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# Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy

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# **Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy**

*Kurt T. Lash*<sup>†</sup>

## I. A TALE OF TWO LAW PROFESSORS: ROBERT BORK AND PHILIP KURLAND ON THE NINTH AMENDMENT

One of the more indelible moments in late twentieth-century legal discourse occurred when Judge Robert Bork described the proper response of a judge confronted with the Ninth Amendment.<sup>1</sup> Nominated to replace retiring Supreme Court Justice Lewis Powell, Judge Bork appeared before the Senate Judiciary Committee and declared that courts had no business enforcing the mysterious clause at all. Given the scarcity of historical evidence regarding the original meaning of the amendment, using the Ninth Amendment to strike down a law would say more about the predilections of the judge than the requirements of the text. Here is the famous exchange:

Judge Bork: . . . I think the ninth amendment therefore may be a direct counterpart to the 10th amendment. The 10th amendment says, in effect, that if the powers are not delegated to the United States, it is reserved to the States or to the people.

And I think the ninth amendment says that, like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions. That is the best I can do with it.

Senator DeConcini: Yes. You feel that it only applies to their State constitutional rights.

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<sup>1</sup> US Const Amend IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

Judge Bork: Senator, if anyone shows me historical evidence about what they meant, I would be delighted to do it. I just do not know.

Senator DeConcini: I do not have any historical evidence. What I want to ask you is purely hypothetical, Judge. Do you think it is unconstitutional, in your judgment, for the Supreme Court to consider a right that is not enumerated in the Constitution——

Judge Bork: Well, no.

Senator DeConcini: ——to be found under article IX?

Judge Bork: . . . 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 inkblot 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 inkblot if you cannot read it.<sup>2</sup>

Judge Bork suspected that the Ninth Amendment ought to be read as a companion to the Tenth Amendment, with both provisions serving to protect the retained rights of the people in the states. Nevertheless, absent additional evidence, Bork believed judicial enforcement of the Ninth Amendment was inappropriate. This meant that Justices William Douglas and Arthur Goldberg erred in their respective opinions in *Griswold v Connecticut*<sup>3</sup> by suggesting the Ninth Amendment helped justify the Court’s identification and enforcement of the right to privacy.<sup>4</sup>

Criticism of Judge Bork’s position on the Ninth Amendment and unenumerated rights was a major theme among opponents to his nomination.<sup>5</sup> During the same confirmation hearings, Bork’s former colleague, Professor Philip Kurland, testified that

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<sup>2</sup> *The Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary*, 100th Cong., 1st Sess 249 (1987) (statement of Robert H. Bork) (“Bork Hearing”).

<sup>3</sup> 381 US 479 (1965).

<sup>4</sup> See *id.* at 484 (Douglas); *id.* at 487 (Goldberg concurring).

<sup>5</sup> According to Professor Sanford Levinson, Judge Robert Bork’s nomination to the Supreme Court was defeated “largely because of his refusal to acknowledge the ‘unenumerated’ right to privacy.” Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 Chi Kent L Rev 131, 135 (1988).

the research Kurland conducted for the creation of the five-volume set of books known as *The Founders' Constitution*<sup>6</sup> established the Ninth Amendment as a declaration of unenumerated natural rights.<sup>7</sup> According to Kurland, Judge Bork's failure to understand the Ninth Amendment as authorizing judicial enforcement of unenumerated rights against the states was a major reason why Bork should not be confirmed.<sup>8</sup>

In retrospect, Kurland's confident assertion about the original meaning of the Ninth Amendment is surprising and, as it turns out, demonstrably incorrect. Although Professor Kurland

<sup>6</sup> Philip B. Kurland and Ralph Lerner, 1–5 *The Founders' Constitution* (Chicago 1987).

<sup>7</sup> For example, here is an exchange between Chairman Joseph Biden and Professor Kurland during the Senate Hearings:

The Chairman: Professor Kurland, is your view on the right of privacy the same as Judge Bork's, to the best of your knowledge, to the extent that one exists or does not exist within the Constitution?

Mr. Kurland: It is not now, no. That is, I have come to realize this through the book that I just edited, which was the—it is called "The Founders' Constitution" and consists of all of the, or most of the writings and documents relating to the framing.

