## The Ninth Amendment Example

The Ninth Amendment interpretation illustrates originalism is dead. The Ninth Amendment is an enigma because it is interpreted incorrectly and it is hardly used. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment and the privileges and immunities clause of the Fourteenth Amendment are very similar and allow for Justices to elevate natural law fundamental rights that are not found in the Constitution. They are also very similar because they are seldom used. Scholars are at odds whether the Ninth Amendment applies to both federal and state governments. [1] The argument I put forth in this text is that the Ninth Amendment should be included as part of the Bill of Rights (most scholars only believe the first eight amendments make up the Bill of Rights). Therefore, the Ninth Amendment should be applied to the states via the Fourteenth Amendment's due process clause, the same as other Bill of Rights amendments (more on this in the next chapter).

The privileges and immunities clause, of the Fourteenth Amendment, has been incorrectly redacted from the Constitution in the *Slaughter-House Cases* and the Ninth Amendment is long forgotten, also redacted by the inkblot theory. Robert Bork, a Supreme Court Justice nominee (Senate did not confirm him in 1987), said during his confirmation hearings that the Ninth Amendment is an inkblot and should be ignored since its true meaning is hard to discern. It is hard to fathom, something as important as the Ninth Amendment should be redacted from the Constitution. After all, our Founders had a specific reason to put it in the Constitution in the first place. [1, 12, 17, 19]

The Ninth Amendment was James Madison's way to handle a very perplexing issue. Most Constitutional Convention members did not want a Bill of Rights for various reasons. The most important reason was echoed by James Iredell of North Carolina and James Wilson of Pennsylvania. They both argued it was impossible to list all the natural rights of citizens. [19] Thus, by enumerating a few natural rights it may end up disparaging the many natural rights that are not found in the Bill of the Rights. However, many states would not ratify the Constitution without the promise of a Bill of Rights added to the document. In Federalist Paper 84, Alexander Hamilton argues against a Bill of Rights. A Bill of Rights is not needed for the Constitution since many individual and state's rights are built into the Constitution such as not allowing a suspension of a writ of habeas corpus. Besides, Hamilton argues that by adding a Bill of Rights, "They would contain various exceptions to powers not granted." Furthermore, Hamilton added, "Why declare that things shall not be done which is no power to do?" [5] Hamilton argues further, in Federalist Paper 83, many individual rights are already included in state constitutions such as trial by jury. Hamilton claims there is no trial by jury provision in the Constitution since each state has varying and unique interpretations on the subject. Some states allow trial by jury for criminal cases but not for civil ones and vice versa. In most cases, fundamental rights protected by state constitutions were more stringent than the federal Bill of Rights. [5] Iredell, Hamilton, and Wilson were correct in their assessment and this will be explained later in this book. Madison's plan to solve this conundrum was the Ninth Amendment. [1, 17, 19]

The Ninth Amendment was scarcely used in American jurisprudence to enumerate individual rights, but there is some precedent to back this school of thought. Justice Goldberg used the Ninth Amendment in his reasoning for *Griswold v. Connecticut* (he was the only Justice out of seven to do so) and Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter used the Ninth Amendment in *Planned Parenthood v. Casey* (*Roe v. Wade* follow up in 1992). Most scholars (both liberal and conservative) tried to minimize the impact and relevance of the Ninth Amendment and most Justices have been reluctant to use it because they are afraid of opening Pandora's Box. Put another way, both the Right and Left are afraid how each side will use the amendment. In particular, they fear the amendment will be exploited for political purposes. [1, 7, 17, 19] But Justices have already exploited many provisions within the Constitution for political purposes. Later, in this text, I outline several principles to elevate unenumerated natural law fundamental rights to constitutional status, so the Ninth Amendment is not exploited for political purposes.

