THE GOLDEN MEAN BETWEEN KURT & DAN: A MODERATE READING OF THE NINTH AMENDMENT

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It is a great pleasure to be here today. I may not know much about the Ninth Amendment, but the Drake Law School did put me up at the Holiday Inn Express last night. Yesterday, I came from a conference at Vanderbilt Law School called "The Neglected Justices." I hope it does not reveal too much about my contrarian nature that two topics of particular appeal to me are neglected Justices and ignored provisions of the Constitution. And, while many of those Justices were rightly neglected, I deny this is true of the Ninth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.

When Mark Kende invited me to give the talk today, he suggested that I take the opportunity to express my disagreement with Dan Farber's view of the Ninth Amendment in his new book[1] and with Kurt Lash's view of the Ninth Amendment in his recent articles.[2] But when it came time to give this talk, I decided that this was not going to be practical. Because disagreements over the Ninth Amendment are so focused on historical evidence, it is impossible to present this evidence orally in a persuasive manner without putting all of you to sleep. So I decided to refocus my remarks on a question that would be more feasible to address in the allotted ten minutes: Why have the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment been overlooked?

Let me begin by identifying where the three of us agree about the Ninth Amendment. We all agree that the Ninth Amendment is an important part of the Constitution. We all agree that it has been unjustly ignored. We all think that the Supreme Court should use the Ninth

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1. *See* DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007).

2. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008).

Amendment in adjudication. And we all agree that the Ninth and Fourteenth Amendments protect individual rights. Finally, I think we all agree that much of the Court's current jurisprudence in the Due Process Clause area with respect to the federal government would be more accurately characterized as Ninth Amendment doctrine as opposed to Due Process Clause doctrine.

So what do we disagree about? First of all, Dan basically limits the application of the Ninth Amendment to the unenumerated rights that the Supreme Court has already recognized as fundamental under its Due Process Clause fundamental rights doctrine, and not much beyond that. I think that is a mistake. I think that the Supreme Court's fundamental rights doctrine is fundamentally wrong.[3] In fact, in some sense, it is somewhat of a fraud on the public because the doctrine is so malleable that it simply allows the Court to turn away unenumerated rights claims whenever it wants to. I think that limiting the protection of the "rights retained by the people" simply to the Due Process Clause rights that have already been recognized is an overly constrained view of the Ninth Amendment. I have a broader view of the Ninth Amendment. I think it protects all of the liberties that are retained by the people—not a favored few that are established as fundamental to the Court's satisfaction, which is its current approach to the protection of liberties. I think that, under the Ninth Amendment, all liberties should be equally protected. That is where Dan and I disagree.

While Kurt accepts the proposition that the Ninth Amendment protects unenumerated individual liberties—or natural rights—to these he adds the protection of something like a collective right of the people in the states, or majoritarian rights. He has a number of different formulations of the extra rights he says are protected.[4] I think this goes too far—Kurt adds a kind of right to the meaning of the Ninth Amendment that was not within its original meaning. To reconcile this debate, you would have to get into the weeds of the evidence that he and I have been debating for several years now, which is not practical to do here.

To relate my position to Dan and Kurt's, we have a Goldilocks

3. *See generally* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

4. *See* Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937, 938–39 (2008) (discussing Lash's various versions of a collective right of the majority to govern in the states).

situation. Dan's view of the Ninth Amendment is too small. Kurt's view of the Ninth Amendment is too big. My view of the Ninth Amendment, of course, is just right: it recognizes all of the individual liberties of the people; however, it does not recognize a collective right that goes beyond that. Although I am abstaining from defending my interpretation or critiquing theirs, I would like to give you some reason to accept my approach as plausible.

As it happens, there is a single piece of evidence that powerfully supports the individual natural rights interpretation of the Ninth Amendment. It is a quote by Representative Roger Sherman of Connecticut. Sherman was on the Select Committee of the House of Representatives to draft the Bill of Rights along with Representative James Madison, who had offered the original proposal for a bill of rights in the House. In Madison's proposal, the amendments were to be inserted in the relevant portions of the text. Madison would literally have amended or changed the Constitution by inserting new text in different places and crossing out old text. Sherman has been credited with the idea of leaving the original text intact and listing the amendments at the end. Apparently to this end, Sherman formulated a list of proposed amendments that was lost to historians until 1989 when it was discovered among Madison's papers.

The second proposed amendment on Sherman's list has proved to be of great importance in interpreting the Ninth Amendment, particularly how it begins and ends. Here is how it starts: "*The people* have certain *natural rights* which are *retained* by them when they enter into Society. . . ."[5] That is an unmistakable affirmation that the "rights retained by the people" to which the Ninth Amendment refers are natural rights, and it connects the terminology of "natural rights" with "retained" rights within the very committee that proposed the Ninth Amendment. This single fact has been instrumental in refuting claims that the Ninth Amendment was not a reference to natural rights; after this piece of evidence was introduced into the debates over the Ninth Amendment, it was difficult to make that argument again. And neither Dan nor Kurt deny that the Ninth Amendment refers to natural rights.

