere I describe at greater length the pervasive social problems of knowledge, interest, and power. *See* Barnett, *Foreword: Can Justice and the Rule of Law be Reconciled?* 11 HARV. J.L. & PUB. POL'Y 567 (1988).

and willful deception and because such error and deception is not always directly detectable, an assessment of the end of legislation, while necessary, is not sufficient to justify a conclusion that legislation is in fact legitimate or just. A functionally independent evaluation of means—together with an assessment of jurisdiction—is also needed to support our substantive assessment before we may be confident that a legislative act is in fact just or legitimate. In practice, only if legislation passes all three standards of evaluation may we safely conclude that it is entitled to a presumption of legitimacy.

In this respect, each of these three criteria of legal legitimacy or justice *is* redundant in the same sense that we say that back-up safety mechanisms on airplanes are "redundant." That is, to avoid a crash when one safety system fails (as we know it can), we rely on the others to pick up the slack. Analogously, to avoid error in assessing legal legitimacy when one mode of analysis fails (as we know it can), we rely on the other modes of analysis to pick up the slack. Operating redundantly within a mechanism of choice, each criterion is functionally "equal" to the others—in the sense that each criterion must reach the same result before we can be sure that such a result is correct.

How does evaluating the means employed by legislation complement a substantive assessment of its ends and enhance an assessment of its overall legitimacy or justice? One way of answering this question is to consider the commonly made criticism that believing that "the ends justify the means" is a bad thing. Sometimes this is a way of questioning whether, as an empirical matter, *this* means is actually conducive to *that* end, but there is more to this charge than the (important) question of "fit" between means and end.

The view that "the end does not justify the means" is also based on the idea that certain means have so proven their worth in serving good ends that we have come to think of them as "good" in themselves; that we should not lightly discard these means in pursuit of some seemingly desirable end. Or conversely, certain means are so conducive to evil ends that we judge them to be evil as well—even where they appear to be conducive to an end that we think is good. A person who believes that "the ends justify the means" is one who is willing to use one of these evil means in pursuit of what may be desirable ends. Such a person is criticized on the grounds that, although only an end can ever justify a means, we are constrained in pursuit of ends by those means that are themselves "good"—or at least not evil.

In short, a *good* end cannot justify the use of a *bad* means, even

instrumentally. And is this not Aquinas' point: that to be legitimate or just, a law must pass not only substantive scrutiny but also formal or means scrutiny; that, even if means are thought of as instrumental to (good) ends, as an operational matter, we cannot be content to rely solely upon a substantive analysis of ends? For to do so may very well lead us to ignore the folly of using certain evil means to accomplish noble ends.

C. *Means Scrutiny and the Rule of Law*

To put the matter in jurisprudential terms, suppose that the "rule of law" or *formal* justice corresponds to those legal means or forms that have proven their worth over the centuries. Lon Fuller referred to this normative dimension of law as the internal or inner morality of law,[17] and later as "the morality that makes law possible."[18] He described "eight ways to fail to make law" that suggest eight formal or procedural characteristics of valid law:

> [T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his actions by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[19]

If these criteria of "formal" (or procedural) justice correspond to what has been called the rule of law, while "substantive" justice corresponds to those ends of law that are morally justified—what Fuller called the external morality of law[20]—then, *at the level of legal decision making* (as opposed to moral theory), neither of these values is necessarily superior to the other. Given the fallibility of real world assessments of legitimacy, neither a formal nor a substantive analysis of legitimacy is adequate to ensure the actual legitimacy of legislation. Substantive justice and the formal constraints of the rule of law are functionally equal to

17. Fuller, *supra* note 9, at 645.
18. L. FULLER, *supra* note 11, at 33-94.
19. *Id.* at 38-39.
20. *Id.* at 96.

each other. Both criteria must be consulted so that each may help to correct the other.[21]

It would be "formalism" (in a pejorative sense) to discard the justice of ends entirely and to pursue the rule of law exclusively. However, it is not formalism to acknowledge the propriety of formal means and their ability to constrain our pursuit of ends. On the other hand, it would be "instrumentalism" (in a pejorative sense) to view the rule of law as solely a means to just ends, the former to be discarded whenever it conflicts with the latter. However, it is not instrumentalism to acknowledge how the ends of justice operate to influence the operation of the rule of law.

On this view, the legitimacy of any governmental act (including an act of legislation) that violates the procedural strictures of the rule of law is suspect; the legitimacy of any governmental act that violates canons of justice is suspect; and the legitimacy of any act that exceeds the jurisdiction of its maker is suspect. Only a governmental act that conforms to all three criteria of legitimacy can be presumed legitimate.

For example, suppose that police officers conduct a search of a suspect's apartment and obtain vital evidence—bloody sheets and clothes—reliably indicating that the suspect is guilty of murder. For this reason, such evidence would ordinarily be admissible in a criminal trial of the suspect. Suppose also that the search was unlawfully conducted and that the legal system has an "exclusionary rule" requiring that, to be admissible at trial, evidence be obtained by appropriate means. Although the evidence serves the legitimate end of establishing the guilt of a murderer (it is both relevant and reliable), because it was obtained by procedurally flawed means, it is deemed by this analysis to be illegitimate and therefore inadmissible. Conversely, evidence that is obtained by legal means, but is either irrelevant or unreliable, is substantively defective and also inadmissible. Requiring a convergence of both means and ends before judging evidence to be legitimate and admissible entails that a deficiency in either factor will result in a judgment that the evidence is illegitimate and inadmissible.

D. Obtaining Convergence Among Criteria of Legitimacy

I have suggested that the three criteria of legitimacy may operate to complement rather than contradict one another; that each criterion oper-

21. Explaining how certain concepts of justice, the rule of law, and jurisdictional restrictions on lawmaking are each needed to reinforce one another would take me far beyond the bounds of this Foreword. I begin this undertaking in Barnett, *supra* note 16. The views I express there and here on these topics are part of a larger work in progress and should be considered tentative.

ates as a check on the others. If so, then the assessment of all criteria must converge before legislation may be judged legitimate. Requiring convergence means that a conflict among criteria is not a contradiction in the system. For, as Aquinas argues, a law must be substantively, formally, and jurisdictionally justified to be just or legitimate (and therefore binding in conscience). Presumably a law is unjust that does not satisfy all three of these requirements, although Aquinas softens this rather rigorous requirement with the prudential admonition to obey even a defective law if disobedience would create more harm than good.

