

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOSEPH KIRCHNER,

Plaintiff,

v.

Civil Action No. 25-cv-_____

MIKE JOHNSON, et al.,

Defendants.

APPENDIX II: Ninth Amendment Constitutional Analysis

**Constitutional Text Supremacy Through Logic and Linguistics Supporting
Federal Civil Rights Complaint**

SUMMARY

1. This comprehensive constitutional analysis demonstrates the systematic judicial nullification of the Ninth Amendment through judicial supremacy over constitutional text, exemplifying the fundamental crisis where judicial philosophy subordinates clear constitutional commands to personal interpretive preferences, directly violating the constitutional hierarchy established by Article III and Article VI of the Constitution.
2. The Supreme Court's treatment of the Ninth Amendment in *Griswold v. Connecticut*, 381 U.S. 479 (1965), reveals systematic judicial supremacy over constitutional requirements where Justice Black's dissent demonstrates fundamental misunderstanding of both constitutional text and constitutional structure by treating unenumerated rights as non-enforceable, effectively violating the Amendment's explicit prohibition against construing enumerated rights to "deny or disparage others retained by the people."
3. Through objective principles of logic and linguistics applied to constitutional text, the Ninth Amendment establishes clear constitutional commands that protect substantive retained rights rather than serving merely as interpretive guidance, with the term "retained" referring to rights people possessed before creating the Constitution and continued to possess afterward, creating constitutional obligations that no judicial philosophy can legitimately override.
4. This analysis supports the broader constitutional crisis documented in the federal civil rights complaint by demonstrating systematic judicial nullification of constitutional text through interpretive doctrine lacking democratic ratification, requiring constitutional amendment to restore constitutional text supremacy over judicial interpretation and

ensuring democratic governance operates according to democratically ratified constitutional law rather than judicially preferred constitutional philosophy.

I. THE CONSTITUTIONAL TEXT VERSUS JUDICIAL PHILOSOPHY **CRISIS**

A. Griswold v. Connecticut and the Judicial Supremacy Problem

5. The Supreme Court's treatment of the Ninth Amendment in *Griswold v. Connecticut*, 381 U.S. 479 (1965), exemplifies the fundamental crisis of judicial supremacy over constitutional text that threatens the foundations of American constitutional government.

6. While Justice Goldberg's concurrence recognized the Amendment's role in protecting unenumerated rights, Justice Black's dissent revealed a judicial philosophy that subordinates clear constitutional commands to personal interpretive preferences, directly violating the constitutional hierarchy established by Article III and Article VI of the Constitution.

7. Justice Black's position that the Ninth Amendment was "intended to limit federal power, not to serve as a basis for judges to create new rights" demonstrates a fundamental misunderstanding of both constitutional text and constitutional structure.

8. This interpretation commits multiple analytical errors that, when examined through objective principles of logic and linguistics, reveal systematic judicial supremacy over constitutional requirements.

B. Constitutional Text Analysis Requirements

9. The Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

10. Through proper textual analysis, this language establishes clear constitutional commands that no judicial philosophy can legitimately override.

11. The constitutional hierarchy established by Article VI requires that constitutional text serve as supreme law controlling all governmental action, including judicial interpretation, rather than being controlled by judicial preference.

II. LINGUISTIC ANALYSIS OF CONSTITUTIONAL TEXT

A. Substantive Rights vs. Rules of Construction

12. The Ninth Amendment's language, when analyzed through established principles of linguistics and constitutional interpretation, demonstrates that it protects substantive rights rather than serving as merely a "rule of construction."

13. The word "rights" in constitutional context refers to substantive entitlements that individuals possess against governmental action, as established consistently throughout the Bill of Rights.

14. In *United States v. Cruikshank*, 92 U.S. 542 (1875), the Supreme Court recognized that constitutional rights represent "fundamental" protections that "were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors."

15. This understanding of constitutional rights as substantive protections applies equally to the "rights...retained by the people" referenced in the Ninth Amendment.

