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Means, Ends and Original Intent: A Response to Charles Cooper

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*by Michael Wells**

Charles Cooper believes that the ninth amendment should be read at once more broadly and more narrowly than it is today. In his view, the intent of the Framers was to cabin the power of the federal government. By taking note in the ninth amendment of rights other than those enumerated in the first eight, they sought to ensure that the national government would not exercise powers beyond those listed in the Constitution. Since the aim of the ninth amendment was to keep the federal government one of limited power, it is inappropriate to apply the amendment to the states, in whose hands the general police power was meant to remain. The federal government has long since shed the shackles placed upon it by the Framers, and some judges and scholars would invoke the ninth amendment as a source of rights against state governments. Each of these developments flouts the intent of the Framers, and their intent should govern the disposition of constitutional questions. So goes Cooper's argument.

This account of the ninth amendment stands somewhere between the two major contemporary positions regarding its scope. On the one hand are liberal constitutional theorists like Gene Nichol and Lawrence Tribe, who view the ninth amendment as a rich source of rights against both state and national governments. Nichol, for example, conceives of the ninth amendment as an expression of the libertarian ideals of Thomas Jefferson.[1] On the other side of the

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[1] Nichol, Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty, 1985 Wis. L. Rev. 1305, 1311-16; see also L. Tribe, American Constitutional Law 569-72 (1978) (viewing the ninth amendment as protecting a rational continuum of rights rather than limited to protecting those enumerated in the first eight amendments).

debate one finds Raoul Berger and others who style themselves as guardians of the Framers' intent. They maintain that the ninth amendment was not enacted in order to recognize any constitutional rights, but merely to declare the existence of rights that might be protected by state law and that are subject to defeasance by either the national or state governments.[2] Cooper shares their premise that the intent of the Framers is dispositive and agrees that the ninth amendment does not bind the states. He breaks ranks with them over whether it has any teeth at all; the ninth amendment was intended, he insists, to limit the power of the national government.[3]

I share Cooper's apparent distaste for our ever more powerful and intrusive national government and I find his vision of federalism an alluring one. Imagine a world in which the Supreme Court had strictly limited the federal government to the functions set forth for it in the constitutional text, and had permitted states a free hand outside the area explicitly reserved for the federal government. Congress could invoke the power over interstate commerce only to enhance trade and remove state-created barriers to trade, but not as a pretext for economic and social legislation.[4] Similarly, since the commerce power is assigned to Congress and not the courts,[5] the Supreme Court could not invalidate state laws in the absence of a federal statute under the "negative commerce clause."[6] Had the United States followed this path, the national government would be much weaker than it is today, and states correspondingly stronger. In the absence of a powerful national government and the pressure it exerts toward uniformity, there would be more marked political and cultural diversity among states. At the same time, and in accordance with the Framers' intent, a national government, although weak, would act against the erection of harmful barriers to trade and migration by the states.

In this vision, the United States might resemble the modern Eu-

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[2] See, e.g., Berger, The Ninth Amendment, 66 Cornell L. Rev. 1 (1980); Caplan, The History and Meaning of the Ninth Amendment, 69 Va. L. Rev. 223 (1983).

[3] See also J. Ely, Democracy and Distrust 36-38 (1980) (discussing the "incorporation" issue).

[4] See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941).

[5] U.S. Const. art. I, § 8.

[6] See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

ropean Economic Community. The advantage of such a federation would lie not only in its diversity but also in the safeguards it provides against oppression. No one member state could easily deprive its citizens of liberty, since these citizens could easily flee to another state. Each of the member states would have an interest in seeing to it that none of the others became too powerful. The liberty of the people would be ensured not by words written in declarations of rights, in which James Madison had little faith, but in the incessant struggle among competing governments.[7]

American federalism did not develop as Cooper thinks the Framers intended, or as I would have liked. Starting with the Marshall Court and continuing with occasional divagations to the present, the Supreme Court has upheld congressional power to legislate on anything it pleases,[8] and has often reined in the states even where Congress has not sought to do so.[9] Even in areas where states retain nominal control, they generally lack the will to resist federal pressure. Thus, even though state participation in the social security system is nominally voluntary, no state is able to resist the federal dollars that participation brings its citizens and the resulting political pressure for joining. Witness, too, the recent capitulation by most states when faced with loss of federal highway money if they did not lower speed limits and raise the drinking age. The United States has developed into a nation rather than a federation.

Cooper's complaint about these developments differs from mine, and the difference must be stressed. In my view, our society would be better off with a weak national government. Cooper's criticism, on the other hand, is based on the belief that Congress and the Supreme Court have breached their duty to adhere to the intent of the Framers. For him, the Framers' intent is the guiding principle of constitutional interpretation; even if we are better off with a strong national government, that government is illegitimate because it contravenes the intent of the Framers.

