NINTH AMENDMENT
UNENUMERATED RIGHTS

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NINTH AMENDMENT—UNENUMERATED RIGHTS

Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights

The Ninth Amendment provides that the enumeration of certain rights in the Constitution should not be construed to mean that the Constitution does not protect rights that are not enumerated. The Amendment was included in the Bill of Rights to address fears that expressly protecting certain rights might be misinterpreted implicitly to sanction the infringement of others.[1]

Few Supreme Court cases offer significant analysis of the Ninth Amendment. Prior to 1965, litigants occasionally invoked the Amendment, often along with the Tenth Amendment or other provisions of the Bill of Rights, to challenge the constitutionality of government actions, but the Court consistently rejected those claims.[2] In 1965, in *Griswold v. Connecticut*, a majority of the Court cited the Ninth Amendment, along with the substantive rights protected by the First, Third, Fourth, and Fifth Amendments, and held that the Constitution protects "penumbral rights of 'privacy and repose'" that bar a state from prohibiting the use of contraception by married couples.[3] By contrast, in the 1973 case *Roe v. Wade*, the Court grounded a constitutional right to abortion in the Fourteenth Amendment rather than the Ninth.[4]

Overall, the Court has generally treated the Ninth Amendment as a rule of construction for the Constitution rather than a freestanding guarantee of any substantive rights. Thus, in *Richmond Newspapers v. Virginia*, a plurality of the Court referred to the Amendment as a "sort of constitutional 'saving clause,' which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined."[5]

Amdt9.2 Historical Background on Ninth Amendment

Ninth Amendment:

> *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 a part of the Bill of Rights, and its purpose is best understood in the context of the debate around the express enumeration of protected rights at and soon after the Founding. As originally drafted and ratified, the Constitution did not include a bill of rights. A proposal to include a bill of rights was rejected late in the Constitutional Convention.[1] The Federalists argued that because the national government had limited and enumerated powers, there was no need to protect individual rights expressly. As Alexander Hamilton wrote

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[1] *See* Amdt9.2 Historical Background on Ninth Amendment The Tenth Amendment responded to related concerns that including a list of rights in the Constitution might be misunderstood to imply that the national government had powers beyond those enumerated. U.S. Const. amend. X; *see also* Tenth Amendment.

[2] *See generally* Amdt9.3 Ninth Amendment Doctrine.

[3] 381 U.S. 479, 481–85 (1965).

[4] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. (U.S. June 2022).

[5] 448 U.S. 555, 579–80 & n.15 (1980); *cf.* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (The Ninth Amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.").

[1] 2 Max Farrand, Records of the Federal Convention of 1787, at 341–42, 587–88, 617–618 (1911) [hereinafter Farrand's Records].

in the *Federalist Papers*, "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given [in the Constitution] by which restrictions may be imposed?"[2] The Federalists contended that including a list of rights in the Constitution could be "dangerous" because it might be misunderstood to imply that the national government had powers beyond those enumerated, or that rights not expressly identified for protection were not in fact protected.[3]

In contrast to the prevailing delegates to the Convention, many state conventions considering whether to ratify the Constitution preferred to include a bill of rights. Several states ratified the Constitution on the understanding that a bill of rights would be added.[4] The first Congress accordingly proposed twelve constitutional amendments, ten of which were ratified by the requisite number of states and became the Bill of Rights.[5]

In contrast to the first eight amendments to the Constitution, which protect substantive rights, the Ninth Amendment sought to address Federalist fears that expressly protecting certain rights might implicitly sanction the infringement of other rights.[6] James Madison responded to that argument in presenting his proposed amendments to the House of Representatives:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system.[7]

Madison suggested, however, that that concern "may be guarded against" by the text that became the Ninth Amendment.[8]

Madison's statement and the text of the Ninth Amendment both indicate that the Amendment itself does not guarantee any substantive rights.[9] Instead, it states a rule of construction, making clear that the Bill of Rights may not be construed to limit rights in areas not enumerated. As Justice Joseph Story explained, the "clause was manifestly introduced to

[2] *See* The Federalist No. 84 (Alexander Hamilton).

