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Lucas B. Drill
Columbia University

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Title: Constitutional Individualism: The Ninth Amendment and the "Natural Rights of Man"

Author: Lucas B. Drill

University: Columbia University

Biography: Lucas B. Drill is from La Cañada Flintridge, California. He is a rising senior in the Joint Program between Columbia University and the Jewish Theological Seminary, in which he is simultaneously pursuing Bachelor of Arts degrees in Political Science and Jewish History. Lucas is an aspiring lawyer, constitutional scholar, and judge.

Abstract: The Ninth Amendment is not a one-off historical anachronism aimed at protecting nonexistent rights. Instead, it should be construed by the courts as a bulwark against undue governmental interference in people's private lives.

Upon the founding of this country, the constituent members of what would become the United States of America declared, "…all men are… endowed by their Creator with certain unalienable Rights" (U.S. Declaration of Independence). This is a philosophy which holds that all human beings inherently possess a wide array of freedoms that cannot be granted to, or assumed by, any government. In the Constitution and the Bill of Rights, the people of a new and independent country created a system of government wherein the state possesses certain specific, even sweeping powers, but where the citizens also retained certain prerogatives which the government may not invade.

Often lost in the ensuing and evolving debate over the extent of governmental power, and the limits that the rights of its citizens placed upon it, is a seemingly innocuous, and arguably overly legalistic, provision in the Bill of Rights. This amendment memorializes the notion articulated in the preamble to the Declaration of Independence that we should never consider exhaustive any list of the natural rights of man and the boundaries they place upon the government: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (Amendment IX). The meaning, scope, and majesty of this Ninth Amendment to the Constitution of the United States, and its potential impact on the country's jurisprudence in the twenty-first century, is the subject of this paper.

While the Supreme Court cites the Ninth Amendment relatively rarely, there do exist cases that rely on either its direct text or its principles. In *United Public Workers v. Mitchell* (1947), for example, the Court held that the Hatch Act, which prohibits federal employees from engaging in political activities, did not violate the Ninth Amendment. In doing so, the Court articulated the test which still governs Ninth Amendment cases to this day:

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 (*United Public Workers v. Mitchell*, 1947).

Essentially, the Supreme Court ruled that in times of conflict between enumerated powers and claimed unenumerated rights, the enumerated powers prevail. While this decision declared enumerated federal powers superior to unenumerated rights, which is arguably contrary to the hierarchy of natural rights versus governmental powers as understood by the framers, it provided a much-needed interpretation of the Ninth Amendment. On the other hand, the analysis stopped short of addressing the power of the Ninth Amendment in cases involving implied governmental power. If, as the court questioned, it could not side with a hypothetical right invoked under the auspices of the Ninth Amendment against a Congressional enactment grounded in an enumerated power, how would the Ninth Amendment fare in the case of a claimed unenumerated right competing not against an enumerated power, but a policy which the government argued was necessary for the progress of civil society?

The Supreme Court's answer came eighteen years later in *Griswold v. Connecticut* (1965), when the Court overturned a Connecticut law banning contraception on the basis that it violated a right to marital privacy despite the fact that the Constitution enumerates no such right. Technically, the majority opinion stated that such a right is found in the "penumbras" and "emanations" of other enumerated rights, such as the First Amendment's guaranty of freedom of association and the Fifth Amendment's right against self-incrimination. However, a concurring opinion by Justice Arthur Goldberg, joined by Chief Justice Warren and Justice Brennan, specifically relied upon the Ninth Amendment for the foundation of such right, saying that it was among the rights "retained" by the people (*Griswold v. Connecticut*, 1965). Justice Goldberg asserted that not only can a right be essential regardless of whether it is enumerated, but that it is the Ninth Amendment, in particular, that protects such essential rights. The Justice explicitly recognized the place of the Ninth Amendment in the pantheon of Supreme Court jurisprudence: "…moreover, 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" (ibid.)

Griswold was shortly followed by *Roe v. Wade* (1973), in which the Court held that the right to privacy trumped a state ban on all abortions. Although the trial court found that the right was guaranteed by the Ninth Amendment, the majority opinion declined to adopt that rationale and, instead, relied upon the Fourteenth Amendment's concept of personal liberty and its restriction of state action. Furthermore, in a concurring opinion, Justice William O. Douglas flatly rejected the trial court's reasoning, unequivocally stating, "The Ninth Amendment obviously does not create federally enforceable rights" (*Roe v. Wade*, 1973). As such, *Roe* marked a prominent shift, relegating the Ninth Amendment to the forgotten footnotes of case law.

