

The Breakfast Club

Constitutional Minute for 25 Jul 2023

Right #25: Protection of Unenumerated Rights

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Ninth Amendment.

Most Americans have only a vague understanding of why the Ninth amendment was added to the Constitution. What “other rights” are retained by the people? Obviously, if the ratifiers of 1789-91 had been as mystified by these words as modern Americans, the proposed amendment would not have been ratified; but it was ratified, which tells us Americans of the Founding period understood the intent of this amendment and agreed these “unenumerated rights” deserved protection from denial and/or disparagement.

Webster’s 1828 Dictionary defines “disparage” as: *“To treat with contempt; to undervalue; to lower in rank or estimation; to vilify; to bring reproach on; to reproach; to debase by words or actions; to dishonor.”*

The federal government (the Ninth Amendment has not been incorporated against the states) is enjoined from denying these unenumerated rights exist or treating them with contempt. This is all well and good, but it doesn’t help us understand what these unenumerated rights consist of.

The Ninth Amendment became famous during the 1987 Senate hearing for Judge Robert Bork to be confirmed to a seat on the Supreme Court. Judge Bork famously stated that, to him, the Ninth Amendment was like trying to discern what is obscured by an “ink blot:” He was asked by Senator DeConcini:

“Do you think it is unconstitutional, in your judgment, for the Supreme Court to consider a right that is not enumerated in the Constitution...?”

Judge Bork replied: *“[I]f you had an amendment that says “Congress shall make no” and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.” Thus was born the “Ninth Amendment is an inkblot” meme.*

But twenty-two years earlier, in 1965’s [Griswold v Connecticut](#), the court had done just that, they pulled a “right to privacy” out of the “inkblot” of the Ninth Amendment. That year, the Court decided the “right to privacy” meant only that married couples had to be allowed to purchase and use contraceptives. Eight years later, in *Roe v Wade*, the court expanded the “right to privacy” to include terminating the life of an unborn child in the womb. Do you see the danger of the Ninth Amendment in the wrong hands?

James Madison added what became the Ninth Amendment to address a specific criticism of Bills of Rights:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution [Note: which eventually became the Ninth Amendment].”

This amendment makes it clear that rights not specifically mentioned in the Constitution still deserve to be protected.

The consensus among constitutional scholars is that the Ninth Amendment should be read as a limitation on the power of Congress to enact a law which limits what is generally conceived to be a commonly understood right of the people.

“[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.”¹

But this, once again, is not very helpful. Today’s American views the world in a vastly different way than did our founding generation. In eighteenth-century America, Christianity was the “glue” of society, the prime institution; founding period Americans understood and unflinchingly proclaimed their natural rights were a gift of a benevolent Creator God who cared about all people, but especially those “called by His name.” Those rights were derived from Natural Law, which itself was a gift of God to help people live harmoniously and thus happily. The Virginia Declaration of Rights says it best:

“That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

But today’s progressives are more interested in a “right” to not be offended, a “right” to not be exposed to opinions they do not embrace, a “right” to be supplied with a free education, and on and on and on. They demand the authority to identify these as “unenumerated rights.”

To the progressives who believe the Ninth Amendment permits the “inventing” of new rights never before thought of,² Professor Randy Barnett argues that the “retained” rights to which the Ninth Amendment refers are individual natural rights that individuals possessed before the

Constitution's adoption and that they "retained" to themselves upon forming their government.

Barnett argues that the Ninth Amendment's reference to "retained" rights refers to unenumerated *individual* rights and that the amendment should be construed to empower courts to enforce such rights directly in the same manner as enumerated rights. But unlike those non-originalists who view the Amendment as an open-ended invitation for judges to protect only those unenumerated rights they find appealing, Barnett argues that the amendment's retained rights language points to a historically defined standard.

I'll have more to say on this point in my concluding essay in this series.

Can you think of some conservative "rights" that are not currently enumerated? I can:

The right to self-government.

The right to have sound money.

The right to enter into contracts.³

The right to be governed only by our consent, not by the United Nations, for example.

Protection from coercive taxes....

So who gets to identify these "retained rights," the judges or the people?

If "we the people" leave the job to the judges, the judges will gladly take over. Think about it.

For further reading:

[The Ninth Amendment: It Means What It Says](#). by Professor Randy Barnett (click to download)

[The Ninth and Tenth Amendments: An Illustrated History](#), by Robert McWhirter, 2017.

[Recovering the Constitution: Using the 9th Amendment to Restore Civil Liberty](#), by David Fowler, 2021.

Next week: The Tenth Amendment.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.

Contact: gary@constitutionleadership.org; 757-817-1216

¹ Sir William Blackstone, Commentaries on the Laws of England, 1:120—41.

² See *Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*, by Dan Farber

³ This right was actually adjudicated in the famous case of *Lochner v. New York*, 198 U.S. 45 (1905) in which the majority was criticized for reaching onto natural law for their decision.