Even so qualified, a requirement that all three criteria of legitimacy converge on the same result may seem too stringent a requirement. For example, many people chafe when the operation of the exclusionary rule obstructs the conviction of the guilty. Yet, given the way such analysis is conducted, an apparent lack of convergence does not necessarily result in a conclusion that legitimacy is absent. For we know from experience that even our best conceptions of formal, substantive, and jurisdictional justice may be in error. An apparent conflict among criteria may at least sometimes be resolved by shifting the discussion from how we apply formal and substantive precepts of legitimacy to the facts of a particular case, to a discussion of the merits of a evaluative precepts themselves. Convergence between means and ends may then be obtained by modifying our conception of one or more of the criteria of legitimacy to more closely correspond to the common good.

With the exclusionary rule, the apparent lack of convergence between means—the illegal search—and ends—the conviction of the guilty—undermines the legitimacy and, therefore, the admissability of the evidence. We may, however, reconsider whether the "exclusionary rule" is actually conducive to the common good in this type of situation. Such an analysis might proceed as follows: Assume that the only significant way that the exclusionary rule contributes to the common good is by deterring police misconduct. Suppose that recurrent conflicts between means and ends induces someone to study the likely deterrent effects of alternative remedies for police misconduct. Suppose that such a comparative analysis reveals that requiring the police department to compensate the victim of its employees' misconduct (while admitting at trial the illegally seized evidence) will deter misconduct at least as well and perhaps even better than exclusion.[22]

We might then resolve this conflict between criteria of legitimacy

22. *See* Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983).

and achieve convergence by adjusting our particular conception of one of the criteria: viz., that illegal conduct can effectively be deterred by a remedy other than exclusion and therefore that there is no genuine conflict between preventing illegal police conduct and admitting relevant and reliable evidence in a trial. On the other hand, had the means employed by the police undermined the reliability of the evidence obtained, as in the case of a coerced confession, such evidence would still be illegitimate and inadmissible. Even if some coerced confessions appear to be truthful and accurate, the coercion is likely to taint the reliability of such evidence in ways that cannot be effectively discerned directly.

Conversely, just as convergence may be achieved by altering the means to better fit the ends, we may sometimes reconsider our ends in light of the means such ends require. Suppose, for example, that we require police to enforce laws against consensual adult behavior where there is no complaining witness—drug laws, for example—because we deem the deterrence or punishment of such behavior to be a desirable end. Suppose, however, that such an end simply cannot be accomplished without engaging in wholesale "unreasonable" and therefore illegal searches. The seriousness of this conflict between means and ends may call into question the legitimacy of the ends themselves.

Of course, this challenge to the substance of the law is not definitive. In the previous example we would not be moved to reexamine the law prohibiting murder, even though such a crime also lacks a complaining witness. However, the pervasive need for intrusive police tactics might well provoke a more careful examination of the underlying end of such laws. Such scrutiny may reveal pertinent distinctions between such consensual conduct and murder that lead us to conclude, not only that the ends do not justify the means, but that the ends themselves are not justified. In short, an analysis of means may well precipitate a successful challenge to the justice of the ends of such laws.[23]

This last way of obtaining convergence between means and ends is frequently overlooked or rejected. Many are unwilling to reconsider the substantive merits of their favored enactments even when implementation violates a formal or procedural requirement. Instead, they often disparage such formal strictures as "technicalities" or formalisms when they become inconvenient. Here is where someone may be accused of letting an "end justify the means" rather than reconsidering the real justice of the end in question in light of the fact that it apparently cannot be ac-

23. *See* Barnett, *Curing the Drug-Law Addiction: The Harmful Side Effects of Legal Prohibition*, in DEALING WITH DRUGS 73 (R. Hamowy ed. 1987).

complished without utilizing means that are known to be undesirable. By the same token, some will refuse to reevaluate their favored means—the exclusionary rule for violations of the fourth amendment comes to mind—no matter how seriously these means may undercut the common good.

These examples suggest that when accepted means and ends conflict we have two options: (1) we may stick with our means and ends and conclude that a legislative or executive act that requires a violation of one or the other is illegitimate and not binding in conscience; or (2) we may obtain convergence by reconsidering our view of means or ends or both. The mere fact of a conflict between accepted conceptions of means and ends does not tell us which of the two, if either, needs reformation. Such a decision is a matter of judgment. Still, a persistent or pervasive conflict between two or more criteria of legitimacy is a significant warning that something may be amiss and perhaps that our particular conceptions of substantive, formal, or jurisdictional legitimacy should be seriously reconsidered.

II. LEGAL LEGITIMACY AND THE CONSTITUTIONAL ENTERPRISE

A. Legitimacy and the Problems of Knowledge and Interest

One function of a constitution is to establish and regulate an enterprise that is supposed to produce laws that can bind the conscience of the citizenry. Such a vision invites us to inquire as to whether actual constitutional processes accomplish this objective. Suppose that Aquinas is right when he claims that, to be binding in conscience, a law must be substantively, formally, and jurisdictionally just. Do the processes established by the United States Constitution justify a presumption that enacted legislation is legitimate?

Assessing how a constitution effectively imparts legitimacy on legislation is, at least in part, a practical problem. We must decide whether actual enactments produced by an actual constitutional process are entitled to a presumption that they conform with substantive, formal, and jurisdictional justice and therefore are binding in conscience. In practice, for a constitutional process to impart legitimacy to legal enactments, it must successfully confront the twin problems of knowledge and interest discussed earlier.[24]

The problem of knowledge in this context refers to the ability of constitutional processes—assuming the good faith of its participants—to

24. *See supra* note 16 and accompanying text.

render accurate assessments of the proper end and form of legislation, as well as the jurisdiction of the lawmaker. Do the processes regulated by the United States Constitution give us any confidence that each of these assessments have been accurately made? Do we have *enough* confidence to conclude that enacted legislation that emerges from this process is entitled to a presumption of legitimacy?

