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Life, Liberty and Happiness. In Pursuit of the Ninth Amendment

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ABSTRACT

Prominently included in the American idea of freedom is individual rights. In American history this concept has fallen into two broad ideological camps. Most common have been conservative judicial scholars and Supreme Court justices that limit individual rights to those explicitly identified in the Constitution (originalists/textualists). This view has often involved the states'-rights stance. Since Lochner v New York (1905) the first group also includes less conservative Justices (often associated with the Warren Court) that are willing to include rights that are related to or derived from those rights clearly stated in the Constitution. More recently, a smaller second group of Justices and scholars have argued that the above position ignores the Nineth Amendment which recognizes unenumerated rights. This latter group argues that Americans have many unnamed individual rights that are equally Constitutional such as the right to privacy. The Ninth Amendment implies that new rights should be pursued. This paper examines this history and makes a case that unenumerated rights should be developed. Since the Dobbs v Jackson Women's Health Organization (2022) decision unenumerated rights are being threatened much like the right to abortion.

INTRODUCTION

When Connecticut's statute outlawing contraception was struck down by the Supreme Court (Griswold v. Connecticut 1965) as an unconstitutional violation of individual rights, a few scholars and judges began paying attention to the Ninth Amendment. Contrary to this attention, conservative justice Antonin Scalia was quoted as saying; "If my life depended on it, I couldn't tell you what the Ninth Amendment [is]" (Schulman, 2019). Similarly, Robert Bork when questioned by the Senate Judiciary Committee concerning his nomination to the Supreme Court, said the meaning of the Ninth Amendment is not clear and compared it to a statement covered by an inkblot. Bork stated, "I do not think the court can make up what might be under the inkblot if you cannot read it" (Lash, 2009).

But the meaning of the Ninth Amendment could not be clearer, i.e., Americans have rights not named in the Constitution. It would have been impossible for Madison and the Framers to list all Constitutional rights (Schulman, 2019). It is difficult to believe that Madison would suddenly become indecipherable after writing a clear and intelligible constitution.

Conservatives fear that the proliferation of individual rights emanating from the Ninth might endow common Americans with a sense of entitlement. This might result in an intrusion on private property, contracts, and/or on the laissez-faire marketplace, through taxation and/or confiscation of property during times of economic stress. Conservatives also fear that a propagation of constitutional rights might erode traditional moral values and beliefs. For example, Griswold v Connecticut (1965) allowed contraception, Roe v Wade (1973) permitted abortion, and Lawrence v Texas (2003) decided same-gender relationships are Constitutional.

A more generous reading of rights has been embraced by those who view the Ninth Amendment as a source of rights buoyed by the Fourteenth Amendment's "liberty." As incorporation of the Bill of Rights proceeded and picked up pace during the Due Process Revolution of the Warren Court (1953-1969), the Supreme Court first explored the Ninth Amendment in Griswold. The Court also connected their ruling on contraception to a right of privacy under the penumbra of other enumerated rights. Two Justices, Douglas and Goldberg, justified their privacy ruling with specific references to the Ninth Amendment. At this point, the Ninth Amendment would seem to have been waiting in the wings ready to inspire a new discussion of rights not yet named (Massey, 1995).

MATERIALS AND METHODS

The research for this article was done in the library at Idaho State University in Pocatello, Idaho. Because the Ninth Amendment has been largely ignored by the courts and scholars the amount of literature on this subject is relatively scarce and spread over time. As a result, some books and articles had to be searched for through the library loan system or in some cases searched and purchased through the web. The single best source for those who may desire an introduction beyond the current article would, in my opinion, be from Yoo (1993).

The Historical Struggle for Individual Rights

In Corfield v. Coryell (1823) Justice Bushrod Washington, following the natural rights sentiment so popular at the time, ruled that citizens have fundamental rights that

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could not be compromised by the states (Konvitz, 2001). The dissenting opinions in the Slaughterhouse cases made the same argument; that fundamental rights of citizenship always existed and could not be compromised by any government (Konvitz, 2001). Written in the Constitution, enumerated and unenumerated rights were given to the federal government to enforce.

Article VI (of the Constitution) established the Constitution, laws made in its pursuance, and treaties of the United States to be the supreme law of the land, anything in the state constitutions to the contrary notwithstanding (Levy, 1999).

John Marshall, who was no friend of states'- rights, argued in McCulloch v. Maryland (1819) and Gibbons v. Ogden (1824) that the "supremacy" and the "necessary and proper" clauses gave the federal government ultimate power. As Marshall confirmed, there were no limits to federal power except those expressly named in the Constitution.

In 1833, as Marshall's tenure on the Court ended, Marshall contradicted his stance on federal power by giving a crippling blow to the Bill of Rights in Barron v. Baltimore (1833). He ruled that the Bill of Rights could only be applied in federal jurisdictions, not in the states. Marshall had already used the supremacy clause to assert federal power against the states, making the Barron ruling an inconsistent exception. With this blow, the ten amendments receded from importance in the daily lives of Americans, just as the Federalist had originally favored. As Irons (2006[1999]) notes,

"…Marshall was a fervent nationalist and almost always gave an expansive reading to the Constitution. It would have been more in character for him to force the states into compliance with federal standards. However, he had little respect for the rights of 'the people' against the government – state or federal. Forced to choose between these countering principles, he did not find 'much difficulty' in rejecting the argument based on individual rights."

A resurgence of the Bill of Rights came deliberately in 1868 with the passage of the Fourteenth Amendment authored by John Bingham. Bingham purposefully informed his congressional colleagues that this new amendment would restore the Bill of Rights to the states. As Bingham stated, "No state ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic" (Konvitz, 2001). There is no reason to think that Bingham was not including the Ninth in this repossession of the Bill of Rights.