B. The Critical Linguistic Element: "Retained"

16. The term "retained" presents perhaps the most crucial linguistic element for proper constitutional interpretation.

17. "Retained" is the past tense of "retain," meaning to keep possession of something previously held.

18. Black's Law Dictionary defines "retain" as "to keep; to continue to have, use, recognize, etc."

19. This linguistic reality establishes that the Ninth Amendment refers to rights that people possessed before creating the Constitution and continued to possess afterward.

20. The Amendment cannot coherently be interpreted as referring to non-existent rights or mere interpretive principles, because one cannot "retain" something never possessed.

21. This linguistic analysis directly contradicts Justice Black's interpretation in *Griswold*, which treated retained rights as judicial creations rather than pre-existing entitlements.

C. Popular Sovereignty and Constitutional Rights

22. The phrase "by the people" reinforces the substantive nature of these rights by establishing their source in popular sovereignty rather than governmental grant or judicial interpretation.

23. As the Supreme Court recognized in *Chisholm v. Georgia*, 2 U.S. 419 (1793), "the people" in constitutional context refers to the sovereign authority from which all governmental power derives.

24. Rights retained "by the people" therefore exist independently of governmental recognition and cannot be limited or denied through governmental interpretation, including judicial interpretation.

25. This linguistic analysis demonstrates that the Ninth Amendment protects substantive popular rights that precede and constrain governmental authority.

III. LOGICAL ANALYSIS OF CONSTITUTIONAL STRUCTURE

A. Formal Logic and Constitutional Commands

26. The logical structure of the Ninth Amendment, when analyzed through principles of formal logic, reveals constitutional commands that are incompatible with treating the Amendment as merely advisory or constructive.

27. The Amendment contains a negative prohibition: rights "shall not be construed to deny or disparage others retained by the people."

28. In logical terms, this creates a universal negative: for all X (constitutional constructions), X shall not deny or disparage retained rights.

29. This logical structure establishes an absolute prohibition that applies to all constitutional interpretation, including judicial interpretation.

B. Performative Contradiction in Judicial Interpretation

30. Justice Black's position in *Griswold* violates this logical structure by permitting exactly what the Amendment prohibits.

31. By treating unenumerated rights as non-enforceable, judicial interpretation effectively "denies or disparages" the retained rights that the Amendment explicitly protects.

32. The logical contradiction becomes clear: if the Amendment prohibits construing enumerated rights to deny unenumerated ones, then any interpretive approach that renders unenumerated rights unenforceable violates the Amendment's logical command.

33. This represents what logicians term a performative contradiction, where the act of interpretation violates the content of what is being interpreted.

C. Constitutional Hierarchy and Paramount Law

34. The constitutional structure reinforces this logical analysis through the hierarchy established in Article VI, which declares that "this Constitution...shall be the supreme Law of the Land."

35. In *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice Marshall established that constitutional text represents "paramount law" that controls all governmental action, including judicial action.

36. The logical hierarchy therefore requires that constitutional commands control judicial interpretation, not vice versa.

37. When judicial philosophy conflicts with constitutional text, the constitutional text must prevail under the logical structure established by Article VI and confirmed in *Marbury*.

IV. THE CATEGORY ERROR IN JUDICIAL PHILOSOPHY

A. Recognition Versus Creation of Rights

38. Justice Black's *Griswold* dissent commits a fundamental category error by conflating the recognition of pre-existing rights with the creation of new rights.

39. This category confusion underlies much of the constitutional interpretation crisis surrounding the Ninth Amendment.

40. The Amendment does not authorize courts to "create" rights, as Justice Black feared, but rather commands recognition and protection of rights that already exist.

41. The difference between recognition and creation represents a fundamental distinction in both logic and constitutional law.

B. Supreme Court Recognition of Pre-Existing Rights

42. The Supreme Court has consistently recognized this distinction in other constitutional contexts.

43. In *Calder v. Bull*, 3 U.S. 386 (1798), Justice Chase explained that natural rights "are not derived from any legislature" but rather "have been established by the Creator."