I have come to a different realization of the breadth of the rights of Englishmen, that was sought to be protected by the Constitution makers.

So that while I was prepared to argue as to whether the right of privacy should be included among those rights, my position now is that there is no doubt about the Court's capacity to create that right. Not to create it, but to affirm it.

*Bork Hearing*, 100th Cong, 1st Sess at 2860 (cited in note 2).

<sup>8</sup> See *id.* See also Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 *Cardozo L Rev* 127, 131–33 (1987) (describing Bork's theory of "unlimited" government powers against individuals, in light of the Ninth Amendment and the history surrounding it, as based on a "myopic" reading of history). Professor Kurland was deeply involved with a group assisting Senator Joseph Biden in putting together a strategy to defeat Bork's nomination. Mark Gitenstein, *Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* 60–61 (Simon & Schuster 1992). In late June 1987, when Justice Lewis Powell announced his resignation from the Supreme Court, Senator Biden immediately set up a conference call that included Kurland, Laurence Tribe, Ken Bass, and Floyd Abrams. *Id.* at 24. This became a working group of academics advising Biden throughout the hearings. See Edward Walsh, *For Committee Staff, Time to Get Ready for Bork; Confirmation Drama to Supplant Iran-Contra Hearings as Capitol Hill's Main Event*, *The Washington Post* A13 (Aug 11, 1987). This was not Kurland's first foray into the politics of judicial nominations—he had worked with Tribe the year before in opposing the appointment of Daniel Manion to the Seventh Circuit. Gitenstein, *Matters of Principle* at 160. When interviewed on the television show *Meet the Press*, Kurland remarked, "The one thing we know is that the senate should not be asked to consent to the appointment of both Dr. Jekyll and Mr. Hyde." This quote would become the central theme in a *Time* magazine cover story that included two identical pictures of Judge Bork side by side—one upside down. *Id.* at 200–01.

and his coeditor, Professor Ralph Lerner, had recently collected historical materials for the section on the Ninth Amendment in *The Founders' Constitution*, none of these materials involved actual discussion of the ratified amendment by its framers, ratifiers, or early constitutional commentators.<sup>9</sup> Omitted from the collection is Ninth Amendment–framer James Madison's speech describing the ratified Ninth Amendment as working in tandem with the Tenth Amendment to protect the retained powers and rights of the states.<sup>10</sup> Likewise omitted is a discussion of the Ninth Amendment by another one of its framers, John Page, who also described the Ninth Amendment as working alongside the Tenth in order to preserve the autonomy of the states.<sup>11</sup> Nor does the collection include a discussion of the Ninth Amendment in the first constitutional commentary by St. George Tucker.<sup>12</sup> Although the collection uses Tucker's work in numerous other sections, it does not include Tucker's description of the Ninth and Tenth Amendments as jointly requiring a strict construction of federal power.<sup>13</sup> Finally, despite including numerous judicial opinions from the same period, Kurland's collection omits the first Supreme Court opinion discussing the Ninth Amendment by Justice Joseph Story, in which Story described the Amendment as, you guessed it, limiting the scope of federal power in order to preserve the same in the states.<sup>14</sup> In short, the historical

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<sup>9</sup> The only materials actually dealing with the Ninth Amendment in the section labeled "Amendment IX" are a paragraph from Madison's speech introducing the first draft of the amendment, two paragraphs from the drafting debates, and one paragraph from Joseph Story's 1833 *Commentaries on the Constitution*. See Kurland, 5 *Founders' Constitution* at 399–400 (cited in note 6). For comparison, the section on the First Amendment religion clauses includes extensive postratification discussion and case law, including speeches and letters by James Madison and Thomas Jefferson, major sections of St. George Tucker's "View of the Constitution of the United States," and early case law. *Id.* at 94–110.

<sup>10</sup> James Madison, *Speech in Congress Opposing the National Bank* (1791), in Jack N. Rakove, ed., *Madison: Writings* 480, 488–89 (Library of America 1999).