But the conservative Court would almost immediately ignore the meaning of the Fourteenth Amendment in its Slaughterhouse Cases. The majority argued that "citizens" in the Fourteenth referred only to United States citizens and not to states' citizens. In effect, the Court argued the Bill of Rights still only applied to federal jurisdictions (Irons, 2006). This disregard for the Fourteenth Amendment (Konvitz, 2001) continued until incorporation in the Gitlow v. New York (1925) case.

In Gitlow the Court found that "liberty" stated in the Fourteenth Amendment's due process clause included the Bill of Rights. Paraphrasing, the Fourteenth Amendment affirms that no state can pass a law that deprives any person of life, liberty, or property. As such, the First Amendment's freedom of speech applied to the states. With this reasoning one might conclude that the whole Bill of Rights had been incorporated but the Court, for unclear reasons, did not reach this conclusion. Rather, incorporation occurred piece meal across the twentieth century.

The (Franklin) Roosevelt Court was the first Court to seriously address and expand individual rights (Stromberg v. California 1931; West Coast Hotel v. Parrish 1937; National Labor Relations Board v. Jones & Laughlin Steel Company 1937). Roosevelt himself elevated the consciousness of the Bill of Rights by offering a second Bill of Rights in a State of the Union address (1944) which expanded the original.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence…. In our day, these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all – regardless of station, race, or creed. Among these are "[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the nation; The right to earn enough to provide adequate food and clothing and recreation; The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home and abroad; The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education…. (Rosenman, 1950).

Roosevelt's statement that "true individual freedom cannot exist without economic security and independence" went on to specifically name eight related rights. It was the expansion of rights into economic affairs that originally worried the Framers and their class. Such rights, if named in the Constitution, might very well threaten the wealth and economic activities of the political-economic elite. Not only would funds be sought to support these programs, but the very underpinnings of the laissez-faire capitalist system might be threatened. Legislation forwarded to guarantee employment or more recently to guarantee medical care have met with stiff resistance from the conservative economic and judicial interests.

Nonetheless, Roosevelt did what the Ninth Amendment implicitly invites, which was to enumerate some the unenumerated rights of Americans. As the nationally

elected chief executive, Roosevelt not only had the right to identify new rights but an obligation to do so. Under his tutelage the Supreme Court began to examine the rights of average Americans, most famously in West Coast Hotel v. Parrish (1937). Here the Court upheld the minimum wage law in the state of Washington. And then in National Labor Relations Board v. Jones & Laughlin Steel Company (1937), the Court supported the right of workers to unionize (Irons, 2006[1999]). Referred to as the "Constitutional Revolution of 1937" the Court stepped away from its strident historical protection of the rights of property and began a thirty- year review of the rights of average citizens.

Incorporation of the Bill of Rights actually began in 1897 with Chicago, Burlington & Quincy Railroad Co. v. City of Chicago (1897) when protection against the taking of private property without just compensation was incorporated. Most scholars, however, recognize the first major step in incorporation with the inclusion of free speech in Gitlow. Other incorporations followed in the 1930's and forties but with the Warren Court (1953-69) incorporation began to move more rapidly. Although the Ninth has not been formally incorporated, two Justices, as reviewed above, invoked the Ninth against the state of Connecticut in recognizing the right to privacy in marriage and in a person's relationship with their doctor (Griswold). As Van Loan III (1989) concludes, "…it is almost axiomatic that if an unenumerated right is good against the federal government by virtue of the ninth amendment, it is good against the state government by virtue of the fourteenth amendment."

In more recent history, we see average Americans beginning to reclaim and expand their ancestral birthright. For most of American history, conservative courts and powerful political-economic interests have largely been successful in minimizing and narrowly interpreting citizen's rights. During his term, President Trump attacked the First Amendment, stating it should be curtailed to allow libel suits against those who criticize him in the press. The President found an ally in Supreme Court Justice Clarence Thomas who suggested that the Court reconsider New York Times v Sullivan (1964). In Sullivan, the Warren Court established the "actual malice standard" which holds public figures to a higher standard when proceeding with libel suits. Public figures like the President must demonstrate that the party being sued knew that the critical remarks were false.

Because of these kinds of persistent attacks on rights, even those expressly established in the Constitution, a Ninth Amendment is a crucial tool for those citizens committed to individual rights as an important fixture of democratic government and society. The hard-fought gains in rights of the past century are not secure as seen in such cases as Gore v. Bush (2000) where the Court compromised a citizen's right to vote, or the Patriot Act (2001) which dramatically reduced daily freedoms of the American public and lifted restrictions on law enforcement agencies gathering intelligence within the United States, or in Ledbetter v. Goodyear Tire & Rubber Co. (2007) where the Court allowed pay discrimination against a woman employee of Goodyear Tire & Rubber Co. Most recently the Court decided in Dobbs v Jackson Women's Health Organization that abortion is not a Constitutional right, striking down a fifty-year precedent. Throughout American history we can see the spirit of the Ninth Amendment and the forces that would minimize this spirit. For most Americans, the Bill of Rights, the Constitution, and the Declaration of Independence not only represent explicit rights but more generally represent a broad and deep sense of freedom.

States' - Rights vs. Federal Authority

In their respective books, The Lost History of the Ninth Amendment, and The Ninth Amendment and the Politics of Creative Jurisprudence, Kurt T. Lash (2009) and Marshall L. DeRosa (1996) make arguments that the purpose and original meaning of the Constitution was to restrict the federal government's powers to those expressly delegated by the Constitution. This restriction was for the purpose of preserving the rights and powers of the various states. This position became known as "states'- rights" (Caplan, 1989). The preservation of the states'- rights position was explicitly accomplished, Lash argues, by the passage of the Bill of Rights in general, and specifically with the inclusion of the Ninth and Tenth Amendments. The Ninth Amendment he argues was offered to protect the "rights of the people," and Lash interprets "people" to mean the states, rather than protecting individual federal rights as it is commonly understood today (DeRosa, 1996; Massey, 1995; Lash, 2009; DeRosa, 1996; Yoo, 1993).

