

The Most Ingenious 21 Words of the Constitution:

The Redacted Ninth Amendment

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The [Framers](#) of the [Constitution](#) faced a conundrum. The states refused to ratify their cleverly crafted document without a [Bill of Rights](#) guaranteeing the protection of the privileges and immunities of all citizens. Privileges and immunities are synonymous with [fundamental rights](#). Fundamental rights are those rights which are essential for a free society. The Framers however, did not want to include a Bill of Rights. The Framers concluded drafting such a document would be impossible. After all, how could anyone detail all the rights of mankind. People literally had thousands of rights. Just about any legal action a person may partake in their daily lives could be deemed essential to a free society. Thus, the plan was to write a Bill of Rights to include the most essential and necessary fundamental rights such as the right to free speech, to religious liberty or liberty of conscious thought, to justice or due process of the law, to own and sell property, and the right to bear arms or self-defense.

The Framers feared however, any list of rights would leave many more important fundamental rights unprotected. Many of the Framers [objected](#) to a Bill of Rights because the Framers feared unenumerated rights (or rights not listed in the Bill of Rights) would not be protected or protected as vigorously as those rights enumerated in the Constitution. Ultimately, there are many important and essential fundamental rights which are not included in the Bill of Rights such as the right to obtain knowledge, to contract, to marriage, to travel, to raise a family, and to work a lawful occupation to name a few.

To resolve the unenumerated rights conundrum, [James Madison](#) proposed the [Ninth Amendment](#) which reads:

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

The Ninth Amendment is, in my opinion, synonymous with [liberty](#) and is the most magnificent and ingenious 21 words of the Bill of Rights and the Constitution. The Ninth Amendment was a catch all provision to protect all fundamental rights of humanity.

Why, then, did Congress pass, for example, the [Fourteenth Amendment's](#) Privileges and Immunities Clause or the [Nineteenth Amendment](#) granting United States citizens over 18 years of age with voting privileges? Shouldn't the rights protected by those amendments be encompassed in the Ninth Amendment? One would think so, but constitutional law has made a mess of things. For example, [Chief Justice John Marshall's](#) decision in [Barron v. Baltimore](#) in 1833 complicated matters. Marshall held the Bill of Rights did not pertain to the states, but only to laws initiated by the federal government. Thus, the Fourteenth Amendment's Privilege and Immunities Clause was a necessity to protect citizens from state laws which may infringe on fundamental rights. The history of American law gets much messier when the 1873 [Slaughter House Cases](#) essentially redacted the newly passed Privileges and Immunities Clause from the Fourteenth Amendment. The story of the *Slaughterhouse Cases* is for another day.

The primary reason for drafting the Nineteenth Amendment is because legislatures and courts very rarely use or rely on the Ninth Amendment. The reason for the Ninth Amendment's lack of

use is twofold. First, many law experts claim understanding the amendment's true meaning is ambiguous. The uncertainty surrounding the amendment's meaning is unclear since the words seem fairly self-explanatory and information explaining why James Madison included the amendment in the Bill of Rights is readily [available](#). Second, many jurists are afraid to open Pandora's box because judges are uncertain of how the other side will use the amendment. For example, liberals and conservatives may want to use the amendment to protect things which are not fundamental rights. However, those fears have already been realized when the Supreme Court protected abortion without the use of the Ninth Amendment.

Of course, the apprehension or fear of how the Ninth Amendment would be used could have easily been averted. Legislators and courts could simply define the criteria a fundamental right must possess to be elevated to constitutional protection through the Ninth Amendment. In 1997 the Supreme Court finally attempted to define the properties of fundamental rights in [Washington v. Glucksberg](#). In *Glucksberg*, the Court held fundamental rights had to be "deep rooted in American culture and history." Natural law philosopher, [John Locke](#), provided the best definition of a fundamental right in his "[Second Treatise of Government](#)" published in 1689 when he said a fundamental right was one "the fewest people have dared to deny." In other words, fundamental rights should be unanimously accepted. The topic of unenumerated rights is a lesson for another day.

During his confirmation hearing to the Supreme Court, [Robert Bork](#) was asked about the Ninth Amendment. Bork essentially told congressional members the amendment was redacted or the word he used was the amendment was an [inkblot](#). Nevertheless, Madison had a purpose for writing and including the Ninth Amendment in the Bill of Rights. Ignoring the Ninth Amendment has done a great disservice to not only the Constitution, but as we shall learn, protecting unenumerated fundamental rights of citizens.

The Tenth Amendment is similar to the Ninth Amendment because both amendments are a catch all. The [Tenth Amendment](#) provides all powers which are not delegated to the federal government in the Constitution are reserved for the states. In [United States v. Darby Lumber](#) in 1941, [Chief Justice Harlan Stone](#) wrote the Tenth Amendment was a "truism" as he expanded federal powers under the [Interstate Commerce Clause](#). Stone would do the same in [United States v. Carolene Products](#) in 1938. Although Stone did not address the Ninth Amendment in his infamous [Footnote Four](#) in *Carolene Products*, he would create the two-tiered level of rights the Framers feared. The story of *Carolene Products* is also for another day, but the bottom line is James Madison's ingenious 21 words fell on deaf ears and protecting the fundamental rights of citizens was put in danger.

The Ninth Amendment is so magnificent and powerful it could have been used as the vessel to support the two biggest civil rights movements in United States history: Ending [slavery](#) and passing women's [suffrage](#). Essentially, there was no reason to pass the [Thirteenth](#), [Fourteenth](#), [Fifteenth](#) and Nineteenth Amendments since the amendments are encompassed in the Ninth Amendment. But legislators and jurists have not only complicated matters, those politicians have done a grave injustice to protect unenumerated fundamental rights of citizens by redacting the Ninth Amendment.