The original meaning of the Ninth Amendment provides for a dual purpose. First, it is to prevent the federal and state governments from denying rights that may not be enumerated in the Constitution or Bill of Rights. Second, the amendment is to "deny an expansion of federal power" that may arise from a limited list of rights in the Constitution. [17, 25] In other words, the amendment would prevent the federal government from assuming it has the power to regulate rights that are not enumerated in the Constitution. The Ninth Amendment also has a dual purpose in terms of protecting the rights of individuals and protecting the collective rights of people within a state. For example, the collective right of the home rule provides states can "determine for itself its own political machinery and its own domestic policies" so long as they do not violate the rights of citizens. The Ninth Amendment text also means enumerated and unenumerated rights are treated exactly the same. Put in other terms, one right, regardless of enumeration, should not garner priority over other fundamental rights. [17, 19] This concept is important because the entire history of the Supreme Court violates this Ninth Amendment rule. Instead, SCOTUS conjures up balancing tests to provide some rights more preferred status over other rights.

Some scholars insist the Ninth Amendment only applies as a compact between the states and the federal government (similar to the Tenth Amendment). This theory is half true. The original meaning of the Ninth Amendment can be explained in part by Roger Sherman's original draft of the Bill of Rights. Sherman attempted to combine both the Ninth and Tenth Amendments into one amendment. The committee rejected this, but it is proof both amendments had the purpose of limiting federal power. [17, 19]

Madison's first inclination was to add the first ten amendments into the Constitution under the section where they were most pertinent. Madison wanted to list the first nine amendments under Article I, Section 9 after those clauses guaranteeing other natural or fundamental rights including a writ of habeas corpus, the ban on bills of attainder, and ex-post facto laws. Madison proposed placing the unique federalism protection clause (the Tenth Amendment) in Article VI. Since Madison did not want to place the Ninth Amendment in the same section as the Tenth Amendment, some incorrectly argue the two amendments cannot have a similar meaning to limit federal power. Conversely, some states had provisions similar to the Ninth Amendment in their state constitutions. They believed the Ninth Amendment limited federal power, but not state power. Of course, the amendments were added at the end of the Constitution creating some confusion about the meaning of the Ninth Amendment. [17, 19]

Madison's amendment placement proposal also debunked several other flawed theories about the meaning of the Ninth Amendment. First, the collective rights theory, which implies the Ninth Amendment's purpose was for a Constitutional Convention. If true, then Madison would have proposed placing the Amendment in Article V with other Constitutional Convention and amendment guidelines. Second, the Ninth Amendment's purpose was for guaranteeing a republican form of government for the states. If that were true, then Madison would have proposed placing the Amendment in Article IV with the other guaranteed republican form of government statements. Finally, other scholars theorized the Ninth Amendment's purpose was to prevent the repeal of states' Bill of Rights provisions, which are stricter than those in the Constitution. This is true; however, SCOTUS routinely infringes on stricter state law interpretations of the Bill of Rights, especially during the Warren Court (more on the Warren Court later). [17, 19]

Another theory limiting the power of the Ninth Amendment is the residual rights theory. A good example of this theory is *United Public Workers v. Mitchell (1947)* in which Justice Stanley Reed wrote, "If granted power is found, necessarily the objection of invasion of those rights reserved by the Ninth and Tenth Amendments, must fail."[1, 7, 17] In other words, individual freedom, rights, and liberty must take a back seat to enumerated federal powers. Let's be clear, the Constitution does not support any hierarchy of clauses or Amendments (unless amendments are drafted specifically to repeal or correct previous clauses and amendments). In fact, the Ninth Amendment guarantees all rights to be treated equally. [1, 21] This process follows the natural law principle that there is "no arbitrary preferences among values" or among morals or rights. [3] Why have the Ninth and Tenth Amendments been treated differently than other amendments?