As Massey (1995) argues, a states'- rights interpretation of the Ninth Amendment maintenances that unenumerated rights would arise only from the states. A state would have the prerogative under the Ninth Amendment to recognize rights not enumerated in the U.S. Constitution. Although a particular state right would not be extended to all the states, it would restrain the state government in question. While this states'- rights interpretation is no longer the dominate reading of the Constitution and the Ninth Amendment, a states'- rights position has reappeared, for example, in the cases of gay rights, civil rights and abortion rights. In the Dobbs ruling comments made by some justices suggest that this states'- rights view has regained some license with the conservative Roberts' Court.

Lash (2009) and DeRosas' (1996) states'- rights arguments are compelling but do not give a thorough and balanced historical interpretation. They exclude the position which holds a state's authority is subject to federal overview except in the immediate instance where federal statutes are absent. This was certainly the position of the Marshall Court (1801-1835), and other early federal courts populated with Federalist judges (Irons, 2006). Lash and DeRosa are restating popular arguments made in the Antebellum period to save slavery. But the

merit of this position was not always, or now, the general political reality, especially after passage of the Fourteenth Amendment.

The Constitution does include a limited states'- rights stance in the Tenth Amendment. But the Constitution also includes contrary and conflicting positions to that of the states'- rights view. The "supremacy," and the "necessary and proper" clauses would seem to clearly give the federal government final authority over state law. The federal supremacy power would later be bolstered by the Fourteenth Amendment, and even later by the New Deal and Warren Courts.

The ambiguity between state and federal powers in the Constitution reminds us that the Constitution is a political document that includes touted compromises as well as contradictions. It should be remembered that the Constitution was written by Federalists for their purposes, which meant that the Constitution was designed to create a strong central government that would exclude the states' interference, especially in matters of private property and commerce.

It is no surprise that the new federal government of 1788, largely made up of Federalists, generally ignored Constitutional protections and made arguments for the expansion of federal powers that reflected Federalist desires. This came early and glaringly with the passage in Congress of the Sedition Act of 1798. As Lash (2009) notes, "the Sedition Act was a concrete and 'palpable' example of federal abandonment of the rule of strict construction with direct effects on the liberty of the individual" and the powers of the states. The Federalists, like the states'- rights advocates, pointed explicitly to the Constitution for support of their conflicting arguments.

In the early nineteenth century, it would seem that nails were driven into states'- rights and "strict construction" positions in two important Supreme Court decisions, both overseen by Justice Marshall (McCulloch v. Maryland (1819) and Gibbons v. Ogden (1824). In McCulloch the Chief Justice Marshal, "…literally handed Congress a blank check, to be filled in with any 'necessary and proper' purpose and amount" (Irons, 2006[1999]). In Gibbons, "Marshall ruled that federal power had no limits other than those expressly enumerated in the Constitution… It was the most expansive statement of federal power to issue from the Marshall Court, indeed from any decision of the Supreme Court to this day" (Lash, 2009).

Yoo (1993) argues effectively that the Ninth Amendment was a declaration of unnamed individual rights and not simply a restriction of federal powers. In a lengthy discussion, Yoo (1993) examines the Ninth Amendment as it was written into state constitutions and concludes:

"In the antebellum period, many states inserted clauses in their constitutions borrowing the language of the Ninth Amendment. These provisions stunningly demonstrate that the people, speaking through the states, considered the Ninth Amendment a declaration of rights, rather than a limitation on enumerated powers. Moreover, several state courts affirmed this understanding, using these Ninth Amendment analogues to enforce natural rights through the positive law of their constitutions. The existence of these Ninth Amendment analogues in the state constitutions directly undermines the view that the Ninth is a rule of construction."

Nonetheless, the states'- rights position continued to reappear.

The Fourteenth Amendment and the Rejection of States' - Rights.

Whether Lash (2009) and DeRosa (1996) are correct in their analysis that the Ninth Amendment is only about states'- rights, we would expect the Union victory in the Civil War, and the subsequent passage of the Fourteenth Amendment, changed this stance through the Fourteenth Amendment's restricting state powers.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law" (Fourteenth Amendment of the U.S Constitution, Section 1 – emphasis added).

In the Fourteenth Amendment's first section cited above, all individual rights are recognized today in the concept of "liberty." Nowhere does the Fourteenth Amendment refer to specific individual rights but uses expansive language. Thus, all individual rights, enumerated or not, are included. Lash (2009) concedes this point and recognizes the effect the Fourteenth Amendment had on the Ninth. "There is no doubt that the Reconstruction Amendments altered the original scope of the Ninth Amendment, at least when it comes to individual rights and congressional power to pass legislation protecting those rights."

Contrary to states' - rights arguments, the Reconstruction Amendments reconceptualized the Ninth Amendment.

"In framing the Privileges and Immunities Clause of the Fourteenth Amendment, the Thirty-Ninth Congress intended to enforce the first eight amendments of the Bill of Rights against the states. In so doing, the Thirty-Ninth Congress reconceived the rights guaranteed by those amendments as individual and civil, rather than as majoritarian and political. The Ninth Amendment played a crucial role in the Republicans' plans to amend the Constitution. They believed the Ninth allowed them to extend the protections of the Privileges and Immunities Clause beyond those rights guaranteed in the first eight amendments. As historical evidence shows, the Framers of the Fourteenth Amendment saw the Ninth as a clause that could affirmatively protect unenumerated individual rights from government interference. They sought to declare in the Fourteenth Amendment that both the Privileges and Immunities Clause (as applied against the states) and the Ninth Amendment (as applied against the federal government), protected unenumerated civil rights" (Yoo, 1993).