[3] *Id.* For the Antifederalists, the absence of a bill of rights was a reason to oppose ratification of the Constitution. *See, e.g.*, George Mason, Objections to this Constitution of Government (1787), *reprinted in* 2 Farrand's Records, *supra* note 1, at 637–38 ("There is no Declaration of Rights.").

[4] *See generally* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568–70 (1985) (Powell, J., dissenting) (reviewing this history and noting that "eight States voted for the Constitution only after proposing amendments to be adopted after ratification").

[5] *See* Intro.3.2 Bill of Rights (First Through Tenth Amendments).

[6] The Tenth Amendment responded to related concerns that including a list of rights in the Constitution might be misunderstood to imply that the national government had powers beyond those enumerated. U.S. Const. amend. X; *see also* Tenth Amendment.

[7] 1 Annals of Congress 439 (1789). *See also* 3 J. Story, Commentaries on the Constitution of the United States 1898 (1833).

[8] *Id.*

[9] *But compare* Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) ("[A] judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.") *with* Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (The Ninth Amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.").

prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others."[10]

Amdt9.3 Ninth Amendment Doctrine

Ninth Amendment:

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

Supreme Court cases from before 1965 contain little analysis of the Ninth Amendment. Litigants in earlier cases occasionally invoked the Amendment, often along with the Tenth Amendment or other provisions of the Bill of Rights, to challenge the constitutionality of various government actions. The Court dismissed those claims, usually with limited discussion.[1] For example, in the 1947 case *United Public Workers v. Mitchell*, the Court rejected Ninth and Tenth Amendment challenges to the Hatch Political Activity Act.[2] The Court explained,

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.[3]

Concluding that Congress had the authority to enact the Hatch Act and the Act did not violate any of the prohibitions in the Bill of Rights, the Court upheld the statute.[4]

Several members of the Court examined the Ninth Amendment in greater depth in the 1965 case *Griswold v. Connecticut*.[5] In *Griswold*, the Court held that a statute prohibiting use of contraceptives unconstitutionally infringed on the right of marital privacy. Justice William O. Douglas, writing for the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] The majority cited the Ninth Amendment along with the substantive rights protected by the First, Third, Fourth, and Fifth Amendments while discussing the "penumbral rights of 'privacy and repose.'"[7] Although a right to privacy is not expressly mentioned in the Constitution, the Court concluded that banning contraceptive use by married couples impermissibly intruded on "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[8]

Justice Arthur Goldberg, concurring, devoted several pages to the Ninth Amendment. He opined,

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[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 1893 (1833).

[1] *See* Ashwander v. TVA, 297 U.S. 288, 330–31 (1936); Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143–44 (1939); Roth v. United States 354 U.S. 476, 492–93 (1957); Singer v. United States 380 U.S. 24, 26 (1965).

[2] 330 U.S. 75 (1947).

[3] *Id.* at 95–96.

[4] *Id.* at 96–104.

[5] 381 U.S. 479 (1965).

[6] *Id.* at 484.

[7] *Id.* at 481–85.

[8] *Id.* at 485.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . [A] judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.[9]

Justice Goldberg disclaimed any belief "that the Ninth Amendment constitutes an independent source of right protected from infringement by either the states or the Federal Government." Rather, he explained, the Amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[10]

In the 1973 case *Roe v. Wade*, the Supreme Court held that the Constitution limited the ability of the states to prohibit abortion before fetal viability.[11] The district court in *Roe* held that the Ninth Amendment protected the right to abortion. On appeal, the Supreme Court instead held that the right was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," but cited both the majority opinion in *Griswold* and Justice Goldberg's concurrence among opinions that "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[12] In the 2022 case *Dobbs v. Jackson Women's Health Organization*, the Court overruled *Roe* but emphasized that its decision should not cast doubt on precedents not involving abortion, including *Griswold*.[13]

[9] *Id.* at 487–91 (Goldberg, J., concurring).

[10] *Id.* at 492. Justices Hugo Black and Potter Stewart dissented. Justice Black wrote, "I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law." *Id.* at 522 (Black, J., dissenting). Justice Stewart contended, "The Ninth Amendment, like its companion the Tenth, . . . 'states but a truism that all is retained which has not been surrendered.'" *Id.* at 529 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[11] 410 U.S. 113 (1973).

[12] *Id.* at 152–53.

[13] No. 19-1392, slip op. (U.S. June 2022).