Following that trend, in the case of *Lawrence v. Texas* (2003), the Court invalidated a statute criminalizing homosexual activity on the basis that it violated the right to privacy, which the Court concluded flows from the Fourteenth Amendment. Unfortunately, the Ninth Amendment was not even mentioned in the case, arguably putting the final nail in the coffin entombing the Ninth Amendment in the graveyard of Supreme Court opinions.

While the Ninth Amendment is unique among Constitutional provisions in its recognition and protection of the unenumerated rights of the people, other formulations, expositions and lists of natural individual rights exist around the globe. These alternate catalogs of rights parallel those that the framers of our own nation's foundational documents set forth, which demonstrates that our forefathers correctly understood that the enumerated rights in the first eight amendments of the Bill of Rights is far from exhaustive, and that additional natural rights are potentially suitable for recognition and protection under the Ninth Amendment.

The United Nations' *Universal Declaration of Human Rights*, for example, provides in Article 3, "…everyone has the right to life, liberty, and security of person." Indeed, Thomas Jefferson listed "life" as the first of the natural rights. Perhaps a further exploration of the natural right to security of person through the aegis of the Ninth Amendment would result in a more thorough understanding of the parameters of the natural right to life. This right would presumably be intentionally broad, just as our current understanding of the bounds of the right to privacy far exceed the express limitations imposed on the government in the Fourth Amendment. Although

myriad examples might be used to illustrate the Ninth Amendment's application in this context, I explore the potential for a right to education, a right to freedom from attack upon reputation, and freedom from association below.

Should families have the right to secure their children's future through education in whatever reasonable way they see fit? Grappling with this principle, there are those who conclude that the Ninth Amendment cannot protect such rights due to the Supreme Court's trend to avoid this Amendment (e.g., *Oldaker* 1993, 75). The right to an education and one's school choice using an individualist security of person approach under the Ninth Amendment, however, should at least be the subject of reconsideration. If one concedes, if only because the truth of the proposition is self-evident, that education is foundational in the evolution of a just and productive society and essential to the ability of a person to achieve security, the right to an education, and the mode of its delivery (provided that there are minimum standards that every child must meet in various academic subjects), seem to easily fall within the penumbra of a life/security interest.

In the same way, we can develop our thinking relative to the right to freedom from attack upon reputation –the analog of the existing First Amendment right. This right is loosely based on the European Union's recognized right to be forgotten, which asserts that "…individuals have the right to ask search engines to remove links with personal information about them." It goes on: "This applies where the information is inaccurate, inadequate, irrelevant, or excessive"(European Commission, 2012). While the First Amendment protects freedom of speech and the press, these rights are not absolute. This is readily apparent through the current legal definitions of libel, defamation, and slander, which circumscribe First Amendment protections and proscribe the misuse of information in an unfair method to harm individuals (libel, defamation and slander legal definitions obtained at Legal Information Institute, Cornell University). Similarly, the right to protection of reputation would work as an analog to the First Amendment, only enjoining the sullying of an individual's reputation if deemed unfair under certain clear legal standards. In this way, only the individuals who are being targeted have something to lose, and their exercise of the right to protection of reputation does not infringe upon the legitimate rights of others.

An example of the potential application of this right comes in the form of the publication of mugshots. In an ongoing class action against websites and news outlets publicizing and charging individuals as much as thousands of dollars for the removal of mugshots, a claim is made that once people have served their sentence, or in some cases, have been acquitted of all charges, their mugshots should not continue to appear in the public sphere (Kravets 2012). Current laws do not extend far enough to protect these claimants without a recognized right to protect one's reputation because technology and data sharing is evolving much more rapidly than the legal system in the United States. Consequently, a right to protection of reputation can be established and applied on a case-by-case basis under the Ninth Amendment. In this way, individuals may protect their ability to live securely, notwithstanding a recognized right to freedom of speech which, in these cases, actually interferes with the exercise of the countervailing natural right.