By the time of the New Deal administration, constitutional interpretation was noticeably shifting to

focus on individual rights, as opposed to property rights which had long been protected by the Court as the first principle of the Constitution. Likewise, recognition and protection of individual rights through Fourteenth Amendment incorporation worked to advance the federal government's power at the expense of a state's - rights. As Lash (2009) concedes,

"In the constitutional upheaval known as the New Deal revolution of 1937, the doctrinal underpinnings that had informed judicial understanding of the Ninth and Tenth Amendments for a century and a half were swept away. … In a rapid succession of cases, the Supreme Court … began to construct a new framework for protecting the individual rights listed in the first eight amendments. The last two provisions of the Bill of Rights were abandoned."

In this passage Lash (2009) is using the "the doctrinal underpinnings… of the Ninth and Tenth Amendments" to represent the states' - rights interpretation of the Constitution. It was not that these Amendments were "abandoned" but came to have new meanings as the Fourteenth Amendment started to receive Constitutional traction in the twentieth century. Incorporation of the Bill of Rights through the Fourteenth Amendment, which had already begun by 1937, was sped up by the needs of common Americans, especially during the Great Depression, needs met through a constitutional recognition of individual rights (West Coast Hotel v. Parrish 1937; see Irons, 2006[1999]). It has been argued that the Griswold decision began incorporation of the Ninth Amendment when the Court decided that Connecticut's law against the sale and use of contraception violated an unenumerated right to privacy protected by the Ninth Amendment (Redlich, 1989).

With Griswold, the Ninth Amendment became a most opportune portal through which to examine the subject of unenumerated rights in the Constitution, rights that had been ignored historically by the Supreme Court. The Court had been reluctant to examine the meanings of the Fourteenth Amendment's "privileges and immunities" and "liberty" concepts, or to explore any rights not enumerated.

The Lochner v. New York (1905) case threw stark light on a dilemma faced by the Court when identifying unenumerated rights. Historically, conservative courts touting laissez-faire doctrine have been concerned with the rights of property and business, whereas later progressive courts have been more concerned with the rights of individuals, often as a protection against aggressive business practices.

Lochner involved a situation where bakers were forced to work long hours. The State of New York passed protective labor legislation restricting working hours to ten hours a day and sixty hours a week. Joseph Lochner, owner of Lochner's Home Bakery challenged the law, citing property and contract rights. After failing in the state court, Lochner took his case to a conservative Supreme Court which found that Lochner had the right to contract employment with his individual employees. In other words, an employee could accept Lochner's employment terms or look for a job elsewhere.

To avoid a plethora of conservative business rights at the expense of protections for individuals, later Courts followed the principle that only explicitly recognized rights in the Constitution, or rights derived from the penumbra of explicit rights would be recognized. This principle and practice effectively neutered the Ninth Amendment, and the recognition of rights not enumerated.

Examining the debate over the meaning of the Ninth Amendment Yoo (1993), noting the expansive language of the Ninth, comments that, "Such language, if anything, suggests that the Ninth Amendment is perhaps the most dynamic and open-ended of the Constitution's provisions...." This understanding reflects more accurately the place of the Ninth Amendment in U.S. history.

Continuing, Yoo (1993) observes,

"Unlike other provisions of the Bill of Rights, the Ninth neither acts solely as a limitation on the federal government nor creates new rights through positive enactment. Rather, the Ninth declared the Framers' understanding of what rights already existed, both in other parts of the Constitution and outside the Constitution altogether. A declaratory vision of the Ninth Amendment is a dynamic one; it anticipates that future amenders of the Constitution may re-declare their interpretation of constitutional rights. Thus, the Framers of the Reconstruction Amendments could fundamentally expand the Ninth Amendment's meaning by declaring that it includes individual rights."

As for a more modern interpretation of the Tenth Amendment, Justice Stone, as noted by Lash (2009), declared its modern status in United States v. Darby Lumber Co. (1941) when Stone determined,

…the Tenth Amendment, which provides: "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." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments, as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that

In modern practice and thinking, "the Tenth Amendment does not support the states' - rights position but merely fills a vacuum with state authority when federal authority is absent.

As noted above, a recent Roberts' Court decision has challenged this modern interpretation of the Tenth and has reinserted states'-rights philosophy in a potentially revolutionary turnaround of the Court's thinking. In Dobbs the Supreme Court did not just reverse Roe, taking away the Constitutional right to an abortion, but declared it a states'- rights issue. Dobbs also went a long way in overthrowing the right to privacy. Conservative

philosophy has long held that if a right is not explicitly identified in the Constitution, then it doesn't exist (originalism/textualism). This is what Scalia and Bork were saying above, that since the Ninth Amendment does explicitly identify rights it is meaningless.

With this thinking many federal rights now assumed would disappear and become the providence of the states. Justice Thomas suggested this in Dobbs, i.e., that federal rights like those given in Griswold, granting the constitutional right to use contraception, should be revisited by the Court and given back to the states. Again, this would include the right to privacy. Other rights not named in the Constitution which might very well receive the same treatment includes gay rights, women's rights, labor rights, and civil rights, and even those rights recognized by the Warren Court.

