

The Patriots News from the citizen advocates..

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All I Want for Christmas – The Ninth Amendment

By Sarah McIntosh

I've finished my Christmas list. It might differ slightly from others' lists but I think it is a good one. There's only one thing on it. Dear Santa, For Christmas I would like you to find the Ninth Amendment...

The Supreme Court lost the Ninth Amendment. It's still in the Constitution; it was not written with disappearing ink. But, for some reason it has been ignored for many years. Maybe Santa can help the Supreme Court find it. He may be our only hope.

The Ninth Amendment is part of the Bill of Rights to the United States Constitution. It's not as popular as the First Amendment. Most people can come up with some of the gist of the First Amendment--free speech, assembly, press, religion. And the Second Amendment--the right to bear arms, that's pretty well known. But somehow the Ninth Amendment has slipped the minds of not only the community at large but it has evaded the legal community as well.

The text of the Ninth Amendment states that, "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." There are different schools of thought on exactly what the Ninth Amendment means.

According to the *states law rights model*, the other rights referred to in this amendment are state constitutional rights and common law rights in existence at the time of the Constitution's ratification. The argument is that the Ninth Amendment was intended to be a protection of rights that the states guaranteed through their own laws. There does not appear, however, to be much evidence to support the states law rights model.

Another interpretation of the Ninth Amendment is the *residual rights model*. This viewpoint argues that the amendment was adopted to stop later interpretations of the Constitution from usurping the system of enumerated powers, expanding federal powers beyond those that the Constitution delegates. The other rights part of the Ninth Amendment then, under this approach, is intended to be defined by the powers granted to the national government. But a look at Constitutional history doesn't seem to support this viewpoint either.

The interpretation of the Ninth Amendment best supported by constitutional history and the model that desperately needs to be reintegrated into our constitutional jurisprudence, is the *individual natural rights model*. This model contends that the Ninth Amendment's "other rights" is referring to all of the other rights that exist as the natural rights of individuals. Indeed, James Madison and Thomas Jefferson both supported the view that there are rights that inherently exist and the purpose of government is to protect those rights. Thus, government does not create all rights but rights pre-exist government.

Thus, the purpose of the Ninth Amendment is to make sure that those natural rights are protected even though they are not all enumerated in the Constitution. Meaning, just because the Constitution does not list it as a right (enumerates it) does not mean that it is not a right that needs to be afforded protection. So, enumerated and unenumerated rights deserve the same protections.

It is important then to recognize that the Ninth Amendment itself is not the source of those rights but rather a protector of all of those rights that could not be detailed in the Bill of Rights. In fact, some of the founders were concerned that by having a Bill of Rights they would signal that those are the only rights to be protected. The Ninth Amendment is intended to safeguard against that unintended effect of a Bill of Rights.

So at the base level, the true importance of the Ninth Amendment is to provide a protection of rights that are fundamental but not specifically listed in the Constitution. At times, conservative scholars criticize their more liberal counterparts for “creating” rights; and rightly so because a “creation” of rights approach supports no objective criterion for judicial interpretation.

But, by using the Ninth Amendment and the natural rights criterion, judicial interpretation would have a basis for protecting rights not enumerated in the Constitution. This would help to solve the problems created by both major sides of constitutional interpretation. The rights would not be created because they were already in existence (they are natural rights) and rights could be judged on that basis, hence cajoling the more conservative jurors while liberals could have the protection of many of the rights they see as needed because they are in fact, natural rights.

Of course, debate would ensue over what is a natural right but at least there would be a starting point with an objective criterion for determining which rights should be protected by the Constitution. And not all of those “created rights” would be natural rights so contentions would continue. But, at the end of the day the mindset would shift so that all of legal jurisprudence would at least recognize that there does exist a set of rights just as fundamental as those listed in the Constitution, that need protection.

While my Christmas list was short, it had a rather lengthy footnote, so if Santa does not get to my list this year, perhaps he will take the next year to work on it. Then, maybe the following year he can work on finding the Tenth Amendment.

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