44. Similarly, in *Loan Association v. Topeka*, 87 U.S. 655 (1874), the Court recognized that certain rights exist "by the very nature of well-ordered civil society" and "need no constitutional recognition to exist."

45. These precedents establish that constitutional rights often involve recognition of pre-existing entitlements rather than creation of new governmental grants.

C. Logical Impossibility of Simultaneous Retention and Creation

46. The category error becomes particularly problematic when applied to the Ninth Amendment because the Amendment explicitly refers to rights "retained by the people."

47. Rights cannot be both "retained" (kept from before) and "created" (brought into existence) simultaneously without logical contradiction.

48. Justice Black's concern about judicial "creation" therefore mischaracterizes the constitutional function, which involves judicial recognition of what people already retained.

49. This category confusion has enabled courts to avoid their constitutional obligation to protect retained rights by reframing protection as illegitimate creation.

V. CONSTITUTIONAL HIERARCHY AND JUDICIAL AUTHORITY

A. Article III Limitations on Judicial Power

50. The treatment of the Ninth Amendment reveals a deeper crisis in the relationship between constitutional text and judicial authority.

51. Article III establishes that judicial power extends to "all Cases...arising under this Constitution," but this power operates "under" the Constitution rather than over it.

52. In *Ex parte McCordle*, 74 U.S. 506 (1868), the Supreme Court acknowledged that judicial power "is strictly and exclusively judicial" and "cannot be made to embrace duties which are not judicial."

53. The duty to ignore or limit constitutional commands based on judicial philosophy exceeds judicial authority by placing judicial preference above constitutional text.

B. Democratic Legitimacy Hierarchy

54. The constitutional hierarchy becomes particularly clear when examining the democratic legitimacy of constitutional amendments versus judicial interpretation.

55. Constitutional amendments require approval by two-thirds of both houses of Congress and three-fourths of state legislatures, representing supermajority democratic ratification as established in Article V.

56. Judicial interpretation, by contrast, requires only five unelected justices with lifetime tenure and no democratic accountability.

57. In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court recognized that the Constitution "is supreme" and that governmental officials "can only act in accordance with the limitations placed upon them by the Constitution."

58. This democratic legitimacy hierarchy requires that constitutional text, democratically ratified through Article V supermajorities, control judicial interpretation rather than being controlled by it.

C. Constitutional Impossibility of Judicial Philosophy Supremacy

59. The application of this hierarchy to the Ninth Amendment demonstrates the constitutional impossibility of Justice Black's position.

60. The Amendment was ratified through the Article V supermajority process specifically to ensure protection of unenumerated rights.

61. Justice Black's judicial philosophy, lacking equivalent democratic ratification, cannot legitimately override this constitutional command without violating the democratic legitimacy hierarchy established by the constitutional structure itself.

VI. HISTORICAL CONTEXT AND FOUNDING INTENT

A. Ratification Debates and Anti-Federalist Concerns

62. The historical context surrounding the Ninth Amendment's adoption reinforces the linguistic and logical analysis demonstrating its substantive protective function.

63. During the ratification debates, Federalists like Alexander Hamilton argued in *Federalist 84* that enumerating rights might "afford a colorable pretext to claim more than were granted" by suggesting that unlisted rights were not protected.

64. Anti-Federalists demanded explicit protection for unenumerated rights to prevent this interpretation.

65. James Madison's response was the Ninth Amendment, designed to ensure that constitutional enumeration could never be used to deny pre-existing rights.

B. Prevention of Interpretive Limitation

66. This historical context demonstrates that the Amendment was adopted specifically to prevent the interpretive approach that Justice Black endorsed in *Griswold*.

67. The Founding generation understood that people possessed natural rights before creating government and that constitutional enumeration posed a risk to unenumerated rights.

68. The Amendment was intended to resolve this risk by establishing constitutional protection for all retained rights, not merely those specifically enumerated.

69. Justice Black's position in *Griswold* creates exactly the problem the Amendment was designed to prevent, using constitutional enumeration to justify limiting protection for unenumerated rights.