An Entry to Unenumerated Rights

The Ninth Amendment to the U.S. Constitution, though often overlooked by the courts and legal scholars is, nonetheless, a vessel for individual rights and an entryway through which to understand some of the most sacred values, beliefs, and political tenets in American history. Natural law theory, a product of Enlightenment thought, produced several important concepts and ideas in creating a new kind of social contract. This modern social order, which challenged the divine rights of kings and the hegemony of religion, puts forth the notion that all persons are equal as bestowed by natural rights and the Divine. Thomas Jefferson, a serious student of Enlightenment philosophy, enlisted natural law and natural rights language in the beginning phrases of the Declaration of Independence: "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. … "[emphasis added].

Revealed in these phrases are the foundational ideals and first principles of the American polity. As the Constitution was being written, and ratified, a majority of Americans feared that the principles expressed in the Declaration might be compromised. The Federalist majority at the Philadelphia Convention convened in secret sessions to conceal the fact that they were not amending the Articles of Confederation as they had been charged, but were creating a powerful centralized government, potentially threatening individual liberties and to the states' independence. Just as suspicious, the Philadelphia Convention created a document that deliberately omitted a bill of rights. The Federalist Framers feared that a statement of rights might be employed and expanded by the people to compromise the governmental powers that the Federalists desired, especially those powers protecting property rights. This omission of a bill of rights the Framers had to weigh against not obtaining a new constitution at all. In the end, the Federalists effectively exchanged restrictions on power in the form of a bill of rights for a stronger federal government than that which had been prescribed in the Articles of Confederation.

Omitting a bill of rights from the proposed constitution was seen by many common Americans as a step toward undermining the foundational philosophy of natural and unalienable rights. It was believed that a strong centralized government might divest the states of their powers and the people of their God-given rights, just as the British monarchy had done. To divide and cripple the opposition to the Constitution, Federalists finally consented to include a bill of rights.

As the debate over the passage of the Constitution developed, Federalists argued in the Federalist Papers that a bill of rights would be deleterious to society. One argument rebounded and subsequently led to the Ninth Amendment. The Federalists argued that by enumerating rights in the Constitution, those rights not expressed would be lost by omission. It was better to assume, the Federalists continued, that the people's government would support all rights, state and individual, through its publicly elected bodies and courts.

Although Levy (1999) credits Madison with writing the Ninth Amendment and resolving the fear that unenumerated rights might be lost, this is suspect, as originally the unenumerated rights argument of exclusion, accepted by Madison, was intended to defeat the bill of rights. It is more likely that Madison and his fellow travelers, who were very troubled that the Constitution might be defeated and/or be revised by a second constitutional convention, offered the Ninth Amendment as a concession for securing the Constitutions passage. The Ninth Amendment was meant to reassure those Antifederalists who were sitting on the fence concerning passage of the Constitution that they would be adequately protected from centralized power encroaching on individual rights.

By in large, conservative justices have dominated the Supreme Court since its inception and have been tight-fisted with all individual rights. This reflects the inherited negative attitudes of their Federalist predecessors regarding the Bill of Rights. Levy (1999) notes that

"Those who advocate a constitutional 'jurisprudence of original intention' and assert that the Constitution 'said what it meant and meant what it said,' are ironically, the ones who most vigorously deny any meaning to the Ninth Amendment."

The Ninth Amendment was written and included in the Constitution as a repository for all unspecified rights. It is clear from the Amendment that these rights already exist and thus are to be "retained." But what are these rights, and how are they determined? Such rights can be as mundane as they are important.

"Other natural rights come within the protection of the [Ninth] amendment as well, among them the right, then important, to hunt and fish, the right to travel, and very likely the right to intimate association or privacy in matters concerning family and sex, at least within the bounds of marriage. Such rights were fundamental to the pursuit of happiness" (Levy, 1999).

In a similar fashion, Justice Douglas wrote (Palmer v. Thompson 1971), "the right of the people to education or to work or to recreation…, like the right to pure air and pure water, may we be rights 'retained by the people' under the Ninth Amendment" (in Caplan, 1989).

Continuing, Levy (1999) recognizes that,

"In addition to natural rights, the unenumerated rights of the people included positive rights, those deriving from the social compact that creates government. What positive rights were familiar when the Ninth became part of the Constitution, yet were not enumerated in the original text or the first eight amendments? The right to vote and hold office, the right to free elections, the right not to be taxed except by consent through representatives of one's choice, the right to be free from monopolies, the right to be free from standing armies in time of peace, the right to refuse military service on the grounds of religious conscience, the right to bail, the right of an accused person to be presumed innocent, the person's right to have the prosecution shoulder the responsibility of proving guilt beyond a reasonable doubt, the right of a woman to an abortion, a right of privacy against electronic eavesdropping, or a right to engage in nude dancing."

These and other rights can be recognized in law by the states or Congress or reasoned by the courts when processing the law. The right to racial and gender equality are cases in point and like other individual rights emerged since the ratification of the Constitution. They are dependent on the Fourteenth Amendment's "privileges or immunities" or "liberty" concepts. The Ninth Amendment has seldom been invoked for this purpose even though it is more direct and clearer in intention.

As seen above, an important exception to the Ninth's exclusion from active law was in Griswold where Justice Douglas cited the Ninth Amendment to support the majority ruling that citizens have a right to privacy in their marriages. Concurring with Douglas' opinion, Justice Goldberg also used the Ninth Amendment to argue for a right to marital privacy.

"To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Justice Goldberg justified his attention to the Ninth Amendment stating that. While this Court has had little occasion to interpret the Ninth Amendment, '[it] cannot be presumed that any clause in the constitution is intended to be without effect' (Marbury v. Madison). In interpreting the Constitution, 'real effect should be given to all the words it uses" (Myers v. United States)."