The middle portion of Sherman's second Amendment provides a nonexclusive list of examples of the sorts of rights that were retained by the people:

5. Roger Sherman, *Draft of the Bill of Rights*, *reprinted in* THE RIGHTS RETAINED BY THE PEOPLE 351–52 (Randy E. Barnett ed., 1989) (emphasis added).

> Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.[6]

Each of these "natural rights" are individual rights rather than collective or group rights, and each are also liberty rights—that is, each identifies a type of action that individuals are entitled to take, rather than goods one is entitled to receive.

Sherman's second amendment ends saying, "Of these rights therefore they Shall not be deprived by the Government of the united States."[7] This affirms that the natural rights retained by the people, whether enumerated or not, shall not be violated by the government of the United States.

Sherman's second amendment is important, therefore, because it is a direct affirmation of the existence of natural rights, which are defined as individual liberty rights, and is a direct affirmation that these liberty rights shall not be violated. The Ninth Amendment does not say this expressly. The Ninth Amendment only says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[8] In other words, the Ninth Amendment expressly says only that one cannot use the lack of enumeration to claim that a right should not be protected; it is a response to a particular argument. But, as I have contended elsewhere,[9] the Ninth Amendment also implies, as part of its original meaning, what is expressly affirmed in Sherman's proposal: there are, in fact, natural rights and these rights shall not be denied or disparaged.

Given the available evidence of its original meaning, why has the Ninth Amendment been so neglected by the courts? There are two

6. *Id.* at 351.

7. *Id.*

8. U.S. CONST. amend. IX.

9. *See* Randy E. Barnett, *The People or the State:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1748–50 (2007) (explaining the notion of constitutional implicature as applied to the Ninth Amendment); *see also* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. (forthcoming Mar. 2009) (expanding on this analysis of constitutional implicature); Lawrence Solum, *Semantic Originalism* (Ill. Pub. Law Research Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1120244.

obvious reasons. First, the content of this Amendment seems too terribly open-ended. It seems to give what Raoul Berger has called a "roving commission" to judges to identify whatever rights they may like or may not like.[10] The same could be said about the Privileges or Immunities Clause of the Fourteenth Amendment. As Robert Bork famously asserted in his confirmation hearings:

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.[11]

By the way, Bork loved the ink blot metaphor so much that in his book *The Tempting of America*, he switched it from the Ninth Amendment to the Privileges or Immunities Clause.[12] So both unenumerated rights clauses got covered by ink blots at some point by Robert Bork.

Second, the Amendment is considered too radical. If these unenumerated rights are recognized and protected, some people think the Amendment would have an extremely constraining effect on the exercise of governmental powers, such that it might well do away with government altogether. Moreover, we know that the Founders and the authors of the Privileges or Immunities Clause of the Fourteenth Amendment did not want to do away with all government. Therefore, the Amendment cannot mean what it appears to mean, because if it did, the consequences are too severe.

Let me conclude these remarks by explaining briefly why these two criticisms are unpersuasive. As for the first, the original meaning of the rights to which these provisions refer is not so open ended as Berger, Bork, and others have claimed. Historical research has provided ample evidence

10. RAOUL BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 293 (2d ed. Liberty Fund 1997) (1977).

11. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 100th Cong. 249 (1989).

12. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990) (In his discussion of the Fourteenth Amendment, Bork states, "A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot.").

for establishing the original public meaning of both provisions. My research has shown that the "rights . . . retained by the people" in the Ninth Amendment was a reference to natural, individual, liberty rights. I think in the case of the Privileges or Immunities Clause they meant that, plus those rights enumerated in the Bill of Rights that went beyond natural rights. Michael Curtis's path-breaking scholarship established that the privileges or immunities of citizens referred to in the Fourteenth Amendment included the enumerated rights in the Bill of Rights,[13] and my research has shown privileges or immunities also included the same unenumerated natural rights referred to in the Ninth Amendment.[14] There is no ink blot covering the historical evidence that establishes the original meaning of these rights, privileges, or immunities. So Dan is wrong, I think, to limit the scope of the Ninth Amendment and Privileges or Immunities Clause to the unenumerated rights that the Supreme Court has recognized as fundamental.

If it is true that these provisions refer to all liberties, does this make the Ninth Amendment and Privileges or Immunities Clause too dangerous for courts to use? Would the judicial protection of all liberties bring an end to all government? I think the mistake here is to take a too absolutist view of what it means to protect constitutional liberty. We do not, after all, take so radical a view of the protection of an enumerated liberty when we are talking about, for example, the natural right of freedom of speech, which was included in the Bill of Rights.

