

What is a Constitutional Paradox? Aside from being a term I may be coining, depending on whether someone else has already done so, I suggest the answer lies in its description. A constitutional paradox must provide a right and prevent a right in the same term. In other words, with whatever clause is being interpreted that clause must guarantee some right and take away a right at the same time.

In what could be termed a Constitutional Paradox, the ninth amendment offers its readers an interesting way of understanding foundational law. It reads as follows: “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 one of the least understood of all amendments. On its face, it alludes to rights retained by the people without explaining what those rights are. It also alludes to how to interpret the Constitution as a whole. Therefore, on its face, it both prohibits and expands rights creating this Constitutional paradox.

A quick review of the Supreme Court cases involving the ninth amendment shows that many people view it as granting some specific right. They have tried, as a result, to use the ninth amendment as a mechanism to create additional fundamental rights. The Court, however, does not take this view.

Instead the Court has said that “[W]e have..., however, observed that the Ninth Amendment "has not been interpreted as *independently* securing any constitutional rights for purposes of making out a constitutional violation.”<sup>1</sup>

Conversely, the Court views the ninth amendment as a security for protection of existing rights and freedom. [T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 96 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Please note, in order to protect an existing right, that protected right must exist. Yes, it's deep, I know. But the point is, until it is enumerated as existing, it remains, in theory unprotected. And, by enumerating the right protecting, is the Court not in a sense, creating a right?

Well, all this and more will be answered next time. Later, I will also address a link between the commerce clause and the ninth amendment.

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<sup>1</sup> [Schwengerdt v. United States, 944 F.2d 483, 490 \(9th Cir.1991\)](#) Emphasis added.