The problem of interest in this context refers to the willingness of human actors in the constitutional process—assuming that they know what is just—to act on the basis of their knowledge of justice. It is not enough that one knows the just course; one must still be willing and able to act justly. We know from both experience and public choice theory that legal processes administered by human beings are subject to corruption and capture.[25] Do the processes regulated by the United States Constitution give us any confidence that a particular enactment is not the product of corruption or capture, but is rather the product of knowledge? Do we have *enough* confidence to presume that enacted legislation that emerges from this process is legitimate?

B. Legitimacy and Constitutionality

The American constitutional system incorporates at least three strategies to deal with the problems of knowledge and interest: (1) popular election of the legislative branch and the executive; (2) a structure of divided powers; and (3) judicial review. The idea that popular elections and divided powers effectively avoid legislation resulting from corruption or capture is still voiced, at least on sunny days. It is said that the people would not consent to corrupt or captured legislators for long, and that it is much more difficult to corrupt or capture a number of distinct branches of government than just one. (Of course, popular elections do little to assure us that the lawmakers have not been captured by a majority faction.)

It is, however, far from clear how popular elections and divided powers standing alone justify a presumption that enacted legislation is a result of a knowledgeable assessment of its substantive, formal, and jurisdictional legitimacy. The question is not whether it is possible for processes organized in this fashion to produce knowledgeable action, but whether the probability that an action is knowledgeable is sufficiently high to support a presumption that resulting legislation is likely to con-

25. I have discussed three such concerns elsewhere: the corruption effect, the capture effect, and the halo effect. *See* Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, CRIM. JUST. ETHICS, Summer/Fall 1985, at 50, 50-56.

tribute to the common good. Or—as modern public choice theorists maintain—is there better reason to presume that resulting legislation is likely to be a successful attempt at "rent-seeking" or private enrichment by public means that is inimical to the common good? This is a question I shall not address here.

Instead, I want to explore how, if at all, judicial review makes it either more likely that legislation is knowledgeable or less likely that it is the product of corruption or capture. For the American constitutional system does not rely entirely on popular election of decision-makers or division of powers. Unlike the President who may veto legislation for any reason or no reason, the judiciary is not empowered to reject legislation simply because it does not like it. The framers rejected the idea of a "council of revision." The judiciary may reject legislation only when it can support a conclusion that such legislation is *unconstitutional.*

Judicial review of constitutionality is sometimes said to elevate the opinion of the judiciary above that of the other branches, but this characterization is seriously misleading. The judiciary's assessment that a law is *un*constitutional is in no way privileged. If Congress decides *not* to enact legislation because in its opinion it is *un*constitutional, no other branch may contravene its judgment. Only if Congress decides a measure *is* constitutional will the President have a say in the matter. If the President vetoes legislation because it is *un*constitutional, only a supermajority in Congress may contravene his or her judgment, not the courts. Legislation that never reaches the judiciary will not become law notwithstanding that the judiciary might have concluded that such legislation *is* constitutional. In this manner, the judgment of the other branches that legislation is unconstitutional prevails without judicial input. Only if the legislative and executive branches concur that legislation is constitutional will the judiciary's opinion matter.[26]

The fact that legislation is stricken as unconstitutional when the judiciary disagrees with the executive and legislative branches is simply an expression of the equality of the judiciary.[27] It is also an example of a

26. The same is true at the state level. Legislation that is not enacted because it is believed to be unconstitutional cannot be reviewed by the state or federal judiciary. Only if a state legislature decides that legislation is constitutional will the federal judiciary have an opportunity to review the matter.

27. There remains a sense in which a judicial judgment of unconstitutionality is privileged. While a congressional assessment that a measure is unconstitutional may be overridden by a simple majority of a future congress, and a presidential veto on this ground may be overridden by two-thirds vote of the Congress, a judicial assessment that a measure is unconstitutional may be overturned only by a constitutional amendment. There are three responses to this observation. First, a future Court may overturn a previous judgment of unconstitutionality by a simple majority of justices. Second, since a legislative decision and a presidential veto need not be confined to judgments

requirement of convergence. Just as Aquinas maintained that a judgment of legislative legitimacy requires a convergence of substantive, formal, and jurisdictional analyses, a judgment of constitutionality—or "constitutional legitimacy"—requires in most cases a convergence of legislative, executive, and judicial judgments on this question.

Since it is possible to err by finding a just law to be illegitimate or by finding an unjust law to be legitimate, requiring the convergence of Aquinas' tripartite assessment of legitimacy reflects a judgment that the latter is the more serious danger. Similarly, the requirement of convergence between various branches of government before finding legislation to be constitutionally legitimate reflects a judgment that, as between the error of striking down constitutional enactments and the error of enforcing unconstitutional enactments, the latter is the greater danger.

But what does a judgment of constitutional legitimacy entail, and how closely does it correspond to the criteria of legal legitimacy? The United States Constitution might have incorporated one, two, or all three of Aquinas' criteria of legal legitimacy. We must ask whether incorporating in a constitution one or more of these requirements is sufficient to impart a presumption of legitimacy on the laws made under its auspices so that these laws may be presumed to be binding in conscience on the citizenry.

Moreover, if the purpose of a constitutional enterprise is to produce legitimate law, and if a particular requirement of legal legitimacy is shown to be normatively attractive—that is, essential to legal legitimacy—then, when a constitution neither expressly specifies nor excludes such a requirement we should assume its existence. For doing so would enhance the legitimacy of legislation found to be constitutional and would in this way contribute favorably to the constitutional enterprise. Such an interpretive strategy would serve to provide a closer fit between constitutional and legal legitimacy.

C. Tripartite Legitimacy and the United States Constitution

Let us begin by supposing that a constitution specified that the legitimacy of legislation depends entirely on the will of a designated "legislature," and placed no limits on the exercise of the legislature's jurisdiction. "Jurisdiction" here would mean that the designated legisla-

that enactments are unconstitutional but may also be based on political and policy assessments, it is understandable that it is easier to override these decisions. Third, the amendment process does provide for a reversal of a judicial judgment that truly thwarts the overwhelming will of the people. It is difficult to contemplate a less stringent process that could effectively protect the rights of minorities from majoritarian abuses.

ture and no other was empowered to issue enforceable directives. An enactment would then be constitutional provided only that it can be recognized as an enactment of the group designated as the legislature. So long as the "right" persons (here a legislature) are issuing a directive, then such a directive would be "constitutional" regardless of its form or content; the legislative branch would have the exclusive and plenary power to issue any directive it wished.