In Supreme Court jurisprudence and history, Justice Goldberg's opinion was quite radical. He risked the effects of Lochner to recognize an individual right to privacy that was not enumerated. As noted with Lochner, this opened the door for the Court to assert other liberties and protections not yet named.

Of course, some Justices argued that a right to privacy was implied in the first eight amendments and offered arguments to that end. But one might wonder what other rights might be conjured in this fashion. And, in fact, it is just this type of wondering that has kept most Justices away from applying the Ninth.

More recently in Richmond Newspapers, Inc. v. Virginia (1980) the Court cautiously acknowledged unenumerated rights that have been constitutionally protected. Recognizing unenumerated rights that are related to those rights explicitly declared, the Court stated,

"The State [Virginia] argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed… But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable…doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees."

Here the Court acknowledges unenumerated rights and gives specific examples but nonetheless remains cautious by insisting "that certain unarticulated rights are implicit in enumerated guarantees." In other words, the Court has usually entertained unenumerated rights only when they can still be tethered to those rights explicitly stated. With Lochner looming in the background Justices have been very wary of introducing rights that are not somehow related to those explicitly stated. This insistence has led to some consternation with the more conservative Justices on the Court who feel that these connections have become quite strained. An obvious case would be Roe where Justice Blackmun argued that certain portions of the Bill of Rights guaranteed a right to marital privacy that covered the decision of women to have an abortion. Others have argued successfully that no such right to privacy is named in the Constitution and therefore does not exist. The argument in this text is that there are other rights unattached to those explicitly stated in the Bill of Rights that need recognition, the right to privacy being one of those at least suggested in the Griswold decision. The fact that progressive Justice's fear Lochner-type rights and conservative Justices fear an unleashed fury of new-found rights has left the Ninth Amendment neutered in the Court.

The Evolution of New Rights

Originalists and textualists claim that the Constitution must be read in terms of its earliest meaning and not interpreted by judges. This intervention by judges, deriving rights from the unenumerated, would amount to making new rights from personal bias. But Justice Harlan, a conservative jurist himself, argued persuasively that the process by which an unenumerated right materializes is not simply a matter of a judge's opinion. In the case of the Supreme Court there are always eight other judges with their own minds and equal votes. More specifically, Justice Harlan makes the point that Americans have a high regard for individual freedom which should only be restricted by the essential requirements of the society. This emphasis on personal freedom provides a broad context for the individualism that Americans value – "… which, broadly speaking, includes (repeating Harlan) a freedom from all substantial arbitrary impositions and purposeless restraints…" This libertarian value provides a clear standard from which to understand natural rights arising from a free and democratic society, a standard reflected in the Ninth Amendment.

While Justice Harlan (Poe v. Ullman 1961) made no attempt to account for all rights, he ascertained a process by which new rights come to be recognized.

"The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society…. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."

From Justice Harlan's view, liberty does not simply guarantee rights already presented in the Bill of Rights but prescribes a method by which other rights may emerge. "Thus, Senator Sherman declared that the rights mentioned in the Ninth Amendment derive from '[t]he great fountain-head, the great reservoir of rights….' Such rights were 'as innumerable as the sands of the sea" (Yoo, 1993).

When determining natural rights, Farber (2007) provides several specific criteria revealing the processes by which an individual right is developed, asserted, and recognized. In the first instance, a right should reveal itself in the traditions of society; in values and behaviors which have become customary. Second, there should be a contemporary consensus; some reflection that the right has evolved and is common in the population. Third, consideration should be given to how judges and legislators have addressed this right. Fourth, consideration should be given to the thinking of foreign jurists on the issues of human rights as well as to consideration of foreign constitutions. Finally, the supporting precedents established by the Supreme Court should be considered.

Such criteria are not just a guide for jurists but can be employed by the legislature, and the executive. In fact, advocates for certain rights might also come from popular movements or even the more established institutions of society. In this social-historic process the individual opinions of judges have far less significance, and we see that the recognition of an emerging right must run a complex, conservative, and cultural-historic gauntlet.

Farber (2007) continues expounding his method for the enumeration of fundamental rights by taking a traditionalist, if not an even more conservative turn. Criticizing "Big Think" theories ("the overarching theories that scholars love") as a guide for deciding cases, Farber endorses the long-established Anglo-Saxon tradition of judicial review, especially as it is manifested in the U.S. federal courts. His faith in this system seems to miss the point that in the two hundred plus years of the U.S. federal courts the Ninth Amendment has been largely ignored. What Farber fails to realize are the restrictive forces constructed by the Framers. These men were largely Federalists, men from the conservative commercial class who were able to entrench their cultural and economic interests and political philosophy in a constitution of their making. Being able to establish the foundation of American Constitutional law went a long way in maintaining a system where judicial review established fundamental rights in small and moderate steps. Farber himself implicitly expresses the frustration with this system when discussing emerging rights.

A final example of the enumeration process, not dissimilar to those already discussed, is offered by Massey (1989).

"…[F]or purposes of finding those paramount fundamental rights protected by the ninth amendment against state or federal invasion, some limiting principles are prudent. An asserted fundamental right should have textual foundation in the Constitution, however implicit or attenuated. It should have some historical authenticity in the organic law of the nation, the states, the colonies, or the common law. It should be consistent with the theoretical construct of natural rights, so far as the subject can provide meaning. It should be a right generally recognized by a significant portion of contemporary society as one inextricably connected with the inherent dignity of the individual."

With the current difficulty of raising new rights, it is not surprising that the Bill of Rights was minimized by the early Federalist Court led by John Marshall. Even with the later passage of the Fourteenth Amendment's fundamental rights, liberties and protections were largely ignored until the First Amendment cases that emerged after World War I (see Irons, 2006). Even then, most of the Bill of Rights was not incorporated until the Warren Court (1953-1969).