One could challenge Cooper's account of the ninth amendment on two traditional grounds. He might be wrong in determining the in-

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[7] See The Federalist No. 10 and No. 51 (J. Madison).

[8] See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding broad congressional power to regulate the actions of state governments).

[9] See Hughes v. Oklahoma, 441 U.S. 322 (1979); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

tent of the Framers, or he might be wrong on the question of whether their intent should be dispositive. A large literature is devoted to each of these issues,[10] and I have no insights to add to it. In this response, I will assume that Cooper is correct on both of these matters. Accordingly, I am prepared (very cheerfully) to grant Cooper's indictment of our strong national government. Rather than take this traditional approach, I focus instead on the second aspect of Cooper's thesis, in which he rejects application of the ninth amendment to the states. Even if Cooper is right about the Framers' intent and its relevance, this part of his thesis is open to attack.

Most arguments in favor of adhering to the intent of the Framers, including Cooper's, are carried on at a high level of abstraction and do not take much account of inconvenient facts. It is a fact that the vision of the national government set forth by Cooper, as one of strictly limited powers, is a pipe dream. Over time the government in Washington will only grow bigger and stronger, as it has throughout our history. During liberal eras it will intrude more into the economic life of the people. As the current administration has shown, in conservative times it will shift its attention to the social and moral betterment of the citizenry. The momentum sometimes slows down or stalls, but it never changes direction for very long. No court would ever dare tell this government that it cannot use the commerce clause for purposes other than regulating commerce. Any court that tried would be ignored, packed with compliant judges, or deprived of jurisdiction.

These observations provide important context in evaluating Cooper's claim that the ninth amendment should not be applied to the states. If the Framers intended to protect liberty by structural means, cabining the national government and having the states control one another, then it is easy to see why they would not have intended application of the ninth amendment to the states. It was necessary to lodge general police power somewhere and the compe-

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[10] On the Framers' intent in drafting the ninth amendment, see the works cited supra notes 1 - 3, and sources cited therein. On the debate over the significance of the framers' intent, see, e.g., Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353 (1981); Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204 (1980); Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985); Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296 (1986); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983).

tition among states would limit abuses by them. Today, however, the Framers' design has gone awry. The national government is the powerful force opponents of the constitution feared it would become, in derogation of the clauses specifying its powers and in the face of the ninth amendment.

Nor is this the only departure from the intent of the Framers. The Civil War and the constitutional amendments adopted in its wake fundamentally altered the relationship between the national government and the states. For the first time, significant constitutional restrictions were placed upon state power over personal liberty.[11] These developments marked a shift away from governmental structure as a means of defending liberty, and towards rights written down in the constitution or in judicial opinions, and largely enforced by the courts. However flimsy and untrustworthy this method may be, it is what we have today.

Given this history, the following question must be posed: Does fidelity to the Framers' intent require us to adhere to their decision to restrict only national power, and not apply the ninth amendment to the states? Cooper apparently thinks so, and this is where I part company with him. In my opinion it is nonsense to insist myopically on fulfilling one part of a constitutional blueprint when other integral parts of the same design can never be restored. The components of the Framers' system fit together into a governmental structure where liberty could thrive. Now the structure lies in ruins. Liberty is threatened by a strong national government that can impose its will upon the states whenever it pleases. The states themselves are increasingly homogenous and have become habituated to national control. Enervated by the incessant growth of federal power, many of them have lost the fiesty libertarian spirit that animated the revolutionary era. There is not one shred of evidence in the origins of the ninth amendment that the Framers would have intended to limit its reach to the national government under current conditions. In light of the importance they attached to liberty, they would likely have recoiled in horror at the collapse of their finely wrought structural safeguards against governmental abuse of power. They would probably have been willing to resort to any available

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[11] See G. Gunther, Constitutional Law 408-09 (11th ed. 1985).

means of protecting the individual against government, including the judicial elaboration of rights against not only the federal government but also the states. In any event, this account of how the Framers would respond to our current predicament is at least as plausible as the explanation of their intent offered by Cooper, Berger, and other conservatives.