C. Supreme Court Recognition of Historical Purpose

70. The Supreme Court has recognized this historical understanding in several contexts.

71. In *Griswold* itself, Justice Goldberg's concurrence noted that "the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights."

72. Similarly, in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), the Court acknowledged the Amendment as a "constitutional saving clause" that prevents the "maxim that the affirmation of particular rights implies a negation of those not expressly defined."

73. These recognitions, while limited, acknowledge the Amendment's substantive protective function consistent with its historical purpose.

VII. THE PRECEDENTIAL PATTERN OF CONSTITUTIONAL VIOLATION

A. Systematic Constitutional Text Limitation

74. The judicial treatment of the Ninth Amendment follows a consistent pattern of constitutional violation that extends across multiple areas of constitutional law.

75. This pattern involves courts limiting constitutional enforcement below constitutional requirements through interpretive doctrines that lack democratic ratification.

76. The corporate personhood doctrine emerging from *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), provides another example where judicial

interpretation contradicted constitutional text to create rights that the Constitution does not establish while simultaneously limiting rights that the Constitution does protect.

B. Citizens United and Systematic Rights Inversion

77. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court extended First Amendment protection to corporate political expenditures despite the constitutional text limiting rights to "persons" and the Fourteenth Amendment defining constitutional persons as those "born or naturalized in the United States."

78. This judicial creation of constitutional rights for artificial entities occurred while courts simultaneously limited protection for natural rights retained by actual constitutional persons under the Ninth Amendment.

79. The pattern reveals systematic judicial supremacy that expands constitutional protection where the Constitution provides none while contracting constitutional protection where the Constitution requires it.

C. Qualified Immunity and Constitutional Nullification

80. The qualified immunity doctrine represents another manifestation of this pattern.

81. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court created immunity from constitutional violations for government officials despite the Constitution containing no such immunity provision.

82. Meanwhile, courts limit individual constitutional rights through standing requirements, political question doctrine, and other judge-made limitations that prevent constitutional enforcement.

83. This pattern demonstrates systematic judicial supremacy over constitutional text that violates the fundamental principle of constitutional government.

VIII. MATHEMATICAL IMPOSSIBILITY OF JUDICIAL PHILOSOPHY SUPREMACY

A. Constraint Satisfaction Mathematical Analysis

84. The relationship between constitutional text and judicial philosophy can be analyzed through mathematical principles that demonstrate the logical impossibility of judicial supremacy.

85. Constitutional interpretation functions as a constraint satisfaction problem where judicial decisions must satisfy constitutional requirements as parameters.

86. When judicial philosophy conflicts with constitutional text, the mathematical relationship requires that constitutional text control, because constitutional text represents the democratically established constraints within which judicial interpretation must operate.

B. Democratic Legitimacy Mathematics

87. The democratic legitimacy mathematics reinforces this hierarchy.

88. Constitutional amendments require approximately 290 Congressional members (two-thirds of 435 House and 100 Senate) plus 38 state legislatures (three-fourths of 50 states), representing democratic input from thousands of elected officials across multiple governmental levels.

89. Judicial precedent requires only 5 Supreme Court justices with no democratic accountability.

90. The mathematical ratio of democratic input (thousands to 5) establishes quantitative superiority for constitutional text over judicial interpretation that cannot be overcome through judicial assertion of philosophical authority.

C. Application to Ninth Amendment Controversy

91. This mathematical analysis applies directly to the Ninth Amendment controversy.

92. The Amendment was ratified through the democratically superior Article V process specifically to protect unenumerated rights.

93. Justice Black's philosophical opposition, representing the preferences of one unelected judge, cannot mathematically overcome the democratic superiority of constitutional ratification without violating the fundamental mathematics of democratic legitimacy that constitutional government requires.

IX. INTEGRATION WITH BROADER CONSTITUTIONAL CRISIS

A. Systematic Judicial Supremacy Pattern

94. The judicial treatment of the Ninth Amendment represents one component of a broader constitutional crisis involving systematic judicial supremacy over constitutional text.