The next proposed right, freedom from association, is inspired by Article 20 of the United Nation's *Universal Declaration of Human Rights*, which states that "no one may be compelled to belong to an association." Associations come in many forms, such as political groups, recreational clubs, unions, and homeowners' associations. While most associations are voluntary,

there are those that are obligatory. This is particularly applicable to the "right to work" sphere and the idea that one should not be compelled to join a union as a prerequisite to various fields of employment. While there is no way to force association, in some states "an employee can be forced to pay certain union dues or be fired from his or her job" (National Right to Work 2017). Right to work proponents suggest that even if a union provides a beneficial service to the employee, it should be up to the individual to decide whether those protections are worth the cost of association. This is especially true if union dues are used in ways with which the employee may disagree, such as political donations (Sherk 2012). While unions themselves largely oppose the right to work, the individual's decision to disassociate does not infringe upon the rights of the union; the liberty only effects the union by limiting its power over the individual and its stream of income.

The recent case of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, argued before the U.S. Supreme Court on February 26, 2018, squarely addressed the right to freedom from association and, thus, presented a perfect opportunity for a case to be decided under the Ninth Amendment, rather than on the basis on which it was argued. In *Janus*, the Petitioner asserts that the Court should overrule its 1977 decision in *Abood v. Detroit Board of Education*. There, the Court validated the practice of public employee unions charging non-members "fair share" or "agency" fees (a reduced amount of dues that union members pay). These ostensibly cover the costs the union incurs in negotiating contracts with governmental agencies because those contracts inherently benefit all public employees, so to do otherwise would arguably give the nonmembers a "free ride." *Janus*' argument endeavors to persuade the Court to find that contract negotiations with public bodies constitute a form of political speech, and that under the recent Supreme Court decisions of *Harris v. Quinn* (2014) and *Knox v. SEIU, Local 1000* (2012), *Janus* cannot be compelled to support speech with which he does not agree.

The Supreme Court ruled on the matter on June 27, 2018. In a 5-4 decision, it overturned existing precedent and held that public employees who are not union members cannot be forced to pay "agency fees" to unions which negotiate contracts on behalf of all public employees. The majority opinion, written by Justice Alito, provides that all public union activities are inherently political and that, therefore, forcing nonmembers to contribute to the union violates their First Amendment "right of silence" (the right against being forced to say something [or fund the publication of statements] in which one does not believe). This decision continues the trend of this Court (and particularly Justice Alito, who authored the *Citizens United* opinion) to expand the scope of First Amendment rights. Given the fact that the First Amendment explicitly guaranties only freedom of, not freedom from speech, however, the case could have, and perhaps should have, been decided under the Ninth Amendment's protection of unenumerated rights, and specifically the right to be free from association.

Although the First Amendment protects the freedom to associate and its analog, the freedom from association is not mentioned in our organic law; as we have seen, the latter is recognized in other documents such as in Article 20 of the United Nations' *Universal Declaration of Human Rights* as a right that inherently belongs to all persons. "Fair share" or "agency" fees clearly compel someone who does not want to belong to the union to do so in all but name only, and to support that union's activities, regardless of one's personal preferences. State laws which permit

the imposition of these fees plainly violate the inherent natural right to be free from association, and the Supreme Court should deem these laws to be violative of the Ninth Amendment for that reason.

Today, the grassroots movements to begin implementing these rights exist despite the apparent reluctance to rely on the Ninth Amendment. The right to an education and school choice is being debated on the national level. The right to protection of reputation is being asserted in lower courts and has recently been elevated to class action status (Kravets 2012). Likewise, the right to freedom from association is building momentum through legislative recognition of the right to work enacted in twenty-eight states. With a more broadly recognized understanding of the Ninth Amendment as the preferred vehicle for protecting the natural right to security of person, rights protecting the unenumerated rights of the people of the United States would have a genuine and straightforward path for development.

Inspired by rights enumerated around the globe, such as in the United Nation's *Universal Declaration of Human Rights*, I propose we use the Ninth Amendment to protect the right of individuals to be secure in their person. In addition to the already developing right to education and school choice, we should bring rights to protection of reputation and freedom from association to the forefront of the debate. Viewing an individual's reputation as a right, we can use the Ninth Amendment to reform current libel and defamation laws in order to protect individuals from an evolving and continued threat to their ability to function as productive members of society. Likewise, freedom from association would allow individuals to control their relationships in the workplace and in their private lives, and constrain the activities of oftentimes-large private groups that attempt to proscribe limits upon individuals' actions. In this way, we could invoke the Ninth Amendment to protect the right to security of person, thus shaping future debates about the extent of governmental, and even majority, power in the United States.

The Ninth Amendment is not a one-off historical anachronism aimed at protecting nonexistent rights. Instead, it is properly seen, and should be construed by the courts, as a bulwark against undue governmental interference in people's private lives.

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