



The Forgotten Amendment

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

— Ninth Amendment (1791)

When the Constitution was presented to the states for adoption, it contained no bill of rights. A majority of those who attended the Constitutional Convention decided that no bill of rights was necessary. They believed the powers granted to the federal government by the Constitution were so limited that the government could never become tyrannical. Also, the Constitution created a structure of government made up of three separate branches, each with a specific and separate set of powers providing “checks and balances” so that the actions of one branch could be monitored by the others. But many political leaders were not convinced. Several of the states coupled their ratification of the Constitution with a demand that amendments be adopted to guarantee the rights of citizens. During his campaign for a seat in the First Congress, James Madison pledged to propose constitutional amendments that would provide a Bill of Rights.

During the debate over the drafting of the Bill of Rights, James Madison expressed concern that it was impossible to list all the rights that should be protected by the Constitution, and that the listing of some rights might imply the denial of any rights not listed. Thus, the Ninth Amendment was written by the framers of the Bill of Rights as a “safety net” for those legitimate rights that were not specifically mentioned.

Most scholars agree that the Ninth Amendment was intended to provide one more protection against the government’s abuse of power. Other issues about this amendment

are not so easily resolved. Did the framers see this amendment as a way to expand the rights of the people in future ages? Should the courts use the amendment to identify and recognize new rights that seem desirable as new conditions develop over the years? Many scholars answer no, arguing that the framers had no such intention.

The Ninth Amendment has been cited hundreds of times by federal and state courts, but it has rarely figured in Supreme Court decisions. In a few cases, the amendment provided general added support for specific constitutional rights. But no Supreme Court majority has ever precisely identified the rights “retained by the people” through the Ninth Amendment. The amendment did not even undergo any serious analysis in a Supreme Court decision until 1965. In this case, a minority of three justices were able to agree on one Ninth Amendment right.

Griswold v. Connecticut (1965)

In 1961, officers of the Planned Parenthood League of Connecticut were arrested for supplying and giving instruction in the use of contraceptive devices to married persons. A Connecticut law, on the books since 1879, prohibited the use of “any drug, medicinal article or instrument for the purpose of preventing conception.”

When the case reached the U.S. Supreme Court in 1965, the state of Connecticut argued that its law was designed to discourage extramarital sexual relations by making contraceptives unavailable to everyone. All of the Supreme Court justices agreed the law was largely unenforceable, even silly. But was it unconstitutional?

Justice William O. Douglas, writing for the 7-2 majority, held that the Connecticut law violated the constitutional “right of marital privacy.” The Constitution, including the Bill of Rights, however, never specifically mentions any right of privacy. This fact did not deter Justice Douglas from concluding that various parts of the Bill of Rights “create zones of privacy.”

Justice Douglas explained that although the right to privacy does not appear anywhere in writing, it exists as part of other rights that are written. Douglas found the right to privacy implied by freedom of assembly (First Amendment), the prohibition against quartering soldiers (Third Amendment), the guarantee against searches and seizures (Fourth Amendment), and the rights “retained by the people” (Ninth Amendment). Justice Douglas went on to say that the “right of marital privacy” is even “older than the Bill of Rights.”

Agreeing that the anti-contraceptive law was unconstitutional, several justices differed somewhat with Justice Douglas over the constitutional basis of the “right of marital privacy.” Justice Goldberg, joined by two other members of the court, looked to the Ninth Amendment as the source of this right. Goldberg argued that the Ninth Amendment contains certain fundamental rights. To discover what these rights are, Goldberg wrote, the Supreme Court must refer to the “traditions and [collective] conscience of our people.” Goldberg concluded that “the right of privacy in the marital

relation is fundamental and basic — a personal right ‘retained by the people’ within the meaning of the Ninth Amendment. . . .”

Two additional justices found the Connecticut law to be unconstitutional, but for a different reason than the violation of a privacy right. Justice White argued that the law making the use of contraceptives illegal violated the 14th Amendment by depriving married persons of “liberty” without due process of law.

