

Americans Should Remember the Ninth Amendment

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Two hundred and thirty years ago today, on November 20, 1789, New Jersey became the first state to ratify the proposed amendments to the Constitution that we now know as the Bill of Rights. Over the next two years, other states followed suit, culminating in the adoption of the amendments in December of 1791. It almost didn't happen. Supporters of the Bill of Rights won their opponents over, though, thanks in large part to the inclusion of the Ninth Amendment.

If you're straining to remember what you learned in civics class about the Ninth Amendment, you're not alone. Despite the importance of the rights protected by the first ten amendments to the Constitution, surveys over the past few decades have consistently shown that Americans know little about either the Bill of Rights or the Constitution as a whole.

So what's in the Bill of Rights? For starters, it's not long — all together, the ten amendments are only 462 words and could be tweeted out in ten tweets. Those 462 words pack a punch, though, explicitly protecting a broad range of rights, from the freedom of speech to the right to a speedy and public trial. The scope of several of the amendments, such as the Second Amendment and its right to keep and bear arms, remains a hotly contested issue today. Others rarely breach the surface of public discourse — the Third Amendment's prohibition against illegally housing soldiers in the homes of private citizens has been so effective that it has scarcely ever been litigated.

The Ninth Amendment falls into the latter category — it barely registers in the public sphere. If the Third Amendment is the least relevant of the Bill of Rights to Supreme Court jurisprudence, then the Ninth Amendment is the second-least relevant. The Supreme Court's relegation of the Ninth Amendment to the dusty attic of judicial doctrine is odd when you read it, though: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." "Others retained by the people" is powerful language. Does it mean that Americans have constitutional rights not actually written in the Constitution? It depends whom you ask.

During his infamously contentious confirmation hearings as a Supreme Court nominee in 1987, then-judge Robert Bork said the meaning of the Ninth Amendment was too uncertain for judges to enforce, famously comparing it to an uninterpretable inkblot. This fit with Judge Bork's belief that there are no "unenumerated," or unwritten, constitutional rights. Fast-forward 30 years to the 2017 confirmation hearing of Neil Gorsuch, though, and you get a markedly different answer.

When Senator Ben Sasse asked then–Judge Gorsuch what the Ninth Amendment means, Gorsuch answered simply: “I think it means what it says,” echoing an argument made in a 2006 law review article by Georgetown law professor Randy Barnett titled “The Ninth Amendment: It Means What It Says.”

In his article, Barnett reviews the historical evidence for the meaning of the Ninth Amendment and concludes that the amendment uniquely provides explicit guidance on how to interpret the Constitution. Specifically, it tells us that “unenumerated rights deserve no less protection from courts than those that were enumerated.” Accordingly, interpretations contrary to that principle are constitutionally prohibited.

The inclusion of an amendment dictating constitutional interpretation is a result of serious worries among the founding generation that a Bill of Rights would actually lead to *less* liberty, not more. James Wilson, one of the Constitution’s drafters, argued that a Bill of Rights would endanger liberty by implying that any rights left off the list were unprotected. Because it would be impossible to list all the rights that a person holds, it was better not to have a Bill of Rights at all. Instead, he argued, the Constitution protected liberty by carefully limiting the powers held by the government.

The Ninth Amendment was the compromise measure. By clarifying that listing certain rights did not mean that *other* rights were less protected, the drafters thought that they had covered all of their bases. The rights listed in the first ten amendments would be protected, but so would those that were *not* listed. That was important, because the rights listed in the Constitution and the Bill of Rights amendments are hardly comprehensive. Notably left off the list is the principal right asserted in the Declaration of Independence: the right to “alter or abolish” an unjust and abusive government. This and other rights were included in the Bills of Rights of many state constitutions, but they were not explicitly listed in the Bill of Rights amendments to the national Constitution. The Ninth Amendment ensured that these rights would not be demoted to second-class status, as people like James Wilson had feared.

The Ninth Amendment has grown only more important over time. Though the protections of the Bill of Rights amendments originally applied only to the federal government, the 14th Amendment has been interpreted to apply those protections against state governments as well (although which part of the 14th Amendment does this remains the subject of considerable debate). The Ninth Amendment’s interpretive rule applies here too, foreclosing the argument that only the rights specifically listed in the Bill of Rights are enforceable against the states.

The animating principle of the Ninth Amendment is one that, as Justice Stevens wrote, “goes to the very core of the constitutional relationship between the individual and governmental authority.” Although the Ninth Amendment has only rarely been explicitly invoked by the Supreme Court, you can see its fingerprints on many of the Court’s decisions. The Court’s protection of unenumerated fundamental rights that are “deeply rooted in this Nation’s history and tradition” acknowledges that today, as at the time of the Founding, listing every one of a person’s rights is impossible. Our Constitution is one of expansive rights and limited

government. The Ninth Amendment's inclusion in the Bill of Rights reminds us, and the Supreme Court, not to interpret it otherwise.

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