Would such a constitutional scheme impart any genuine legitimacy on legislation? Is there any reason to presume that the enactments of the demarcated body are substantively and formally just? Would such a grant of lawmaking jurisdiction be just? Answers to these questions depend in part upon the nature of the body to whom legislative power had been delegated.

The United States Constitution, for example, rests the jurisdiction for lawmaking in a popularly elected Congress and an elected President. As was suggested above, the requirement that lawmakers be popularly elected is seen as reducing the likelihood that enacted legislation is the result of corruption or capture. If this perception is accurate, then the mere fact that legislation issued from a popularly elected body is some reason (however strong or weak) to think that it is just. Moreover, by requiring a convergence of judgment between a House, a Senate, and a President, each elected by different constituencies, the United States Constitution appears to reduce still further the likelihood that legislation is the result of corruption or capture and thereby to enhance the likelihood that enacted legislation is legitimate.

Let us assume that the bare fact that legislation is produced by popularly elected lawmakers enhances to some degree the likelihood that such legislation is legitimate. We need not decide whether a grant of unlimited legislative jurisdiction to a number of popularly elected bodies is sufficient to create a presumption of legitimacy in enacted legislation for—at least at the federal level—this was not the actual jurisdictional scheme embodied in the United States Constitution. Congress is granted the power to make laws, but only for certain enumerated ends specified in article I, section 8—for example, to "raise and support Armies." In this way, the jurisdiction of the legislative branch is substantively limited to certain specified ends.

A scheme of substantively limited powers could enhance the legitimacy of legislation provided (1) that the ends enumerated are actually conducive to the common good and (2) that there is some effective means of ensuring a fit between particular legislation and the enumerated ends.

Few would deny that the United States Constitution incorporates a jurisdictional dimension of constitutional legitimacy that imposes a substantive limitations on the jurisdiction of the lawmakers. There is, then, an argument for judicial review of legislation to ensure compliance with these limitations, lest Congress be the judge in its own case. As Madison explained, this long-standing principle reflects the problem of interest:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?[28]

In light of the problems of knowledge and interest, it would seem that Congress should have to do more than merely assert that it is in compliance with this or any other constitutional requirement.

The Constitution did not stop with jurisdictional constraints on lawmaking. It also restricts Congress to use only certain means in pursuit of its delegated powers. Among the restrictions on means provided by article I, section 9 are prohibitions of bills of attainder and ex post facto laws. Similarly the fifth amendment prohibits the taking of private property for public use without just compensation. Even legislation that is necessary and proper for the accomplishment of a delegated end is unconstitutional if it violates a constitutional restriction on means.

Appropriate side-constraints on permissible means better assures that resulting legislation is legitimate than a sole reliance on a scheme of

28. THE FEDERALIST No. 10, at 54 (J. Madison) (H.C. Lodge ed. 1888). Madison was simply extending to the legislative branch the argument made by John Locke against the fiat of the absolute monarch:

> I easily grant, that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be Judges in their own Case, since 'tis easily to be imagined, that he who was so unjust as to do his Brother an Injury, will scarce be so just as to condemn himself for it: But I shall desire those who make this Objection, to remember that *Absolute Monarchs* are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature, where one Man commanding a multitude, has the Liberty to be Judge in his own Case, and may do to all his Subjects whatever he pleases, without the least liberty to any one to question or controle those who Execute his Pleasure? And in whatsoever he doth, whether led by Reason, Mistake or Passion, must be submitted to? Much better it is in the State of Nature wherein Men are not bound to submit to the unjust will of another: And if he that judges, judges amiss in his own, or any other Case, he is answerable for it to the rest of Mankind.

J. LOCKE, TWO TREATISES OF GOVERNMENT 316-17 (P. Laslett rev. ed. 1963) (3d ed. 1698) (emphasis in original).

substantively limited powers, provided, once again, that (1) the side-constraints on legitimate means are actually conducive to the common good and (2) that in practice there is some effective means of ensuring a fit between particular legislation and these side-constraints. This formal dimension of constitutional legitimacy enhances the judiciary's claim to review legislation on these grounds, again, lest Congress be the judge in its own case.

In sum, if (a) the jurisdictional and formal dimension of constitutionality incorporated in the United States Constitution are conducive to the common good, and (b) actual constitutional processes—including judicial review—give us some confidence that enacted legislation complies with these requirements of jurisdictional and formal justice, then the Constitution would impart some degree of legitimacy on legislation enacted under its auspices. But did the Constitution stop with jurisdictional and formal constraints on lawmaking?

A constitution could also incorporate the first of Aquinas' three requirements of legitimacy. A judge would then be authorized to assess whether the substance of a particular legislative act was really "ordered to the common good." That is, even when legislation was in compliance with constitutional restrictions on jurisdiction and means, it might still be unconstitutional for reasons concerning its substance. Did the Constitution of the United States incorporate a substantive dimension of legitimacy?

We have already seen that, insofar as the jurisdiction of the lawmaking branch was limited to certain substantive areas, the Constitution did incorporate a substantive dimension of legitimacy. Congress was empowered to pass only those laws that were necessary and proper to the furtherance of constitutionally delegated ends. A claim that the judiciary is empowered to meaningfully scrutinize whether legislation is truly *necessary* and *proper* for accomplishing a delegated end is, however, quite controversial.

Perhaps such scrutiny is controversial because it appears to authorize an entirely independent judicial evaluation of whether a law was good "policy"—an evaluation of the same sort as the legislative and executive branches may engage in. Such a power seems to resemble the "council of revision" idea that the framers rejected. On the other hand, as with jurisdictional and formal constraints on lawmaking, for a constitutional process to enhance the legitimacy of resulting legislation in a clash between Congress and citizen, the Congress should not be a judge in its own case.