In short, to be faithful to the Framers' intent it is necessary to engage in a somewhat more sophisticated analysis than the one offered by Cooper.[12] We must distinguish between ends and means. The limitation of the amendment to the national government and its strict constraints on that government are both rules of an operational nature. They implement one of the Framers' central aims: to curb the abuse of governmental power. For better or worse, we have abandoned the Framers' structural plan for achieving this vital goal. Cooper would have us cling to those remnants of the Framers' design which might still be observed, as if the plan were all that mattered, and not the objects it sought to obtain. In this Cooper reminds me of the fourteenth century French nobility, who insisted that the way to fight a battle was with armored knights in the vanguard, even after the English longbowmen had clobbered them again and again.[13]

It may well be that a broad reading of the ninth amendment is unwise, because the amendment gives courts no guidance and hence leaves too much to judges' subjective judgment, or because democratic values deserve a higher place in our constitutional scheme than judicial protection of minority rights, or for some other reason. My point is that Cooper's argument for the "intent of the Framers" is not a convincing one.

Another point needs to be made about Cooper's reliance on the Framers' intent, one which has nothing to do with the merits of the argument itself. I do not believe that Cooper is as obtuse as I have made him out to be. Indeed, I have been unjust to the medieval French nobility as well. The real agenda of the French nobles was not blind adherence to past methods at whatever price. They knew that building an army of longbowmen would mean bringing large

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[12] Cf. Powell, Rules for Originalists, 73 Va. L. Rev. 659, 674-75 (1987) ("The founders' comments on constitutional issues always are parts of a larger historical and intellectual whole.").

[13] C.W.C. Oman, The Art of War in the Middle Ages 116, 124-37 (Beeler ed. 1953).

numbers of ordinary people into the fighting force, and they foresaw the consequences. Not only would the knights' prestige diminish,[14] but also the upstart *vilains* would demand a share of the political power.[15] Better to let the English ravage the countryside and pillage the towns.

Perhaps I am too cynical, but I suspect Cooper has an agenda of his own, unrelated to the need for fidelity to the Framers' intent. The New Right, of which I count Cooper a member, can often be found exhorting us to follow the Framers' intent, or to practice strict construction, when the issue is whether to extend constitutional or statutory protection beyond the literal bounds of some century or two-century-old provision.[16] But where are they when the issue is whether to read the eleventh amendment literally and in accord with the expressed intent of the Framers?[17] There is good evidence that the eleventh amendment was intended to immunize states only against suits under state law by out-of-staters.[18] Yet the Supreme Court reads it more broadly to bar many suits brought under federal law,[19] and one hears not a murmur of protest about this instance of judicial activism from Cooper and his kind.

To take another example, the terms of the Civil Rights Act of 1871 impose a very broad cause of action against state officers. Both the language[20] and the legislative history[21] of the statute suggest

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[14] Id. at 125.

[15] Cf. B. Tuchman, A Distant Mirror: The Calamitous Fourteenth Century 155-84 (1978) (discussing the loss of confidence in the French nobility after the disastrous Battle of Poitiers in 1356, and the ensuing efforts of the peasants and bourgeois to obtain power).

[16] See, e.g., Address by Attorney General Edwin Meese before the American Bar Association (July 9, 1985), reprinted in The Federalist Society, Occasional Paper No. 2, The Great Debate: Interpreting Our Written Constitution 9 (1986).

[17] U.S. Const. amend. XI states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[18] See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting).

[19] E.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234; Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890).

[20] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

that the Framers intended to allow no defense based on official immunity. The statute was directed at the oppression of blacks in the South after the Civil War, and a modern reading faithful to the intent of its Framers would permit no immunity defense in suits charging racial discrimination.[22] Nevertheless, the Court recognizes stringent immunity defenses,[23] and neither Cooper nor anyone else on the New Right has spoken out against this judicial arrogation of power. It is hard to resist the inference that Cooper invokes the intent of the Framers not because he sincerely believes their intent should be dispositive, but because it makes a good weapon in some substantive debates.[24] What really matters to Cooper and others may not be the intent of the Framers, but the usual aim of rulers: to curb civil liberties and restrict remedies for governmental wrongs by any available means.

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applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Note the absence of any reference to immunity.

[21] The legislative history contains at least three uncontradicted assertions that no immunity defense would apply. See Cong. Globe, 42d Cong., 1st Sess. at 365-666 (Rep. Arthur); id. at 385 (Rep. Lewis); id. app. at 217 (Sen. Thurman).

[22] See Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 484-522 (1982).

[23] See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978) (absolute immunity for judges); Imbler v. Pachtman, 424 U.S. 409, 420-31 (1976) (absolute immunity for prosecutors); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity for executive officials); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for legislators).

[24] This manipulative tendency is characteristic of political discourse and is by no means restricted to the New Right. For more examples, see Wechsler, Toward Neutral Principles of Constitutional Law, *in* H. Wechsler, Principles, Politics & Fundamental Law 17-20 (1961).