The History and Construction of New Rights: The Rights to Privacy, Health Care, and other Rights

The construction of the right to privacy began with the Bill of Rights. In the Fourth Amendment we find "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment adds that "No person… shall be compelled in any criminal case to be a witness against himself…" And the Fourteenth Amendment's "liberty" clause has also been invoked in recognizing a right to privacy.

The early discussion of the right to privacy in American jurisprudence is often credited to Judge Thomas M. Cooley in his description of the right to privacy as the "right to be let alone." Two years later Samuel Warren and Louis Brandeis authored an article, "The Right to Privacy," for the Harvard Law Review (1890) in which they further develop this right.

In developing the right to privacy Warren and Brandeis (1890) took note of "[r]ecent inventions and business methods." "Instantaneous photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetops." These are similar concerns expressed today but related to modern technologies and business practices, as well as governmental intrusion. So common is encroachment from society on individual privacy that Warren and Brandeis predicted that the courts would work to provide a remedy by developing a privacy right.

The source of this privacy right Warren and Brandeis (1890) believed comes from the common law protection of an individual's right to determine how their thoughts, sentiments, and emotions are communicated to others. This, in turn, is derived from the right to property; property being not just what is physically owned.

The right to privacy, however, was not substantially developed until Griswold. As noted previously in Griswold, the Court ruled that there was a Constitutional right to privacy in marital relations and in one's relationship with their physician. It was determined in Stanley v. Georgia (1969) that the First Amendment's protection of speech and press includes the right to receive information and ideas for use in the privacy of a person's own home. Likewise, the Ninth Amendment has been employed to protect privacy in several Court decisions beginning most notably with Griswold.

Summarizing the Court's history in constructing a right to privacy, Justice Blackmun in Roe stated that,

"The Constitution does not explicitly mention any right to privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia (1969), in the Fourth and Fifth Amendments, Terry V. Ohio, (1968), Katz v. United States, (1967), Boyd v. United States, (1886), see Olmstead v. United States, (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381; in the Ninth Amendment, id. at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer V. Nebraska, (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, (1967); procreation, Skinner v. Oklahoma, (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453-454, id. at 460, 463-465 [p153] (White, J., concurring in result; family relationships, Prince v. Massachusetts, 166 (1944); and childrearing and education, Pierce v. Society of Sisters, (1925), Meyer v. Nebraska, supra…"

The recent conservative Court, true to conservative judicial philosophy, does not recognize the right to privacy because it is not identified specifically in the Constitution. This is what the Court meant when the conservative justices said Roe was incorrectly reasoned. As noted above, Justice Thomas has suggested that Griswold, which has been acknowledged as the opinion most identified with establishing a right to privacy, be reconsidered.

More recent right to privacy cases includes Ravin v. State of Alaska (1975). In 1972 Alaska amended its constitution to include a right to privacy (Article 1, section 22): The right of the people to privacy is recognized and shall not be infringed.

In 1975 the Alaska State Supreme Court ruled in Ravin:

"Thus, we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. …the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when its beings [sic] to infringe on the rights and welfare of others."

In Cruzan v. Missouri Department of Health (1990) it was concluded by the Court (especially with dissent by Brennan, Marshall, and Blackmun) that the right to privacy encompasses the right to die by refusing life-saving medical treatment when a person is in an irreversible vegetative state. Writing the majority opinion, Justice Rehnquist stated that,

"Before the turn of the century, this Court observed that '[n]o right is held more sacred, or is more carefully guarded

by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' Union Pacific R. Co. v. Botsford (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment… 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

Finally, in Lawrence v. Texas (2003) the Court decided that the right to privacy enveloped private sexual behavior between consenting adults. Justice Kennedy notes that consenting sexual conduct is "the most private of human conduct" and is protected "in the most private of places, the home… It suffices for us to acknowledge that adults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."

The right to privacy, which has received so much attention and has been the subject of considerable debate, stands as a crucial example of an unenumerated right acknowledged by the Ninth Amendment. The history of its construction demonstrates in a practical way how unenumerated rights evolve from our society. As stated by Justice Harlan (Poe v. Ullman 1961), "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." As described, this is a very conservative and thoughtful process done with restraint and by small increments. As Justice Harlan continued, "…there is no 'mechanical yardstick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come'."

Another individual right which has been developing over the past eighty years is the right to healthcare. Beginning notably with Franklin D. Roosevelt's state of the union speech on January 11, 1944, Roosevelt subscribed to "the right to adequate medical care" (Rosenman, 1950). This right was recognized by every Democratic President after Roosevelt. During the Johnson administration, Medicaid and Medicare were passed into law, providing medical care for the poor and elderly. The Clinton administration made a major effort to bring universal health care to society.

The Obama administration with the Patient Protection and Affordable Care Act of 2010 was able to provide health care to millions more Americans, although coverage was not universal. Universal health care, which Democrats continue to propose as an individual right, was the leading Democratic proposal in the Presidential election of 2020. Certainly, it would now seem that most Americans believe that healthcare is an individual right.

Other recently developed rights include gay rights, women's rights, and civil rights, to name some of the more obvious. Their sources and development have varied but their historical developments have been slow and contentious, with the opposition often including conservatives, the conservative Robert's Court, Donald Trump, and the Republican Party.

As has been historically required by the Supreme Court, most recently emerged rights have occurred under the penumbra of enumerated rights already expressed in the Constitution. A few have included the Ninth Amendment but the Ninth has never stood alone in this process. The question then arises, are there major individual rights, unrelated to those already enumerated, which might be the outgrowth of the Ninth Amendment? In his speech referenced above, President Franklin Roosevelt suggested several such rights; the right to gainful employment; the right of businesspersons to be free of unfair competition and monopolies; the right to decent housing, and the right to a good education.