Whatever the merits of this dispute, there is still another way that

questions of substantive legitimacy could figure in an assessment of constitutionality. A law that was within the substantive jurisdiction of Congress and employed proper formal means might still be unconstitutional if it violates the "rights of the people." Such a constraint assumes, of course, that "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights),"[29] an assumption that is in harmony with the declaration that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.[30]

Such a declaration of rights need not be religiously based. Instead it may rest in part on a view that the respect for certain individual rights is a prerequisite for achieving the common good;[31] that no matter how desirable its appearance, a measure that violated a proper conception of these rights would invariably detract from the common good; that a respect for a proper conception of individual rights is the only way to achieve in practice a good that is truly *common* to all; that enforcing a proper conception of individual rights was within the competence of and particularly appropriate for the judicial branch; and, therefore, that judicial review on this ground would enhance the substantive legitimacy of resulting legislation.

In sum, adherence to a proper conception of individual rights may be viewed as one part of a multifaceted strategy to address the knowledge problem concerning what enactments actually contribute to the common good. And by establishing a baseline against which legislation can be assessed, a proper conception of individual rights also addresses the problem of interest by helping to detect the existence of corruption and capture.

The claim that a conception of rights is a way of determining whether acts are conducive to the common good may suggest that such

29. R. NOZICK, ANARCHY, STATE, AND UTOPIA ix (1974). Of course, the idea of using a rights analysis to evaluate the substance of human laws is not to be found in the natural law tradition of Aquinas, but develops as part of the natural rights tradition associated with such writers as John Locke.

30. The Declaration of Independence para. 2 (U.S. 1776).

31. There are two ways to interpret this claim. One may take a "hard" rights stance and say that any infringement of a right indicates that a measure violates the common good and is illegitimate. Or one may take a "soft" rights stance that "weighs" the infringement of a right against the benefits to be gained by a particular measure. The choice between these stances has both a normative and a descriptive dimension. As a normative matter, which stance is the better of the two? As a descriptive matter, which stance was adopted by the Constitution? Although I do not wish to express an opinion on these questions here, it seems clear that the "soft" rights position has long been adopted by the Supreme Court.

rights are means, rather than ends. While there is some basis for this observation,[32] it fails adequately to distinguish between social-philosophical discourse and constitutional-legal discourse.[33] What may be a "means" in the former may be an "end" in the latter. In the realm of social-philosophical discourse, individual rights may be an essential means to the end of achieving the common good—which may be conceived as providing the necessary conditions for individuals to live and pursue happiness in peaceful society with each other. In contrast, in the realm of constitutional-legal discourse, the protection of individual rights that preceded the formation of government may be an end of the constitutional enterprise, while the formal safeguards imposed on governmental powers are an essential means to this end.

If the protection of a proper conception of individual rights is part of what is meant by substantive legitimacy, then there is strong support for the view that the United States Constitution incorporates such a substantive dimension. For the Bill of Rights was an affirmative extension of constitutional limitations—or "power constraints"[34]—beyond those that are purely jurisdictional or formal. What sets the first amendment apart from the others is precisely its "substantive" dimension—insofar as it declares rights of speech, religion, and assembly that constrain the exercise of governmental powers in ways that are neither jurisdictional, nor procedural or formal.

Few would deny that the rights enumerated in the Constitution constrain the exercise of enumerated powers. Few would deny that legislation violating expressly stipulated rights may be unconstitutional and that the judicial branch is authorized to review legislation to see if it violates such rights.[35] If the people do indeed have rights of free speech, free exercise of religion, and peaceable assembly, and if respect for these rights leads on balance to attaining the common good, then the legiti-

32. Nozick, for example, refers to rights as "side-constraints" implying that they constrain means, not ends. *See* R. NOZICK, *supra* note 29, at 28-33; *see also* S. BARBER, ON WHAT THE CONSTITUTION MEANS 113 (1984) ("Constitutional rights . . . remove certain means from those means available to the government for pursuing its authorized ends.").

33. Moreover, it tends to underestimate the interrelation between means and ends discussed above. *See supra* text accompanying notes 13-23; L. FULLER, *supra* note 15; *cf.* S. BARBER, *supra* note 32, at 110-15 (discussing the relationship between means and ends on constitutional analysis).

34. I distinguish between the "rights-powers" and "power-constraint" conceptions of constitutional rights elsewhere. *See* R. Barnett, Reconceiving the Ninth Amendment, 74 Cornell Law Review (forthcoming).

35. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 112 (1959) ("Congress . . . must exercise its powers subject to the . . . relevant limitations of the Bill of Rights."). Dennis v. United States, 341 U.S. 494, 501 (1951) ("The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.").

macy of legislation would be enhanced if it can survive meaningful scrutiny on these grounds. But did the Constitution stop there?

III. LEGAL LEGITIMACY AND THE NINTH AMENDMENT

A. The Relevance of the Ninth Amendment

Did the United States Constitution stop at the protection of expressly enumerated rights? Taken literally, the ninth amendment appears to be relevant to this question. By insisting that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," it appears to acknowledge that the rights specified in the text do not exhaust the substantive or the procedural dimensions of constitutional legitimacy; that the powers of the legislature are constrained by other unnamed rights that the people had prior to the Constitution and have retained; that the substantive review authorized by the Constitution is not limited to those rights that are expressly enumerated in the text.

To be sure, the view that the unenumerated rights have the same or a similar "power-constraints" function as enumerated rights is not the only possible interpretation of the ninth amendment.[36] The mere fact that alternative interpretations of the words of the ninth amendment may be conceived, however, does not justify ignoring the ninth amendment or favoring an interpretation that has the same effect. The real question is whether the power-constraints conception is the *best* of the available interpretations of the ninth amendment.

Of course, this depends in part upon whether, as a descriptive matter, a "power-constraints" construction of the ninth amendment would conflict with our conception of other aspects of the constitutional enterprise.[37] But, assuming that such a construction of the ninth amendment is not precluded by the text, determining the best interpretation of the ninth amendment also depends on which yields the best interpretation of the Constitution as a whole. Such an inquiry unavoidably involves the normative dimension of the constitutional enterprise. Would a constitutional process that was limited to substantive review of only expressly

36. *See, e.g.*, Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 178 (1988) (contending that the retained rights may not be justiciable); McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 90-91 (1988) (same); 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, 242-43 (1988) (summarizing and criticizing the view that unenumerated rights are nonjusticiable and other alternative interpretations). All three articles appear in this symposium issue.