<sup>11</sup> John Page, *Address to the Freeholders of Gloucester County, at Their Election of a Member of Congress, to Represent Their District, and of Their Delegates, and a Senator, to Represent Them in the General Assembly of the Commonwealth of Virginia, April 24, 1799* 12–13 (John Dixon 1799). Page was a member of Congress from 1789 to 1797 and Governor of Virginia from 1802 to 1805. *Page, John (1742 - 1808)*, Biographical Directory of the United States Congress, online at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000018> (visited Nov 1, 2013).

<sup>12</sup> St. George Tucker, *View of the Constitution of the United States*, in St. George Tucker, ed., 1 *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* at 140, 154 (Birch and Small 1803).

<sup>13</sup> *Id.*

<sup>14</sup> See *Houston v Moore*, 18 US 1, 20–21 (1820) (Story dissenting).

record regarding the ratified Ninth Amendment powerfully supports Judge Bork's intuition that the Ninth Amendment is best read as working with, and not against, the federalist Tenth Amendment. Yet none of this evidence was included in the collection that Kurland insisted proved Judge Bork was so terribly misguided on the matter that he was not qualified to sit on the Supreme Court.

In fairness to Professor Kurland, almost none of this evidence was widely recognized by legal scholars in 1987. Instead, the vast majority of constitutional scholars at the time believed the Ninth Amendment somehow protected individual natural *rights*, while the Tenth Amendment (perhaps) protected state *powers*. This is why Professor Kurland included materials on Blackstone and natural rights in his section purporting to present documents relating to the Ninth Amendment.<sup>15</sup> This widely held presumption also likely explains why, when Kurland and his staff actually identified a piece of historical evidence relating to the early understanding of the Ninth Amendment, they nevertheless decided to *leave it out of the collection*. Written by Judge John Grimke, one of the ratifiers of the original Constitution, the opinion in *State v Antonio*<sup>16</sup> described the Ninth Amendment as working in tandem with the Tenth, just as Judge Bork suggested. Here is Judge Grimke:

[I]t does not appear that the power of punishing persons for passing counterfeit coin, knowing it to be counterfeit, was either expressly given to the Congress of the United States, or divested out of the individual States. Now the 9th section of the amendments to the constitution, as agreed to by the several States, and which has now become a component part of the constitution, declares, that the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and in the 10th section of the same, it is further provided, that the powers not delegated to the United States by the constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people. When we examine the powers conceded by the individual States, we find no enumeration of this power given to Congress, and when we review the powers denied to the individual States, we discover no

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<sup>15</sup> See Kurland, 5 *Founders' Constitution* at 388–97 (cited in note 6).

<sup>16</sup> 3 Brev 562 (1816).

mention whatever of their being divested of this power. The individual States were in possession of this power before the ratification of the constitution of the United States; and if there is no express declaration in that instrument, which deprives them of it, they must still retain it, unless they should be divested thereof by construction, or implication.<sup>17</sup>

*The Founders' Constitution* includes a great many state court opinions written during the same period as *State v Antonio*.<sup>18</sup> In fact, Kurland and his staff not only discovered the *Antonio* opinion, they initially prepared the case for publication.<sup>19</sup> Nevertheless, Kurland and Lerner chose to omit what appears to have been the only judicial discussion of the ratified Ninth Amendment that they managed to find. You can still find the copied and pasted version of the case in the papers of Philip Kurland in the Special Collections Research Center at the University of Chicago Library. It's in Box 86 of Kurland's papers on *The Founders' Constitution*, in a folder marked "Not Used. Amendment X."<sup>20</sup> Had Kurland and Lerner viewed *Antonio* as a clue rather than an obscure (and presumably unhelpful) outlier, they might have eventually discovered that Judge Bork was not only right to suspect the Ninth Amendment was originally linked to the Tenth, he was especially right to counsel judicial humility until we had more information.

## II. THE HISTORY OF THE NINTH AMENDMENT

Historical evidence from the founding generation unambiguously, and expressly, supports *Antonio's* vision of the Ninth and Tenth Amendments working together to limit federal power in order to preserve the reserved rights and powers of the people in the states. Together they protected the retained right of local self-government. James Madison, principal author of the Ninth

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<sup>17</sup> Id at 567–68.

<sup>18</sup> See, for example, *People v Ruggles*, 8 Johns 290 (NY 1811), reprinted in Kurland, 5 *Founders' Constitution* at 101 (cited in note 6); *Updegraph v Commonwealth*, 11 Serg & Rawle 394 (Pa 1824), reprinted in Kurland, 5 *Founders' Constitution* at 170 (cited in note 6).

