

Book Review

Slouching Toward Bethlehem with the Ninth Amendment

Decision According to Law. By Charles L. Black, Jr. New York: W. W. Norton & Co., Inc, 1981. Pp. 83. \$12.95.

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When Charles Black writes, he writes with the certitude and righteousness of an Old Testament prophet. In *Decision According to Law*,¹ he has done so again. Taking as his text the Ninth Amendment, he seeks a new way to legitimate the ancient tendency of judges to overrun their office with good deeds. And he reconciles this legitimation of judicial activism with the spirit of democracy by the observation that it necessarily is done with the affirmative approval of Congress.

I

The scripture is superb for the task. Indeed, it is far superior to those texts deployed in the past. Very early, judges finding constitutional fault with enacted legislation were captivated by the following provision in Article I, Section 10, of the Constitution: “[N]o state shall . . . pass any . . . Law impairing the Obligation of Contracts.”² Literally hundreds of state laws were invalidated under the proscription of this clause before it succumbed to exhaustion.³

The judiciary eventually became disenchanted with the overuse of the contracts clause, and a period of relative passivity ensued. But judicial

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1. C. BLACK, *DECISION ACCORDING TO LAW* (1981) [hereinafter cited by page number only].

2. U.S. CONST. art. I, § 10.

3. The history of the contract clause is reviewed comprehensively in three lengthy articles by Hale, *The Supreme Court and the Contract Clause* (pts. 1-3), 57 HARV. L. REV. 512, 621, 852 (1944). As succinctly and recently summarized by Justice Stewart: “Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

aggressiveness soon resumed, as activist courts seized upon the more promising (because more promisingly open-ended) due process clause:⁴ "No State shall . . . deprive any person of life, liberty, or property without due process of law."⁵ Temporarily worn out after three decades of extremely heavy use, the same clause returned triumphant as a leading instrument of judicial activism in the 1960's.⁶ In the meantime, however, shifting clauses as others might shift gears, an activist judiciary transferred allegiance to the marvelous device of the imagined equal protection component of the Fifth Amendment and the explicit equal protection clause in the Fourteenth Amendment: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."⁷

But even the fascination with the equal protection clause, with its increasingly baroque overlays (two-tier review,⁸ three-tier review,⁹ sliding scales of review¹⁰), is fast approaching exhaustion. Its overuse, as with any

4. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (state law setting maximum hours of employment for bakers violated due process clause); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (Louisiana statute prohibiting contracting in state for marine insurance on Louisiana property with company not licensed to do business in Louisiana violated due process clause because it infringed upon liberty to contract for insurance).

5. U.S. CONST. amend. XIV, § 1. The Fifth Amendment contains a counterpart to this clause, prohibiting the federal government from depriving any person "of life, liberty, or property, without due process of law." U.S. CONST. amend. V. For examples of the Court's free-wheeling reliance on the due process clause, see *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (striking down New York minimum wage law for women); *Truax v. Corrigan*, 257 U.S. 312 (1921) (striking down state law restricting the use of injunctions in labor disputes); *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state law prohibiting contracts requiring workers to refrain from joining union as condition of employment).

6. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to privacy, encompassing woman's decision whether to terminate her pregnancy, is personal liberty protected by due process clause); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (freedom to marry a person of another race is liberty with which state cannot interfere); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel is liberty protected by due process clause).

7. U.S. CONST. amend. XIV, § 1. The Supreme Court discovered an equal protection component embedded in the Fifth Amendment's due process clause in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), in which the Court held that segregation in District of Columbia public schools deprived black children of due process of law. See *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment".)

8. The Court summarized the basic framework of two-tier review in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973):

We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination

9. In *Craig v. Boren*, 429 U.S. 190, 197 (1976), the Court announced an intermediate standard of review for constitutional challenges to gender classifications: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

10. Justice Marshall has argued that the two-tier and three-tier models do not accurately describe the inquiry the Court has undertaken or should undertake in equal protection cases. Instead, he suggests that the Court has determined and should continue to determine the appropriate standard of review in light of "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state

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scarce resource, dooms it to extinction. As new and convoluted categories of fundamental rights and suspect classes¹¹ are added to the repertoire of equal protection law, the device becomes discredited. Severe criticism sets in, presaging a stopping point at which egalitarian efforts to reconstruct the Constitution will end.