The American society has taken some important steps towards realizing many of these rights. Only one year after Roosevelt's "New Bill of Rights" the U.S. Senate introduced and passed the Full Employment Act of 1945. Supported by President Truman, the Senate passed this Act by a considerable margin of 71-10. This Act gave the President substantial power during times of high unemployment to offer federal programs to keep unemployment low. Led by the ultra-conservative National Association of Manufacturers, conservative elements in the House of Representatives were able to gut the bill behind charges of paternalism, socialism, and communism; a method employed with health care. The result was a compromised Employment Act of 1946.

Again in 1977, House Representative Augustus Hawkins and Senator Hubert Humphrey introduced the Full Employment and Balanced Growth Act (Humphrey-Hawkins Full Employment Act of 1978). This Act passed both the House and Senate and was signed into law by President Carter. However, by the time this Act reached the President's desk it had been greatly watered down by conservatives. Nonetheless, there is now history and a political movement to recognize employment as a right of citizenship, a right which has emerged again in the 2020 presidential run of Sander Senators.

RESULTS AND DISCUSSION

From the time the U.S. Constitution was ratified in 1788 there have been two notable interpretations of the Ninth Amendment. On one hand is a states'-rights viewpoint which emphasizes the power of states in a system where states resist the power of an encroaching centralized federal government. On the other side are those who believe and encourage a strong central government. This latter group has gradually come to believe that the Ninth Amendment applies to the whole society. The struggle over Constitutional interpretation between these two ideologies was most conspicuously realized in the

Civil War where the southern states believed that only individual states could authorize or deny the status of slavery. As a result, the ideology of states'-rights became strongly identified with the proslavery position. However, states'- rights ideology includes many other viewpoints. The overturning of Roe v Wade (1972) with the Dobbs (2024) decision is probably the most recent and notable case where the Constitutional right to abortion was given back to the states by the Supreme Court. The current conservative Supreme Court, and the Trump administration more generally, seem ready to strengthen the states'-rights position in several areas including voting rights and civil rights, transgender rights, women's rights, the rights of those accused of crimes, and workers' rights to name but a few. The states'-rights position has traditionally viewed the Ninth Amendment as a partner to the Tenth Amendment. In this instance unenumerated rights were only viewed as state rights; only the citizens of individual states could petition their state government for new rights which if granted would only apply to the state concerned.

Beginning with Griswald v Connecticut (1965) the Ninth Amendment was recognized by some members of the Supreme Court as a federal amendment applying new rights to all U.S. citizens, in this case a person's right to buy use contraception This interpretation of the Ninth strongly opposed by conservatives on the Court because new rights might endanger property rights during times of economic strife and/or support nontraditional moral values such as gay rights and the right to an abortion.

Those individual rights outlined by President Franklin Roosevelt, and those rights identified by others such as a right to privacy, are arguably developments of individual rights inherent in the Ninth Amendment. Because of the Lochner (1905) decision, and the "right of contract," even more progressive Courts and Justices have largely remained aloof from unenumerated rights. Nonetheless, unenumerated rights have gradually evolved through historical-political processes reflecting progressive democratic developments in society. Newly recognized rights emerge gradually as Blackmun recognized in his decision in Roe. Newly recognized rights emerge from a people's history and circumstances, through Court rulings and from other societal institutions. However, this can be an active process engaged in by society.

As stated directly and forcefully in the Declaration of Independence, all persons have God given unalienable rights which they secure with a duly elected democratic government. These rights are the cornerstone of the United States government. Since all rights cannot be practically named in the Constitution, Madison provided in the Constitution an amendment which not only recognized this fact but also acknowledged that the people retained unnamed rights. Such unenumerated rights are not only acclaimed in the Ninth Amendment but were reassured in the Fourteenth Amendment. Although conservative Courts have discouraged new rights and the expansion of existing rights, in the evolution of democracy a search for new rights is encouraged by the Ninth Amendment.

CONCLUSION

The Bill of Rights is for Americans a sacred document representing the values of American democracy. Most Americans also have a fair idea of the rights represented in the first eight and Tenth amendments. But very few have any idea what is written in the Ninth Amendment and are surprised when told. Quoted at the beginning of this article the language of the Ninth is simple and clear, a textualist's/originalist's dream. Yet it is these same conservative justices and scholars who have convinced us that the Ninth Amendment has no meaning.

Americans are very generous with the rights that they claim in daily life and would be dismayed if told that no such rights exist because they are not in the Constitution, e.g., the right to travel, the right to vote, the right to have and raise children, and numerous other rights Americans take for granted. This awareness began to dawn on Americans when the Supreme Court in Dobbs took away the right to abortion, a precedent which was over fifty years old. Just as important Dobbs went far in undercutting the right to privacy. Indeed, Justice Thomas has suggested that the Court should review again the decision in Griswold which gave Americans the right to use contraception on the basis of privacy rights. Giving jurisdiction of such rights back to the states is a states'-rights position thought to be all but dead with the end of slavery and the passage of the Fourteenth Amendment.

of course, the Ninth Amendment does not present the opportunity to declare any right which might come to mind. Rather, rights appear and evolve within American culture. We are perhaps most familiar with this evolution through court judgements as shown above in Blackmun's decision in Roe and the right to privacy. But new rights can be proposed by the Congress such as the right to employment, or by the Executive as in Roosevelt's proposal of a right to health care. This is a process now threatened by the states'-rights position of the Robert's Court. If rights are given back to the states to determine societal divisions would become more extreme as seen with the results of the Dobbs decision.

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