95. This crisis extends across multiple constitutional provisions where courts have limited constitutional enforcement below constitutional requirements through interpretive doctrines lacking democratic ratification.

96. The pattern includes the corporate personhood doctrine limiting individual rights while expanding corporate privileges, qualified immunity preventing constitutional accountability for government violations, standing limitations preventing constitutional enforcement for widespread violations, and political question doctrine preventing constitutional review of governmental overreach.

B. Constitutional Amendment Necessity

97. This systematic pattern demonstrates that the Ninth Amendment crisis cannot be resolved through individual case litigation but requires constitutional amendment to restore constitutional text supremacy over judicial interpretation.

98. The proposed Twenty-Eighth Amendment would address this systematic crisis by establishing that "Constitutional amendments and the text of this Constitution shall have supreme authority over all judicial precedent, interpretation, and doctrine" and requiring that "Constitutional text and amendments shall be the first and highest precedent in American law."

C. Constitutional Restoration Requirements

99. Such constitutional restoration would resolve the Ninth Amendment crisis by requiring courts to analyze constitutional text through objective principles of logic and linguistics rather than subjective judicial philosophy.

100. Courts would be required to recognize and protect the substantive retained rights that the Amendment's text clearly establishes, ending the judicial nullification of constitutional commands that has characterized constitutional interpretation for over a century.

X. CONSTITUTIONAL RESOLUTION THROUGH TEXTUAL ANALYSIS

A. Objective Constitutional Interpretation Standards

101. The resolution of competing judicial philosophies regarding the Ninth Amendment must occur through objective analysis of constitutional text using established principles of logic and linguistics, not through subjective judicial preference.

102. The constitutional text establishes clear commands that are discoverable through proper analytical methods and that control judicial interpretation regardless of judicial philosophy about their desirability or enforceability.

B. Ninth Amendment Requirements Through Proper Analysis

103. The Ninth Amendment, properly analyzed, protects substantive retained rights through constitutional command that courts must enforce.

104. The linguistic analysis establishes that "rights...retained by the people" refers to pre-existing entitlements that people kept when creating government.

105. The logical analysis establishes that constitutional enumeration "shall not be construed to deny or disparage" these retained rights through any interpretive method, including judicial interpretation.

106. The constitutional hierarchy analysis establishes that democratically ratified constitutional text controls judicial interpretation rather than being controlled by it.

C. Constitutional Government Restoration

107. This textual analysis resolves the judicial philosophy conflict by demonstrating that constitutional text provides objective criteria for constitutional interpretation that are independent of judicial preference.

108. When courts properly apply principles of logic and linguistics to constitutional text, constitutional interpretation becomes a matter of discovering constitutional requirements rather than implementing judicial philosophy.

109. This represents the restoration of constitutional government, where constitutional text serves as supreme law that controls all governmental action, including judicial action, consistent with the fundamental principle established in Article VI and confirmed in *Marbury v. Madison*.

D. Ninth Amendment as Constitutional Test Case

110. The Ninth Amendment thus serves as both a test case for constitutional text supremacy and a constitutional command requiring protection of natural rights retained by the people.

111. Through proper textual analysis using logic and linguistics, the Amendment's requirements become clear and enforceable, restoring constitutional protection for the unenumerated rights that the democratic ratification process specifically sought to preserve.

112. This restoration requires rejecting judicial supremacy over constitutional text and embracing constitutional supremacy over judicial interpretation, ensuring that American constitutional government operates according to democratically ratified constitutional law rather than judicially preferred constitutional philosophy.

113. The systematic judicial nullification of the Ninth Amendment exemplifies the broader constitutional crisis documented in the federal civil rights complaint, where

governmental institutions systematically violate constitutional requirements through interpretive doctrines that serve institutional preferences over constitutional compliance.

114. This constitutional analysis supports the necessity for immediate judicial intervention to restore constitutional text supremacy and prevent continued governmental violations of democratically ratified constitutional requirements through systematic judicial nullification of clear constitutional commands.