Freedom of speech was considered by Madison and others to be a natural right. How do we protect this enumerated right? Essentially, we do so by putting the burden on the government to justify its laws as necessary and proper when a law affects the liberty of speech. We do not say that government may never prohibit speech, and we do not say that government may never regulate the exercise of the right to speak. Instead, we say that if it is going to prohibit speech, the government has to show that the speech is in some sense wrongful—that the speech in some sense violates the rights of other people. Defamatory speech, for example, meets this test. Defamatory speech is prohibited, not regulated. And it is prohibited on the theory that it is tortious—that is, it violates the rights of other people. This is also true of fraudulent speech. Although most speech is not wrongful, when speech wrongfully interferes with the rights of others,

13. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986).

14. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 60–68 (2004).

it can be banned.

Short of prohibition, speech and assembly may also be regulated by what First Amendment doctrine calls time, place, and manner regulations. As outraged as you all may be about the fact that the Ninth Amendment has been ignored since its enactment, you cannot now go into the street and block traffic without getting a parade permit from the City of Des Moines. Why is that? If they meet constitutional muster, time, place, and manner regulations prevent the rightful exercise of the rights of speech and assembly from unduly interfering with the exercise of liberties by our fellow citizens. But the existence of a constitutional right to free speech requires that such regulations be scrutinized to ensure that they are not unduly burdening speech of which the government disapproves

If we were to take essentially the same approach to all liberties that we now use to approach the First Amendment's natural right of freedom of speech, we would employ the same analysis of prohibitions and regulations of liberty. First, it is completely appropriate to prohibit wrongful actions that violate the rights of fellow citizens. The Ninth Amendment poses no obstacle whatsoever to the prohibition of murder, rape, and armed robbery. Actions that risk violating the rights of others can be regulated, provided the government shows that the regulations really are truly necessary to protecting the rights of others, and are not aimed at imposing an undue burden on the rightful exercise of liberty.

To put this approach into context, consider the medical cannabis case of *Gonzalez v. Raich*. After Angel Raich and Diane Monson lost their Commerce Clause challenge to the Controlled Substances Act in the Supreme Court in a six-to-three decision,[15] the case was remanded to the Ninth Circuit, where Angel renewed her Due Process Clause challenge. This claim too was eventually denied.[16] It may come as a surprise to many of you to learn that all of this litigation was pre-trial. Angel and Diane went all the way to the Supreme Court, but they never got their day in court. Because of the Supreme Court decision, the federal government was never required to present arguments and evidence about why it was necessary to reach Diane Monson's backyard marijuana plants—which she consumed on her own property—in order to exercise its power over interstate commerce. Similarly, on remand, the government never had to show why preventing Angel's caregivers—who grew the cannabis for her at no charge—from supplying her with this cannabis was essential to a

15. Gonzales v. Raich, 545 U.S. 1, 33 (2005).

16. *Id.*; *see* Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007).

broader regulatory scheme established by the Controlled Substances Act.

The *Raich* case casts light upon the dirty little secret of the Supreme Court's fundamental rights jurisprudence: the courts may refuse to protect any unenumerated liberty it does not want to protect simply by defining the right with great specificity.[17] In *Raich*, we claimed the unenumerated right being violated was Angel's right to preserve her life; the court instead accepted the government's claim that the right at issue was the right to use cannabis for medical purposes. Because the circuit court then rejected this narrow right as "fundamental," the government never had to come in and justify what it did. Ever! It could just sit back and wait for us to lose. We never got our day in court.

As with the freedom of speech and assembly, all it means to protect the other liberties retained by the people is to put the government to its proof. If a law really is a reasonable regulation of liberty that is necessary to protect the rights of others, the government ought to be able to come forth with a justification that is compelling enough to persuade government judges—government-employed federal judges who get appointed for political reasons—that its justifications are persuasive. In *Raich*, the federal government did not want to have to do this and it never had to.

Now, in the *Raich* case itself, I barely mentioned the Ninth Amendment in our brief before proceeding to argue the case in the context of the Due Process Clause. A word for all you future litigators out there: the Ninth Amendment is not something you can really argue in court. That, in fact, is what makes it part of the "Lost Constitution" that my book is about.[18] But this is unfortunate for two reasons: First, current Due Process Clause doctrine overly restricts the protection of unenumerated rights. Second, resting the protection of unenumerated rights on the Due Process Clause undermines the legitimacy of protecting any unenumerated rights. Adopting the original meaning of both the Ninth Amendment and Privileges or Immunities Clause, however, would provide a far sounder basis to protect unenumerated rights. On this important point, Dan, Kurt and Randy all agree.

17. *See* Barnett, *supra* note 3, at 1488–93 (explaining how the "*Glucksberg* Two-Step" operates to give courts complete discretion to deny unenumerated rights claims).

18. *See* BARNETT, *supra* note 14.