Two dissenters found the law offensive, but constitutional. Justice Stewart wrote that he could find no right of privacy anywhere “in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.” Justice Black stated it was not within the power of the Supreme Court “to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because . . . [they] are unreasonable, unwise, arbitrary, capricious, or irrational.” Both dissenters agreed that since the law did not violate any part of the Constitution, it was up to the people of the state and their elected lawmakers to change the law or take it off the books.

Three justices in the *Griswold* case based their written opinions on the Ninth Amendment. Since this 1965 case, only a few Supreme Court decisions have referred to the Ninth Amendment.

Interpreting the Ninth Amendment

Why has the Supreme Court been reluctant to interpret and apply the Ninth Amendment to its cases? One reason can be found in the language of the amendment itself. By referring broadly to other rights “retained by the people,” the amendment gives little guidance as to which rights are retained. Some scholars have argued that if the Ninth Amendment were used to carve out new rights, the process would be almost endless. They point to the danger of activist judges using the amendment to justify the creation of almost any right and invalidating federal and state legislation that interferes with these hypothetical rights. Ultimately, they argue, the amendment used in this way could upset the doctrine of separation of powers.

Other scholars question this result. The Supreme Court, they argue, has often been called upon to interpret the Constitution, especially in the area of the 14th Amendment’s “due process” and “equal protection” clauses, which are as vague as the language contained in the Ninth Amendment. While one can argue with the results, under this view, the court has shown the capacity to tread carefully when establishing new rights to avoid interfering with legislative power.

The question remains: What rights are retained by the people? Are they only those rights that would have been known in 1791 when the Bill of Rights was ratified? Or are they those rights more broadly described by Justice Goldberg in his *Griswold* opinion, which are to be found in the “traditions and conscience of our people”?

The difficulty in answering these questions helps explain why the Ninth Amendment has not become an important force in the work of the U.S. Supreme Court. While the Warren Court, which decided the *Griswold* case, was more willing to interpret the amendments of the Constitution to identify and establish new individual rights, later courts have been less willing to do so. The current court's chief justice, John Roberts, is very conservative when it comes to carving out new rights through judicial interpretation. It seems unlikely that the present court will be tempted by the Ninth Amendment to do so. For the near future, except in the works of constitutional scholars, the Ninth will probably remain the Bill of Rights' "forgotten amendment."

For Discussion and Writing

1. In what way did Justices Douglas, Goldberg, and White agree in the *Griswold* decision? How did they disagree with one another?
2. In your opinion, is there a right to privacy in the Constitution? If you think there is, where in the Constitution is it located?
3. Make a list of rights not found anywhere else in the Constitution that you believe might be protected by the Ninth Amendment.

For Further Reading

Dixon, Robert G. et al. *The Right of Privacy: A Symposium on the Implications of Griswold v. Connecticut*. New York: Da Capo Press, 1971.

Redlich, Norman. "Ninth Amendment." *Encyclopedia of the American Constitution*. New York: Macmillan, 1986.

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Activity

The Ninth Amendment Remembered

Imagine it is a distant time in our country's future. You and two of your classmates are now serving as clerks to a Supreme Court justice. It is your job to research the law to help the justice make judicial decisions. Your justice is interested in taking a fresh look at the Ninth Amendment. The justice asks you and your fellow clerks to prepare an analysis of the amendment.

To complete the assignment, work in groups of three, following these steps:

- Make a list of three rights not found anywhere else in the Constitution that you believe should be “retained by the people” and protected under the Ninth Amendment.
- For each right on the list, answer the following questions:
 1. Would the framers of the Constitution recognize this right as being protected by the Ninth Amendment?
 2. Would the right meet Justice Goldberg's requirement of being within “the traditions and [collective] conscience of the people?”
 3. What would be the consequences of recognizing this right? What benefits would result? What problems might it create?

* Based on your answers to these questions and your reading, discuss and take a position on the following statement: *The Ninth Amendment should be used by the Supreme Court to establish new rights for the people.* Be sure to support your answer with reasons.

Your teacher will take the role of Supreme Court justice and ask each group of clerks to report.