It is time, then, to shift gears again. Preposterously overlooked, the Ninth Amendment is at hand. Hemmed in by no explicit restrictions, moreover, it well could serve as an indefinite and perpetual basis for the legitimation of judicial activism.¹² The Ninth Amendment handsomely answers the call to provide both a superior explanation for many previously doubtful decisions and a rationale for decisions still to be made: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹³

The Ninth Amendment originally was rescued from obscurity by Justice Goldberg's concurrence in *Griswold v. Connecticut*.¹⁴ There it served the limitable purpose of informing the interpretation of principles enumerated in other amendments. The scope of the Ninth Amendment subsequently was developed more amply in academic suggestions.¹⁵ Professor Black now proposes that the Ninth Amendment be newly centered as the best, if not the only, solid source of LAW for use in organizing a legal order of human rights. He believes that "[w]e need the Ninth Amendment, for the sake of honesty and for the sake of utility."¹⁶ He embraces the amendment as an ambitiously useful judicial tool because it facilitates

interests asserted in support of the classification." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

11. The fundamental interests ingredient of the new equal protection was particularly opened. It was the element which bore the closest resemblance to freewheeling substantive due process, for it circumscribed legislative choices in the name of newly articulated values that lacked clear support in constitutional text and history. The list of interests identified as fundamental by the Warren Court was in fact quite modest: voting, criminal appeals and the right of interstate travel were the prime examples. But in the extraordinary amount of commentary that followed, analysts searching for justifications for those enshrinements were understandably tempted to ponder analogous spheres that might similarly qualify. Welfare benefits, exclusionary zoning, municipal services and school financing came to be the most inviting frontiers Even with regard to suspect classifications, tantalizing statements from the Warren Court beckoned the searchers into the inner circle of strict scrutiny.

Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972).

12. Perhaps, indeed, its very lack of limitation has been a source of inhibition to the judiciary. For most of the amendment's history, courts have regarded it either as largely precatory or, at best, as providing a textual apron around the balance of enumerated rights.

13. U.S. CONST. amend. IX.

14. 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). Justice Goldberg recognized that the Ninth Amendment did not leave judges free "to decide cases in light of their personal and private notions." He believed that the Ninth Amendment must be interpreted in light of three sources: the traditions and collective conscience of the nation, emanations of specific constitutional guarantees, and the experience of free societies. *Id.* at 493.

15. See J. ELY, *DEMOCRACY AND DISTRUST* 34-41 (1980).

16. P. 44.

outcomes that otherwise could be achieved only by "fast-talking our way past road-blocks"¹⁷ thrown up by the less spacious phrases or by the cramping, specific history of other clauses that the Court has used instead.

Professor Black's selected test case, sex discrimination, is highly instructive of the defects of Fourteenth Amendment analysis. Unfortunately, however, it is also instructive of the defects of Professor Black's own Ninth Amendment analysis. He correctly reminds us that courts have grounded advances in women's rights principally—and awkwardly—on the equal protection clause of the Fourteenth Amendment and its (imagined) counterpart in the Fifth Amendment. Pointing specifically to *Frontiero v. Richardson*,¹⁸ Professor Black notes that "[i]n the plurality opinion, sex . . . is labeled a 'suspect' classification. But this conclusion . . . is not attained by flight without instruments into the big sky of prophetic judgment."¹⁹

Professor Black surely is correct in finding the Supreme Court's gender cases very awkward fare for "race-like" treatment under the Fourteenth Amendment. The reasons, only some few of which are summarily listed here, are legion:

1. Women, unlike blacks, were not the subject of any particular solicitude in the framing of the Fourteenth Amendment and thus cannot draw upon abolitionist predicates to free themselves from the ordinary "rationality" standard of equal protection review.²⁰

2. To the contrary, the framers of the Fourteenth Amendment regarded gender so differently from race that states forbidding women to vote did not, on that account, even risk a reduction in congressional representation.²¹ In this respect, voting laws limiting the ballot by sex were treated *unlike* laws limiting the ballot by race and *exactly like* voting laws limiting the ballot by age or by criminal record.²²

17. P. 49.

18. 411 U.S. 677 (1973) (holding unconstitutional federal statute that provided that spouses of male members of armed services were to be treated differently from spouses of female members for purposes of obtaining military benefits).

19. Pp. 72-73. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

20. The rationality standard of equal protection review requires only that a classification be rationally related to a legitimate governmental objective. This test is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam).

21. The Fourteenth Amendment provides for a reduction in a state's basis of congressional representation if that state denies or abridges the right to vote to any man, but not woman, who has reached voting age and who has not participated in a crime. U.S. CONST. amend. XIV, § 2.