37. Elsewhere I argue that there is no unavoidable conflict. *See* Barnett, *supra* note 34.

enumerated rights be more or less likely to result in legislation that satisfies the substantive criteria of legitimacy than a process that also considered unenumerated rights?

B. The Ninth Amendment and "Easy" Cases of Unenumerated Rights

In considering the merits of such an "open-ended" provision as the ninth amendment, there is a natural tendency to posit its import for cases perceived as "hard." Many are quick to ask what the ninth amendment has to say about abortion, sodomy, the death penalty, etc. But hard cases make bad theory, particularly when theory begins with hard cases.

As was suggested in Part I, we obtain moral knowledge by consulting a variety of different criteria. So, for instance, we compare an analysis of ends or results with an analysis of means as well as with an analysis of jurisdiction. Easy cases are easy because our analysis and intuitions about ends, means, and jurisdiction all converge on the same result. Some hard cases are hard because we are either unsure what the proper result is or cannot confidently explain our intuitions about what we believe to be the proper result. With these kinds of hard cases we are deprived of one source of moral knowledge: the rational analysis of ends. Hard cases are also those cases where our different criteria of evaluation point in conflicting directions.

For these reasons it is more fruitful to begin legal theory with a consideration of easy cases. For example, first amendment scholars are well aware of the hard cases that can arise under the enumerated rights contained in this provision. But our basic intuitions and theories about the first amendment are shaped by the easy cases we think this provision undoubtedly resolves. Once we decide which theory best explains the easy cases where our intuitions are firmer, we can then use the best theory at our disposal to guide us where our intuitions are in doubt.[38]

The place to look for the "easy cases" of unenumerated rights are those unenumerated rights that have already been recognized by the courts, albeit under varying constitutional rubrics. One authority lists at least thirteen unenumerated rights that the Supreme Court has found to be fundamental:[39]

38. Elsewhere I have explicitly applied this method of analysis to the private law subjects of contract and agency. *See* Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CALIF. L. REV. 1969 (1988).

39. The following list and citations are taken from W. MURPHY, J. FLEMING, & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION 1083-84 (1986). I am not suggesting that every one of these acknowledged-but-unenumerated rights is easy, but that this is a good place to look for those that are.

(1) The right to retain American citizenship, despite even criminal activities, until explicitly and voluntarily renouncing it;[40]
(2) The right to receive equal protection not only from the states but also from the federal government;[41]
(3) The right to vote, subject only to reasonable restrictions to prevent fraud, and to cast a ballot equal in weight to those of other citizens;[42]
(4) The right to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime;[43]
(5) The right to use the federal courts and other governmental institutions and to urge others to use these processes to protect their interests;[44]
(6) The right to associate with others;[45]
(7) The right to enjoy a zone of privacy;[46]
(8) The right to travel within the United States;[47]
(9) The right to marry or not to marry;[48]
(10) The right to make one's own choice about having children; [49]
(11) The right to educate one's children as long as one meets certain minimum standards set by the state;[50]
(12) The right to choose and follow a profession;[51]
(13) The right to attend and report on criminal trials.[52]

In characterizing any "acknowledged-but-unenumerated" right as "easy," we must distinguish between the *existence* of a right and a controversial *application*. Clearly the right to enjoy a "zone of privacy" is controversial in some quarters when it is used to restrict certain kinds of "morals" legislation. The right to make one's own choice about having children is highly controversial when it is used to restrict legislative prohibitions on abortion. Yet even with these two examples, there is probably a broad consensus that a right of privacy and a right to choose whether or not to have children is entitled to presumptive legitimacy and

40. Afroyim v. Rusk, 387 U.S. 253 (1967).
41. Bolling v. Sharpe, 347 U.S. 497 (1954).
42. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).
43. Jackson v. Virginia, 443 U.S. 307 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); Estelle v. Williams, 425 U.S. 501 (1976); In re Winship, 397 U.S. 358 (1970).
44. NAACP v. Button, 371 U.S. 415 (1963); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
45. NAACP v. Alabama, 357 U.S. 449 (1958); De Jonge v. Oregon, 299 U.S. 353 (1937).
46. Griswold v. Connecticut, 381 U.S. 479 (1965).
47. Shapiro v. Thompson, 394 U.S. 618 (1969); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).
48. Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).
49. Carey v. Population Servs., 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).
50. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
51. Gibson v. Berryhill, 411 U.S. 564 (1973); Meyer v. Nebraska, 262 U.S. 390 (1923); Allgeyer v. Louisiana, 165 U.S. 578 (1897).
52. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). In this case, the plurality opinion rested, in part, upon the ninth amendment. *See id.* at 579 n.15.

that legislation impinging on the exercise of these rights requires justification. The controversies that have arisen here typically surround the application of these generally acknowledged-but-unenumerated rights to particular sets of facts.

Consider two other examples of acknowledged-but-unenumerated rights: the right to travel and the right to the equal protection of the laws against the federal government. The right to travel within the United States has long been recognized as a right retained by the people, although it is mentioned nowhere in the Constitution.[53] Few would contest that such an unenumerated right could and should be used, for example, to subject federal "pass laws" to scathing scrutiny. In *Bolling v. Sharpe*,[54] the companion case to *Brown v. Board of Education*,[55] the Court held that an individual has a right to the equal protection of the laws against the federal as well as state governments, notwithstanding the fact that the equal protection clause of the fourteenth amendment applies only to the states. Few would contest that such an unenumerated right should be used to prevent the segregation of public schools in the District of Columbia.

The ninth amendment strongly suggests that rights such as these need not be enumerated *in* the Constitution to be protected by the enterprise established and regulated *by* the Constitution.

Were judges to ignore these and other acknowledged-but-unenumerated rights when evaluating the constitutionality of legislation,[56] the constitutional process would not be as likely to produce legitimate legislation. Without considering such rights, the fact that such legislation passed judicial scrutiny would give us little, if any, reason to be confident that legislation had not infringed upon them. A finding of constitutionality would simply be unable to justify a presumption that such legislation had not violated these unenumerated rights.

