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The Bill of Rights: Unenumerated Rights

by Jacob G. Hornberger

A common misconception among the American people is that their rights come from the Constitution. Even lawyers and judges are guilty of believing this, oftentimes suggesting that whether a right exists or not depends on whether it is listed in the Constitution. Law-enforcement agents read criminal suspects “their constitutional rights,” which leads some people to infer that the Constitution is the actual source of people’s rights.

Nothing could be further from the truth.

Suppose the Bill of Rights had not been enacted. Would that mean that people would not have the rights that are enumerated in those amendments?

No, it would not mean that. The existence and protection of those rights did not depend on the passage of the Bill of Rights. The reason lies in the rationale and purpose of the original Constitution.

It is important to recognize that not only did the Constitution call the federal government into existence, the type of government it brought into existence was the most unusual in history. Why? Because it was a government of very limited powers — powers that were expressly enumerated within the document itself — and because it was the citizenry who were imposing the limits on their own government officials.

To ensure that the federal government did not become a destroyer of people’s rights, however, the Framers used the Constitution to expressly limit the powers of the newly formed government.

The Framers could easily have called into existence a government whose powers were omnipotent. For example, they could have said,

Believing that a government is needed to do good, the federal government that is hereby called into existence shall have the power to enact whatever laws and to take whatever action federal officials deem necessary to accomplish that end.

Notice that if the Framers had done that, the Constitution could still have enabled people to democratically elect their public officials. In such a case, then, we would have had a democratically elected government with omnipotent powers — a democratic dictatorship.

Thus, in bringing into existence a government of enumerated powers, the Framers believed it was unnecessary to enumerate people's rights.

In their minds, it was unnecessary for the Constitution to prohibit the federal government from violating freedom of speech, for example, because the power to do that wasn't listed among the enumerated powers of the federal government anyway.

As another example, with respect to the federal criminal-justice system the Framers believed that it was unnecessary to list such guarantees as due process of law and trial by jury because everyone knew that such procedural rights, which had been carved out by the British people over centuries of struggle against tyranny, were a well-established part of any civilized criminal-justice system. If the Constitution didn't expressly provide the power to abridge such rights in a criminal prosecution, then such power could not be exercised.

The reason for the Bill of Rights

So, given a government of very limited powers — powers that were expressly enumerated — why did the American people amend the Constitution with ten amendments so soon after the original Constitution was enacted?

The answer is simple: Unlike Americans today, our ancestors didn't trust government or government officials.

That in fact was the mindset of the Framers as they put together the Constitution — that the biggest threat to their freedom and well-being lay with their own government. They had seen what their own previous government (that is, the British government) had done to them when they had been British citizens, and they also were familiar with the countless historical examples of governments that capriciously incarcerated or even killed their subjects, arbitrarily seized their property, or otherwise infringed upon their rights.

Thus, Americans demanded the Bill of Rights as an “insurance policy” — one that was designed to ensure there were no misunderstandings among government officials, albeit democratically elected, that their limited, enumerated powers did not encompass the abridging of such fundamental rights as freedom of speech, freedom of the press, and the right to keep and bear arms, or such important procedural rights as due process of law, right to counsel, and trial by jury.

Opponents of the Bill of Rights responded with an obvious critique: expressly enumerating some rights for protection from federal assault would suggest that other rights remained unprotected. Thus, they argued, it would be better not to list any rights whatsoever. Since the original document didn't empower the government to abridge such rights anyway, no one needed to be concerned.

Fortunately, the proponents of the Bill of Rights won the day, because for all practical purposes, in the 20th century the federal government broke out of the original enumerated-powers straitjacket that the Framers had imposed on it. The idea of a government of limited powers became an anachronism, with the federal government's gradually adopting general powers to act in the "general welfare" of the people. What has ended up limiting them has been the express language of restriction contained in the Bill of Rights and an independent judiciary willing to enforce it.

If the Congress and the state legislatures had failed to enact the Bill of Rights, there is little doubt that today, in the name of the war on poverty, war on drugs, war on communism, or war on terrorism, the federal government would be depriving people of intellectual freedom, religious freedom, due process of law, right to counsel, trial by jury, and the other rights listed in the Bill of Rights. (Keep in mind that, although the federal government is depriving Americans of due process of law, right to counsel, and trial by jury in the name of the "war on terrorism," so far the courts are ruling against it on the basis of the Bill of Rights.) Thank goodness for the wisdom and foresight of those who did not trust government and who insisted on the passage of the Bill of Rights.

The Ninth Amendment

What about the argument of those who said that by listing certain rights, the inference would be that unlisted rights would lack protection?

That's what the Ninth Amendment was all about. 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.

Acknowledging the arguments of those who were resisting the Bill of Rights, James Madison argued that the Ninth Amendment was designed to address their concerns:

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 urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

Again, the purpose of the Constitution was not to give people rights but instead to bring a federal government into existence — a government with very limited powers. Therefore, it makes no sense to look for a right in the Constitution, given that the purpose of the Constitution was not to give people rights in the first place. (We'll leave the issue of the Court's oftentimes distorted understanding of rights to another day.)

The correct issue with respect to government power, then, is whether the federal government has been authorized by the Constitution to exercise some power, for example, a power to infringe on people's rights, whether such rights are listed or not.

A good example of this principle involves the right to privacy. While some have argued that privacy is not a fundamental and inherent right, it would be improper to oppose its protection on the ground that it is not expressly protected in the Constitution and the Bill of Rights.

That is, since the Constitution did not empower the federal government to violate people's right to privacy, the fact that the right to privacy is not expressly mentioned in the Bill of Rights is irrelevant, especially given the language of the Ninth Amendment.

Here's how Justice Arthur Goldberg put it in the famous privacy case of *Griswold v. Connecticut*, which involved a state statute prohibiting the use of contraceptives:

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....

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. 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....

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth 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.

(The reason the Court was addressing the Ninth Amendment in a case involving a state statute is that it had previously held in a series of decisions that the Fourteenth Amendment implicitly incorporated the rights and guarantees in the Bill of Rights and applied them to the states. Thus, if privacy is a right protected from federal infringement, it is also a right protected from state infringement.)

It is not difficult to see how far we have strayed from the original vision that formed the foundation of our nation, and it's all been done without even the semblance of a constitutional amendment.

Today, the presumption is that federal officials are empowered to do pretty much whatever they want, exercising countless powers that are not enumerated in the original list.

The only restriction on the exercise of such omnipotent power is the Bill of Rights, but even that has been seriously eroded, especially with respect to search and seizure and gun-ownership rights, and especially as part of the government's "war on drugs."

We can only hope that the federal courts continue to hold unconstitutional the government's "temporary" suspension of habeas corpus, right to counsel, due process of law, and trial by jury as part of its "war on terrorism."

By the way, waging wars on drugs and terrorism are not among the government's enumerated powers listed in the Constitution.

Who is responsible for this travesty? Ultimately, the American people are responsible. As our ancestors well understood, the type of people who gravitate to governmental power will inevitably thirst for ever-increasing power, a phenomenon against which our ancestors tried to protect us with the enumerated-powers doctrine of the Constitution and the Bill of Rights. The American people have permitted federal officials to indulge their thirst for power by letting them break free of the constitutional constraints that originally bound them. What we need in America is a rebirth of freedom, one in which the American people restore the vision of freedom and constitutionally limited government that formed the foundation of our nation.

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