22. See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (holding that, insofar as § 2 of Fourteenth Amendment precluded reduction in congressional representation of states that disenfranchised persons convicted of crimes, it necessarily implied that such basis of disqualification under no circumstances could be deemed a denial of equal protection under § 1). For reasons expressed elsewhere (and reflected in Justice Marshall's dissenting opinion, 418 U.S. at 72-77), I think the reasoning in Justice Rehnquist's majority opinion is unsound, despite its logical appearance. See Van Alstyne, *The Four-*

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3. So far removed was the early women's rights movement from imagining that the equal protection clause would provide them with any special protection that the earliest post-Fourteenth Amendment women's rights cases did not even attempt to rely on a claimed denial of equal protection.²³

4. Neither can the claim of special protection rest comfortably on the *Carolene Products*²⁴ footnote recognition of "discrete and insular minorities."²⁵ Constituting 51% of the population, fully enfranchised since 1920,²⁶ and scattered uniformly by birth (and evenly with males) among rich families as well as among middle-income and poor families, women simply cannot be compared with or analogized to blacks under the *Carolene Products* standard.

5. If other constitutional clauses are useful in efforts to discern the proper content of a particular clause,²⁷ such clauses in this instance contribute to the conclusion that gender-based classifications do not warrant an extraordinary standard of judicial review. As just noted, Section 2 of the Fourteenth Amendment itself treats sex as a legitimate classifying trait for the important privilege of voting. And insofar as the Nineteenth Amendment may be read to yield any inference at all with respect to the correct equal protection standard for gender-based classifications, it readily may imply that when Congress proposed, and the states ratified, a limited sex-related amendment confined only to voting, they intended to leave absolutely unaffected the remaining mass of state statutes and common law treating men differently from women.

On grounds of text, numbers, economic situation, and statutory and constitutional history, therefore, the Court indeed has been obliged to struggle to place gender-based cases into a near-race-equivalent category of "special" solicitude under the equal protection clause. Indeed, one powerful argument for the dying Equal Rights Amendment²⁸ is that it un-

teenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 SUP. CT. REV. 33, 38-68.

23. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875) (unsuccessfully attempting to compel state to extend right to vote to women); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (unsuccessfully challenging state's right to exclude women from practice of law).

24. *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

25. *Id.* at 152 n.4:

Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [of the constitutionality of legislation challenged under the equal protection clause].

26. U.S. CONST. amend. XIX.

27. Professor Black has been among the most effective in illustrating this technique. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

28. Proposed U.S. CONST. amend. XXVII, § 1 of which reads: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

questionably would provide a proper, desirable, and sound constitutional foundation for what the Court currently attempts to do so poorly under the equal protection clause.²⁹

All of the above goes to show why there is much truth packed into Professor Black's dissatisfaction with the career of gender cases rationalized according to the LAW of the equal protection clause. The point of his prologue, however, is not so much to bury the Fourteenth Amendment as to praise the Ninth.

If we feel uneasy with the Court's "flight without instruments . . .,"³⁰ and its rationalizations of its way through the maze of Fourteenth Amendment sex cases, Professor Black assures us that the Ninth Amendment provides a sound rationale for judicial decision. Apparently without a shred of historical evidence³¹ or other support, Professor Black concludes that all of the awkwardly reasoned Fourteenth Amendment women's rights decisions can be "translate[d] into a conclusion that a broad bar on discrimination against women is a sustainable Ninth Amendment provision."³² Equal rights for women, we are told, is one of the "other rights" mentioned in the Ninth Amendment.³³ This view of the matter is far superior, moreover, not just because it plainly frees judges to do the "right" thing, but because, in this fashion,

we do not have to refer this question to mystical ideas about Western civilization (whose history rarely gives unequivocal support to any very good result, and certainly does not do so in this matter) or about the English-speaking peoples (of whom, in this connection, the less said the better).³⁴

You may canvass Professor Black's book to find a convincing demonstration that the Ninth Amendment can thus be soundly read; I was flatly

29. For a somewhat more elaborate statement on this point, see Van Alstyne, *The Proposed Twenty-Seventh Amendment: A Brief, Supportive Comment*, 1979 WASH. U.L.Q. 161, reprinted (with minor revisions) in *ACADEME* (Bull. A.A.U. Professors) Dec. 1979, at 477.