Some may argue that because cases of acknowledged-but-unenumerated rights have already received protection through other interpretive devices there is little need for an invigorated ninth amendment. However, even when unenumerated rights are widely acknowledged, the judicial protection of these rights is often controversial simply because such rights are not included in the "enumeration in the Constitution, of cer-

53. *See* cases cited *supra* note 47. Such a right was enumerated in the Articles of Confederation. *See* Articles of Confederation, art. IV.

54. 347 U.S. 497 (1954).

55. 347 U.S. 483 (1954).

56. Or executive actions such as the internment of United States citizens of Japanese descent during World War II. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

tain rights."[57] Much of whatever doubts are raised by cases of acknowledged-but-unenumerated rights does not concern whether such rights exist, but rather the legitimacy of enforcing even widely acknowledged rights that are not expressed in the Constitution. Interpreting the ninth amendment as extending constitutional status to the unenumerated rights retained by the people would go a long way towards legitimating (now I am using the modern sense of the term) federal judicial scrutiny of congressional and executive acts and—together with the fourteenth amendment—the acts of state governments that may have violated an unenumerated right. This, in turn, would serve to impart legitimacy (now I am using the traditional sense of the term) on federal and state laws that survive such judicial scrutiny.

Moreover, as the list given above demonstrates, the judicial protection of unenumerated rights is a very long-standing practice. Few would abandon all the rights on this list. However, while many of these are easy cases for judicial review under a power-constraint conception of the ninth (or fourteenth) amendment, cases of acknowledged-but-unenumerated rights become very hard cases indeed for judicial philosophies that, notwithstanding the ninth amendment, require every judicially protected right be grounded in a specific provision of the text. At times the effort to shoe-horn acknowledged-but-unenumerated rights into one expressed provision or another is reminiscent of Ptolemaic attempts to explain the retrograde movement of Venus.[58] Of course such attempts do "work," but in ways that serve to embarrass and betray the underlying weakness of the dominant approach and suggest the need for an alternative that can handle such "anomalies" in a more fundamental, elegant, and honest fashion.

C. The Value of the Ninth Amendment for "Hard" Cases

Some fear a functional role for the ninth amendment because they project its impact upon "hard" cases. Much depends, however, on what one thinks makes a hard case hard. In a jurisprudential climate where the only rights deemed to be "real" are those that a court has recognized,

57. U.S. CONST. amend. IX.

58. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 68 (2d ed. 1970):

> [F]or the planets, Ptolemy's predictions were as good as Copernicus'. . . . Given a particular discrepancy, astronomers were invariably able to eliminate it by making some particular adjustment on Ptolemy's system of compounded circles. But as time went on, a man looking at the net result of the normal research effort of many astronomers could observe that astronomy's complexity was increasing far more rapidly than its accuracy and that a discrepancy corrected in one place was likely to show up in another.

(footnote omitted).

it is not unexpected that many will equate an unenumerated right with the result in a given case. According to this view, when a legal result is controversial, the unenumerated right is automatically controversial as well. For example, when the unenumerated "right to privacy" is defined as a woman's legal right to use contraceptives or to chose abortion, because these legal rights are controversial, a right to privacy must be controversial as well.

The background rights of the people, however, are reasons for legal results. They ought not be confused with the legal results or "legal rights" their application may yield. As I suggested in the previous section, some unenumerated rights are "easy" in the sense that they are readily acknowledged, although judicial enforcement of such rights is controversial if one believes that all rights must be textually specified. Similarly, a legal result or legal right can be controversial, although the existence of an underlying or background unenumerated right is accepted.

For our purposes, then, a case is "hard" not only when the existence of an unenumerated right is controversial, but also when protecting an acknowledged-but-unenumerated right leads to a result or legal right that is controversial. On the issues of abortion or capital punishment, for example, many disagree about the right legal outcome—although many would agree that persons have rights to privacy and against cruel and unusual punishments. To the extent that each side of such disputes views an unenumerated rights analysis to be congenial to its opponent, it will be very suspicious of granting the ninth amendment any role whatsoever in constitutional analysis.

Unless one is willing to claim that there are no such rights deserving of judicial protection—a claim that is undermined by the easy cases just discussed above—the bare fact that a particular application of an unenumerated right may lead to a controversial legal result need not undermine the legitimacy of protecting unenumerated rights. For, until judges examine an issue, it is difficult to know whether a controversy surrounds the existence of the unenumerated right, its application to the facts—that is, the result or legal right—or both.

Moreover, until we evaluate a judge's attempt to defend a legal result in an articulated opinion, it is difficult to know that either the underlying unenumerated right or its application to particular facts is *properly* controversial. After all, some cases create rather than settle controversies because their reasoning seems less than compelling to many thoughtful observers. How do we find this out until judges attempt to decide

such cases or "controversies"?[59] In short, in the effort to avoid controversial results, jurisdictional bars to considering claims based on unenumerated rights cut short the very processes that are needed to settle such controversies or avoid them altogether.

Even when an unenumerated right (as opposed to the legal result) is controversial at a particular moment in time, this may not always remain the case. Consider the example stressed by Sanford Levinson: chattel slavery.[60] The slavery example is useful, because although it was at one time a hard or controversial case (like the death penalty or abortion cases are today) both in terms of result and (in some quarters) also of underlying right, it is hard no longer. In hindsight, there is no one who would not place the right to be free from involuntary servitude (except as punishment for a crime) in the same category of "easy" cases as the right to travel or to the right to equal protection of federal laws that were discussed in the previous section. Before the thirteenth amendment, however, such a right could only be characterized as an unenumerated background right.

Nor can the right enumerated in the thirteenth amendment be viewed in exclusively jurisdictional terms. In two cases discussed by Professor Levinson,[61] *The Antelope*[62] and *Dred Scott v. Sanford*,[63] the Supreme Court of the United States had opportunities within its jurisdiction to take some action inimical to slavery, but declined to reach an anti-slavery result that would most certainly have been controversial. Still, this nineteenth-century controversy does not prevent us from now acknowledging what would have been right even prior to the enactment of the thirteenth amendment—and, at least in the case of Justice Marshall, what was known to be right at the time of the decision.[64] In hindsight, we know that the Court in the *Antelope* and *Dred Scott* cases was wrong and why.