That is the million-dollar question. *Mitchell* upheld the Hatch Act, which denied public servants from practicing their fundamental right to engage in a political activity. *Mitchell* labeled the Ninth and Tenth Amendments as "truisms." [1, 7, 17]

In fact, Madison's original proposal for the Ninth Amendment reads as follows: "The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed so as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted for greater security." The second part of the proposed Ninth Amendment is proof it was intended to be a federalism clause. The purpose of the clause was to limit federal powers similar to the Tenth Amendment. [17, 19]

Since the "enlarge the powers" phrase of the Madison's Ninth Amendment draft was removed, it incorrectly led many scholars to believe the amendment was not one to deny federal power, but only to retain individual rights. However, in letters between Madison and Hardin Burnley, he ensures the meaning of his draft and the final version of the Ninth Amendment have the same meaning. Madison asserted that retained rights and limited power were one of the same. Madison's correspondence with Burnley started when the Virginia ratifying committee (for the Bill of Rights) rejected the Ninth and Tenth Amendments. Governor Edmund Randolph and others fretted over the change to the Ninth Amendment. Although the language of the Tenth Amendment between Madison's draft and the final version remained unchanged, the Virginia committee wanted two amendments to stop the encroachment of federal power. Madison wrote that "every public usurpation is an encroachment on the private right, not of one, but of all." Hence, protecting rights is the same as limiting federal power. [1, 17]

At the same time Virginia was debating ratification of the Bill of Rights, another dispute began in Congress over establishing a national bank. The crux of the debate for Madison centered on the fact that both the Ninth and Tenth Amendments limited federal powers from using the necessary and proper clause to create a national bank. Madison's reassurance of the meaning of the Ninth and Tenth Amendments in the bank dispute may have helped Virginia end its gridlock and pass the Bill of Rights. It is important to note that only Virginia questioned the meaning of the Ninth Amendment. All other states understood that the Ninth Amendment intended to limit federal power. [17]

Thus, the Ninth Amendment was drafted to protect citizens from the backdoor theory. For instance, freedom of the press in the First Amendment did not allow Congress the power to regulate the press if it did not infringe on a free press. [17, 19] Hamilton feared this exact theory in Federalist Paper 84. He felt a Bill of Rights would allow the federal government to have broader powers. Put another way, if there is an amendment restricting Congressional powers, then the fear was that politicians would interpret the Constitution as implying that power must be an enumerated one. [5] However, Madison's words prove he did not intend for the Bill of Rights to "enlarge the [federal] powers" in the Constitution. [17, 19]

A good early example of the backdoor theory was the Alien and Seditions Act signed into law by President John Adams. In the Virginia and Kentucky Resolutions, both Madison and Jefferson proposed the Alien and Seditions Act was unconstitutional because the law violated both the First and Tenth Amendments. In the *Response to the Virginia and Kentucky Resolutions* authored by future Chief Justice John Marshall, he defends the Alien and Seditions Act as constitutional using three arguments. First, he asserts Congress may use the necessary and proper clause in times of crisis (to avoid war with France) to protect the well-being of American citizens. Second, the Tenth Amendment was copied from Article II of the Articles of Confederation and provides "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." The key word in this provision is "expressly," since it was omitted from the wording of the Tenth Amendment. Hence, Marshall felt this omission meant that federal power could be

liberally construed. Finally, Marshall argues Congress can regulate speech so long as it does not abridge freedom of speech. [10, 17]

The final argument proposed by Marshall was the backdoor theory, but the Ninth Amendment does not allow Congress to enlarge its powers around clauses, provisions, and amendments in the Constitution. In fact, many politicians such as Thomas Mason, James Callender, and Nathaniel Macon are on record for using the Ninth Amendment to find the Alien and Seditions Act unconstitutional. As for the "expressly" argument, John Page (Virginia politician and governor), wrote that the combination of both the Ninth and Tenth Amendments provides for "conferred expressly delegated powers." In *Calder v. Bull*, Chief Justice Samuel Chase holds "the several State Legislatures retain all the powers of legislation, delegated to them by the state Constitutions; which are not expressly taken away by the Constitution of the United States" [17]