30. P. 73.

31. To the contrary, the colonial and post-constitutional legal history is overwhelmingly to the opposite effect. For example, in 1873 Justice Bradley wrote: "Man is, or should be, woman's protector and defender The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (upholding state's authority to prohibit law practice by women) (concurring opinion). And, as recently as 1961, the Supreme Court upheld a law that included men on a jury list unless they requested an exemption, but exempted women unless they volunteered. *Hoyt v. Florida*, 368 U.S. 57 (1961). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1060-62 (1978) (early acceptance of prejudicial laws).

32. P. 73.

33. P. 75.

34. Pp. 75-76.

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unable to find one *at all*. He does not burrow through any materials about the Ninth Amendment in particular, for absolutely *nothing* is brought to bear in Professor Black's presentation from Madison's Notes or from any similar sources. Neither does he consult the pattern of laws at the time, the practices of English-speaking peoples in general, or even the "mystical ideas about western civilization." In the end, even an analysis based on an examination of practices of English-speaking peoples or of "mystical ideas about Western civilization" would be more compelling than the analysis offered to us by Professor Black. He does not attempt to support his position, and his argument for incorporation into the Ninth Amendment of a right against sex discrimination in fact boils down to little more than wishful thinking.

I have been frank to select this example of the supposed LAW of the Ninth Amendment for two reasons. First, it is Professor Black's chosen test case—he invites his audience to judge his thesis of the ignored superiority of the Ninth Amendment for the adjudication of constitutional claims by the convincing quality of this example. I suggest that his reading audience accept that invitation and discern for itself where the example leads. Second, I have labored the example for its shock value to make very clear that the proposed transformation of the role of the Ninth Amendment—from diffident and largely secondary uses to central and dominating ones—is a proposal of no small ambition.

The original thought that among the "other rights retained by the people" lies, in particular, a "broad ban on discrimination against women" is startling in the sense of its not being likely to have occurred to many. If such an implausible proposition actually can be made persuasive on no firmer a basis than I can find put forward in its behalf in this book, I do not doubt that virtually every desirable proposition similarly can be discovered as already encompassed in the Ninth Amendment. Indeed, we then would have a more permanent basis for a more permanent flow of judicial activism³⁵—one not embarrassed by precedent (of which there is very little), by language (which, in this instance, will sustain anything), or by history. The malleability of the Ninth Amendment might render the overuse of the contract, due process, and equal protection clauses trivial beyond compare. And this new-found constitutional springboard, which judges understandably have approached with circumspect caution and considerable diffidence, might give discretionary judicial activism its longest life ever. It is not just an invitation to be bolder, but a demand to be so—an appeal to duty to make more decisions according to this LAW of

35. Professor Black has welcomed an association with this position in his highly regarded book, *supra* note 27, at 72 (describing himself as "a judicial activist proudly self-confessed").

infinite capacity.

II

Moreover, there is elsewhere in this call to scriptural obligation a fairly thunderous rebuke of the timid whom Professor Black anticipates in their most obvious excuse. The anticipated excuse is that federal judges are life-tenured, that the Ninth Amendment is notably uninformative of its own content, and that an unseemly ambition in the possible application of this text is inappropriate for the least democratic institution of our national government. Professor Black's answer to this argument is that the federal courts, including the Supreme Court, decide what they decide because Congress wants them to do so. Again and again, Professor Black reminds us that federal courts act upon only so much of the body of cases within the judicial power of the United States as Congress manifests an affirmative will that they decide. The popular will thus is executed, rather than throttled, by uninhibited use of the Constitution.³⁶

For three reasons, I very much wish that Professor Black had not chosen this way to encourage a free-wheeling judicial approach to the serious business of constitutional review. First, it is not at all clear that he is correct. It is genuinely unsettled as to how far Congress may restrict the appellate jurisdiction of the Supreme Court. Absolutely nothing in the book purports either to settle that uncertainty or even, for that matter, to acknowledge its existence. Second, eminently practical constraints make it substantially misleading for Professor Black to ground his theory on congressional ability to restrict the Supreme Court's jurisdiction. Finally, it is my view that the part of the book most likely to be received and acted upon by Congress, to both Professor Black's and my own regret, is the suggestion that, what Congress *permits* the Court to do, it *approves* by permitting the Court to have done. The likelihood is not trivial that, given encouragement of this type, Congress routinely will use a weapon it has been generous enough to forbear from using for more than one hundred years: its power to reduce the role of the Supreme Court in American life. My own view is that Congress has been a friend of the nation in refraining from using this power, but that once instructed that any such forbearance may be deemed a command to the courts to give ultra-activist renderings to provisions like the Ninth Amendment, Congress will feel summoned to its own "duty" to cut back substantially on what the Supreme Court safely may be allowed to decide at all.

