

# NATIONAL REVIEW

## Unenumerated Rights Are Not Second-Class Rights

*The Ninth Amendment is not an inkblot or an afterthought, but a vital protection of freedom.*

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Ramesh Ponnuru has [latest column](#), which expresses a hope that Supreme Court nominee Neil Gorsuch will return to the jurisprudence of natural rights. Ponnuru's interpretation is the very same one that the Ninth Amendment was designed to prevent: It's simply not true that enumerated rights — those explicitly spelled out in the Constitution — deserve more protection than unenumerated ones.

Ponnuru is right that Robert Bork didn't say directly that the meaning of the Ninth Amendment is an inkblot, though what Bork actually did say is hardly better: He stated that he didn't know what the meaning of the amendment was, and so would treat it as an inkblot.

The real problem with this statement is that Bork was unable to give the Ninth Amendment a meaning, probably because the Constitution conflicted with his preferred judicial role.

Judges are not meant merely to implement the will of the legislature, but instead to uphold the law regardless of what the legislature believes. They are a coequal branch, not subservient to the legislature. As Justice Scalia was fond of saying, judges' role is not to divine some mythical legislative intent, but instead to enforce the text as written.

The law, as understood by the Founders, included the idea of the "law of nature" — natural, unalienable rights that existed prior to government, to which the Declaration of Independence specifically refers.

Ponnuru claims it is wiser to have a government where judges only enforce "those natural rights that have been spelled out in the Constitution." The problem with this is that there are far too many natural rights to "spell out." When the Bill of Rights was introduced, Representative Theodore Sedgwick, who had also been a delegate to the Continental Congress, explained:

They might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but [I] would ask the gentleman

whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.

Ponnuru instead thinks it's wiser to leave these unenumerated rights up to the legislature. That makes no sense: Something that's a right can't be subject to legislative grace. Under our Constitution, the government shouldn't be able to interfere with your freedom of speech or stop you from wearing a hat, or from getting up at whatever time you want.

Under our Constitution, the government shouldn't be able to interfere with your freedom of speech or stop you from wearing a hat, or from getting up at whatever time you want. No doubt the legislature should be a defender of these and other rights, but is it wise to leave it entirely up to them? That would be letting the fox guard the henhouse. Indeed, constitutional rights are necessarily removed from the political process.

This is not to say that "natural" or unenumerated rights include anything that any individual wants to assert. Natural rights pre-exist government, so they cannot include government benefits. You cannot have a natural right to health care or any other product or service.

All natural rights exist in the form of a person's right to do that which doesn't harm another. Freedom of speech extends to all acts of speaking that do not harm others (libel, for instance, is not protected). The rights to wear a hat (or not) or to wake up whenever you want are all encompassed within your right of liberty.

The Constitution already protects these unenumerated rights even though it doesn't create any natural right, in the Bill of Rights or otherwise. Instead the Constitution prohibits "abridging" or "infringing" rights that already exist. So the Constitution doesn't need to adopt anything for these natural rights to be just as protected as any enumerated right.

Moreover, the Constitution clearly protects "other" unenumerated rights in the Ninth Amendment from being denied or disparaged. This "disparaged" word is important because it means that unenumerated rights must be given equal treatment to those listed in the first eight amendments. There are no second-class rights.

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