The concurrent powers doctrine using a combination of the Ninth and Tenth Amendment is interesting because it is the antithesis of modern jurisprudence introduced by the FDR Court. The doctrine holds that states maintain sovereignty over powers concurrently held by both the states and federal government via the Ninth and Tenth Amendments. For instance, the federal government has the enumerated power to prosecute counterfeiters. However, in *State v. Antonio,* the South Carolina Supreme Court held that South Carolina had the right to prosecute a counterfeiter citing the Ninth and Tenth Amendments. In *State v. Antonio,* the South Carolina Supreme Court laid the groundwork to limit federal powers by reading Constitutional provisions narrowly to limit the expansion of enumerated powers. For instance, in *Hawke v. Smith*, the Ohio Supreme Court upheld the right of states to use referendums to approve proposed amendments to the Constitution instead of state legislatures outlined by Article V. FDR's National Industrial Recovery Act (NIRA) was rejected using the concurrent powers doctrine by federal judges in *Amazon Petroleum Corporation v. Railroad Commission, Hart Coal Corporation v. Sparks,* and *Acme Inc v. Besson*. The Iowa Supreme Court struck down provisions of FDR's Agriculture Adjustment Act (AAA) in *United States v. Neuendorf* using this doctrine. [17]

In the Supreme Court case, *Houston v. Moore (1820),* in his dissent, Justice Joseph Story held Pennsylvania could discipline militia members (through court-martial) even though Article I, Section 8, Clause 15 and 16 provide enumerated power for militias to the federal government. Story cited both the Ninth and Tenth Amendments to uphold the doctrine of concurrent powers. [17]

In *New York v. Miln (1837),* SCOTUS upheld a New York law that allowed ships to furnish a passenger list to local authorities. [10, 17] In his majority concurrence, Justice Smith Thompson cited Story's opinion in *Houston v. Moore* upholding the law based on the concurrent powers doctrine. At this point, however, Justice Story changed his view about state power and the Ninth Amendment and dissented in the case. In *Smith v. Turner* (1849, passenger car cases), SCOTUS held that states could not impose a passenger tax on ships traveling between states. In his dissent, Justice Peter Daniel, cited the concurrent powers doctrine in Story's *Houston* opinion. Even though Justice Story's dissent in *Houston* was cited in many Court cases, most modern scholars overlook this Ninth Amendment doctrine. The reason for overlooking this theory is simple; Story changed his view. In his book, *Commentaries on the Constitution*, published in 1833, Story changed his opinion about federal power instead invoking those views held by Chief Justice Marshall. Justice Marshall never mentions the Ninth Amendment in any of his opinions, even when it was the main argument in the case. However, Story's concurrent powers doctrine has never been questioned or overruled by SCOTUS. [17]

The 1948 case, *Bute v. Illinois*, is often overlooked. In this case, Justice Harold Burton held that the concurrent powers doctrine of the Ninth and Tenth Amendments could be used to deny applying the Bill of Rights to the states. Burton's opinion should only apply if the state law provided more individual freedom than the federal law. Otherwise, the Bill of Rights should apply to the states. It is important to note that the

Ninth and Tenth Amendments' concurrent powers doctrine should not be used by states to shield them from violating the rights of its citizens (similar to how states used the Eleventh Amendment). For this reason, the Ninth Amendment should apply to the federal government to prevent expanded powers and both the state and federal governments for protecting the individual rights of citizens. [17]

The concurrent powers doctrine, the right to work, freedom of contract, and property rights were decimated in *Tennessee Electric Power v. Tennessee Valley Authority (1938, TVA)*. In this case, the plaintiffs argued that the federal government's TVA project, to generate and sell electricity, violated states' rights because it would "result in federal regulation of the internal affairs of states, and will deprive the people of the states their guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation." Justice Owen Roberts held that individuals had no standing to file a claim under the Ninth and Tenth Amendments–only states could make claims under these two Amendments, which is odd since both Amendments protect the rights retained for the people and/or to the people. The TVA case erased the original meaning of the Ninth and Tenth Amendments. [1, 17, 18]