I need not recapitulate the debate over the scope of congressional power to restrict the Court's appellate jurisdiction. My own view is that this

36. See, e.g., pp. 18-19, 26, 37-39.

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congressional power may be very broad indeed. I do not subscribe to the view that cases involving certain “essential functions” cannot be withdrawn from the adjudicative capacity of the Court.³⁷ So I do not disagree with Professor Black on this point,³⁸ though among the diversity of published opinion, there is a good deal to be said on the other side—and I wish it were correct.

As a practical matter, however, it is quite unfair to infer that, because Congress does not withdraw whole categories of constitutional cases from the Supreme Court, it therefore has approved the Court’s power, much less its particular uses of that power. For instance, it is reasonably well settled, as Henry Hart so usefully observed, that, if the Court is granted the power to decide a case at all, it must be allowed to decide the case constitutionally.³⁹ To have the Court review conflicting lower federal court interpretations (or conflicting state court interpretations) of an Act of Congress, but at the same time to forbid the Court also to adjudicate the substantive constitutionality of the Act as thus interpreted, may violate that precept. If the *meaning*, but not the constitutionality, of a federal statute is open to judicial determination, the necessary consequence might be to involve the judiciary itself in an affirmative violation of the Constitution by producing a decision, for example, that affirms a criminal conviction although the Act as interpreted and as applied quite manifestly violates the constitutional rights of the convicted person.

If Congress cannot so restrict the judicial power, then it is not true that Congress’ failure to limit the Supreme Court’s appellate jurisdiction necessarily expresses approval of how that Court has interpreted the Constitution; rather, it is an acquiescence of sheer necessity on Congress’ part. To avoid the absurdity of having an Act of Congress produce unreviewable, nonuniform interpretations in lower federal courts or among state courts, Congress must provide for unifying review in the Supreme Court. If, as is widely agreed, it cannot prevent that Court from also examining any manifest constitutional flaw in the Act, then it is not correct to say that Congress is approving constitutional review by the Supreme Court merely by its practical helplessness to avoid it. Much less, of course, is it approving whatever radical theories of constitutional construction may be held from time to time by any plurality of the Court’s members.

But at least as important as this last matter is Professor Black’s and my mutual interest in avoiding the erection of self-destructive arguments in

37. “Essential functions” are generally catalogued as cases involving either (a) the meaning of a federal statute or treaty, or (b) the substantive constitutionality of state or federal action.

38. See Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229 (1973).

39. See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373, 1402 (1953).

the first place. The principal political threat to the Supreme Court's constitutional functions today does not lie in an attempt to forestall judicial review of Acts of Congress; rather, it arises from widespread dissatisfaction with the Supreme Court's review of *state* laws. Here, Congress well might remove whole categories from the Supreme Court's appellate jurisdiction with little of the embarrassment and few of the practical problems that would accompany limitation of jurisdiction over Acts of Congress. Very little, perhaps, may constrain Congress from acting to limit federal jurisdiction in this manner, save its own sense of discretion and of institutional regard for the Supreme Court. A thesis urging the Court to do its own vision of good by reading the Ninth Amendment for every possible creative, activist construction, and to do so, moreover, on the theory that, until Congress says otherwise, the Court should feel virtually commanded (or at least encouraged) by Congress to do so, is utterly self-destructive. This thesis puts the onus on Congress if Congress fails to limit the Court's jurisdiction, and life in Congress for those now resisting efforts to pare down constitutional review of state legislation is hard enough already.⁴⁰ Professor Black's "support" is not, I think, especially welcome.

Essentially, then, I find the demonstration of the superiority of the Ninth Amendment as a LAW of decision both unconvincing and largely unwelcome. The leading example chosen as a test case for mounting simpler, more clearly correct decisions is very unpersuasive. Rather, what is featured here is a new agenda for additional, ungrounded judicial activism that is even less encumbered than the current—and often strained—excessive efforts to do good. Finally, insofar as Professor Black's theory makes Congress responsible for what the Court decides, his thesis is partly misleading and otherwise unfortunate.

40. Even now, Congress actively is considering S. 481, 97th Cong., 1st Sess. §§ 1259 (1981) ("[a] Bill to restore the right of voluntary prayer in public schools and to promote the separation of powers"), which would strip all federal courts, including the Supreme Court, of jurisdiction to review, by appeal; writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.

Id. at 1364.

*The Editors wish to dedicate this issue to the memory of
Professor Arthur Leff of the Yale Law School.*



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