59. In describing the scope of judicial power, article III uses the terms "cases" and "controversies" interchangeably.

60. *See* Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 148-54 (1988) (Professor Levinson's article appears in this symposium issue).

61. *Id.* at 150, 153.

62. 23 U.S. (10 Wheat.) 66 (1825).

63. 60 U.S. (19 How.) 393 (1856).

64. Marshall acknowledged that slavery was

> [c]ontrary to the law of nature. . . . That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.

23 U.S. (10 Wheat.) at 120. And the Attorney General understood this as well:

> These Africans are not "effects" or "merchandise." To say that they are so, is to beg the whole question in controversy.

Id. at 113.

Perhaps, given the jurisdictional limitation of the Bill of Rights (though this limitation is unexpressed in the text), the unenumerated rights referred to in the ninth amendment would not have provided a sufficient justification for federal interference with state laws supporting slavery. Perhaps article IV of the Constitution[65] did justify the Court's decision in *Prigg v. Pennsylvania*[66] that the Fugitive Slave Act of 1793 was constitutional. Without expressing a view on these issues, it seems clear to me that permitting judges to protect unenumerated rights does not guaranty a happy result in every hard case where unenumerated rights clash with expressed, but mistaken, provisions of the text.

Still, a judicial philosophy that was willing to completely ignore claims based on unenumerated rights—including the rights of those then held in bondage—did nothing to ensure that governmental actions within the proper scope of judicial review were legitimate. As it turns out, the decision in *The Antelope* that returned the slaves to their European masters was neither mandated by the text, nor binding in conscience, and the Court gave us little reason to think otherwise.

Of course, had the ninth amendment been used to support a decision against slavery in either *The Antelope* or the *Dred Scott* case, such a decision would certainly have been politically divisive. Indeed, many advocate judicial deference to legislative will in controversial cases on the grounds that the alternative course is divisive and deference is expedient. But this argument presupposes a knowledge of the truly expedient course that is open to question. After all, the path chosen by the Court in these two cases was hardly expedient in preventing the ultimate in socially divisive activities: a civil war. It is very difficult to say what the consequences of an anti-slavery decision—particularly an early one—would have been. Our knowledge of the expedient course of action may be no more certain than our knowledge of the right course of action.

I do not mean to suggest that judges are authorized simply to reach whatever result they have reason to think is substantively right. The legitimacy of a judicial decision also requires proper jurisdiction and the procedural protections of the rule of law. The example of slavery reveals, however, that an exclusive reliance on jurisdiction and formal due process, while ignoring substantive concerns, undermines the legitimacy of

65. U.S. CONST. art. IV, § 2 reads in part:

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

66. 41 U.S. (16 Pet.) 539 (1842).

what constitutional processes produce, and thereby the legitimacy of these processes themselves.

D. The Ninth Amendment and Constitutional Legitimacy

Perhaps, then, there is reason to think that a constitutional process that refused to evaluate legislation to see if it violated acknowledged-but-unenumerated individual rights would impart less legitimacy on enacted legislation than a process that took such rights into account. Moreover, a constitutional process that evaluated legislation to see if it violated controversial unenumerated rights—where the better arguments of the day strongly support the existence of such rights—might well impart more legitimacy on enacted legislation than a process that failed to take such rights into account.

If imparting legitimacy on legislation is an end of the constitutional enterprise, then, when there is no expressed barrier to the judicial protection of unenumerated rights, an interpretation of a clause like the ninth amendment that permits such review seems preferable to one that rejects such scrutiny. A constitutional process that ignored unenumerated rights when evaluating legislation would give citizens no reason to believe that such legislation did not violate the rights retained by the people. Without this review, legislation would enjoy a weaker presumption that it is binding in conscience or perhaps no such presumption at all.

Ultimately, the legitimacy of the Constitution itself may hinge on the ability of the enterprise it establishes to convey legitimacy on legislation. A power-constraints conception of the ninth amendment would, I think, contribute favorably and importantly to this constitutional enterprise.

THIS "SYMPOSIUM ON INTERPRETING THE NINTH AMENDMENT"

The publication of this Symposium on the Ninth Amendment is an historic event. While the articles and comments that follow are hardly the first scholarly analyses of the ninth amendment,[67] this issue constitutes the zenith of academic analysis of the ninth amendment. Never before in one place have so many powerful intellects considered the ninth amendment so seriously. Unlike most previous scholarship, these efforts take into account the recent discussion of constitutional interpretation and of original intent. Moreover, it is significant, I think, that none of the contributors has chosen to defend the "rights-powers" conception of the ninth amendment that for so long prevailed in the classroom and the courts.[68]

There are many people responsible for the success of this symposium issue, not the least of whom are the contributors themselves who not only wrote excellent papers, but who had the foresight to accept the invitation to participate in this Symposium in early 1987—months before the ninth amendment became a part of public discourse during the Senate confirmation hearings of Robert Bork. The editors of the *Chicago-Kent Law Review* are to be commended for their enthusiasm, their gracious cooperation, and their tactful, but excellent editing. I am especially grateful to Editor-in-Chief Paula Taffe for her ever-insightful and cheerful collaboration in the execution of this Symposium and to her successor, Steve Wood, for diligently seeing this project through to its completion.

Finally I wish to thank my colleagues, the faculty of the Illinois Institute of Technology, Chicago-Kent College of Law for adopting the all-symposium format that made this and the other symposium issues of the *Chicago-Kent Law Review* possible. Just as I hope that the future bodes well for the ninth amendment, I believe that the future bodes very well indeed for this mode of faculty-student collaboration in the publication of law reviews.

67. For another collection of writings on the ninth amendment and a bibliography of ninth amendment scholarship, see The Rights Retained by the People: The History and Meaning of the Ninth Amendment (R. Barnett ed. forthcoming 1989).

68. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947):

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. . . . If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

I criticize this view in Barnett, *supra* note 34.