Libertarian legal scholar Randy Barnett notices "Ninth Amendment skeptics have always seemed to think that when a provision is inserted merely for greater caution, this means it has no function apart from serving as some sort of enforceable warning." Moreover "[Justices] consistently overlook how such cautionary rights can serve as a redundant or secondary line of defense when other primary constraints on government power fail." Just as the Ninth Amendment provides redundancy to protect the rights of citizens, we will learn freedom of contract can do the same. [1]

Both Barnett and Liberal Legal Scholar Daniel Faber have a few similar views about the Ninth Amendment. However, they differ on one key point. Farber sees the Ninth Amendment as protecting the rights of citizens whereas Barnett sees the Ninth Amendment protecting both the rights and liberty of citizens. They both see liberty as something different than rights. Liberty protects citizens from unnecessary government restrictions, regulations, and mandates that may not necessarily violate the rights of citizens. For that reason, Barnett pictures a small federal government whereas Farber is okay with a big convoluted government encroaching on people's liberty. This also explains why Farber does not view the Ninth Amendment containing a dual purpose to curb federal power. Faber's philosophies are also flawed because he believes the Ninth Amendment defends ALL rights and not just natural law fundamental rights. This is why he supports abortion, welfare for education, government intrusion for protection, and euthanasia as fundamental rights. The bottom line, Farber believes Madison's purpose for the Ninth Amendment had nothing to do with limiting the size of government. [1, 19] He is wrong, the whole purpose of the Constitution and Bill of Rights was to limit the scope of the federal government. Madison may have been a Federalist (wanting a strong central government) at the Constitutional Convention but he said in Federalist Paper 45 that the Constitution provides for limited federal powers but state powers were infinite. [5] In fact, what Madison is referring to is that the Constitution was designed to meet the subsidiarity natural law principle: "Subsidiarity is an organizing principle that matters ought to be handled by the smallest, lowest or least centralized competent authority. Political decisions should be taken at a local level if possible, rather than by a central authority." [3] For the purpose of this book, both liberty and rights are considered equal, since governments should not be in the business of violating either without some compelling reason. [1] Legal scholar, Kurt Lash, also views the Ninth Amendment's purpose to curb federal government encroachment, but his originalism interpretation led him to come to that conclusion using different reasoning. Lash's views are flawed since they do not view the Ninth Amendment as protecting the individual rights of citizens from state government encroachment (only from federal government encroachment). This flawed reason is why the Ninth Amendment should apply to the states. [17]

In *Troxel v. Granville (2010)*, Justice Antonin Scalia's misguided originalism view of the Ninth Amendment is captured. The majority held that parents have the fundamental right to make decisions concerning the care of their children. That decision was not overly surprising, but what was interesting was

Justice Scalia's dissent. Scalia holds, "A right of parents to direct the upbringing of their children is among the unalienable rights." But Scalia declined to use the Ninth Amendment to elevate this right. Scalia made the following remarks regarding the Ninth Amendment: "Even farther removed from authorizing judges to identify what they may be (rights)" when discussing what fundamental rights to elevate. In other words, according to Scalia, if the right cannot be found in the text of the Constitution, then the right does not exist. Therefore, the Ninth Amendment, the privileges and immunities clause, and substantive due process are not acceptable theories or law doctrines to elevate any fundamental right in Scalia's view. [7, 19]

In sum, the Ninth Amendment has been either overlooked or applied incorrectly by judges because it is misunderstood. The Ninth Amendment can be used to elevate fundamental rights and to protect individuals from both state and federal government encroachment, which may violate individual rights and liberty–it is used for neither reason.