no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [7]

Therefore, although neither Douglas' nor Goldberg's opinion sought to make the Ninth Amendment a substantive source of constitutional guarantees, both read it as indicating a function of the courts to interpose a veto over legislative and executive efforts to abridge other fundamental rights. Both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and, in this case, really, the Ninth Amendment added almost nothing to the argument. But, if there is a claim of a fundamental right that cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment? [8]

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[7] 381 U.S. at 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred, id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty" (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. at 500. It appears that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id. at 481–82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

[8] As Justice Scalia observed, "the [Ninth Amendment's] refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people." Troxel v. Granville, 530 U.S. 57, 91 (2000) (dissenting from recognition of due-process-derived parental right to direct the upbringing of their children).

Notice the recurrence to the Ninth Amendment as a "constitutional 'saving clause'" in Chief Justice Burger's plurality opinion in Richmond Newspapers v. Virginia, 448 U.S. 555, 579–80 & n.15 (1980). Scholarly efforts to establish the clause as a substantive protection of rights include J. Ely, Democracy and Distrust: A Theory of Judicial Review 34–41 (1980); and C. Black, Decision According to Law (1981), critically