<sup>19</sup> Kurland's research files for *The Founders' Constitution* contain a folder with a copy of *Antonio* pasted on separate pieces of paper. See Special Collections Research Center, University of Chicago Library, Papers for Philip B. Kurland, Box 86, Folder 2 ("Not Used, Amendment X").

<sup>20</sup> Just to underscore Kurland and Lerner's view that *Antonio* was about the Tenth Amendment, but not the Ninth, there is a citation to the case at the end of *The Founders' Constitution* section on the Tenth Amendment. See Kurland, 5 *Founders' Constitution* at 407 (cited in note 6).

Amendment, explained that the Ninth Amendment “guard[s] against a latitude of interpretation” while the Tenth “exclud[es] every source of power not within the Constitution itself.”<sup>21</sup> Madison insisted that these two amendments worked together to “limit the powers of the general government, and protect those of state government.”<sup>22</sup> St. George Tucker, author of the first constitutional treatise, agreed with Madison. Tucker, professor at the College of William & Mary from 1788–1804, wrote in his influential “View of the Constitution of the United States” that the Ninth Amendment guarded the people’s collective right to alter or abolish their form of government. According to Tucker, under the principles of the Ninth and Tenth Amendments, “the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.”<sup>23</sup> Justice Joseph Story, in the first Supreme Court opinion to discuss the Ninth Amendment, read the Ninth as preserving the concurrent powers of state majorities.<sup>24</sup> There is much more.<sup>25</sup> In fact, every legal treatise and judicial opinion written in the first one hundred years of the Constitution either expressly links the Ninth and Tenth Amendments or describes the amendments as limiting the powers of the federal government in order to preserve areas of autonomy to the states.<sup>26</sup>

Unfortunately, when Judge Bork appeared before the Judiciary Committee, this evidence remained unknown or unrecognized. In fact, most of this evidence was hiding in plain sight. Madison’s 1791 speech opposing the Bank of the United States was well known, but Madison’s reference to the Ninth Amendment was generally unrecognized because Madison’s referred to the Ninth as the “11th” proposed amendment.<sup>27</sup> Congress originally

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<sup>21</sup> Madison, *Speech in Congress Opposing the National Bank* at 489 (cited in note 10).

<sup>22</sup> *Id.* at 490.

<sup>23</sup> Tucker, *View of the Constitution* at 154 (cited in note 12).

<sup>24</sup> See *Houston v Moore*, 18 US 1, 49–51 (1820) (Story dissenting).

<sup>25</sup> See generally Kurt T. Lash, *The Lost History of the Ninth Amendment* 139–226 (Oxford 2009).

<sup>26</sup> *Id.*

<sup>27</sup> Here is the relevant portion of Madison’s speech:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the states. He read several



proposed twelve amendments to the Constitution with our Ninth and Tenth being eleventh and twelfth on the original list. In his speech, Madison used what was then the common convention of referring to the proposed amendments according to their place on the list. As time went on and it became clear that only ten of the proposed amendments would be ratified,<sup>28</sup> this convention changed, and by the mid-nineteenth century, the eleventh was commonly referred to as the “Ninth Amendment.” This changed convention had the effect of obscuring early references to the Ninth Amendment like that contained in Madison’s speech.

The same was true for the first constitutional treatise, St. George Tucker’s “View of the Constitution.”<sup>29</sup> Tucker’s essay on the American Constitution was published in the appendixes of his 1803 annotated edition of Blackstone’s *Commentaries*. Based on lectures that Tucker delivered while teaching at William & Mary during the 1790s, Tucker’s “View of the Constitution” was easily the most influential scholarly work on the American Constitution in the early decades of the republic, and they remained influential long afterward.<sup>30</sup> As had Madison, Tucker believed the proper construction of federal power was limited by amendments “eleven” and “twelve”:

[As a federal compact, the Constitution] is to be construed strictly, in all cases where the antecedent rights of a *state* may be drawn in question [citing amendment “twelve”]; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government [citing amendments

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of the articles proposed, remarking particularly on the 11th and 12th. [T]he former, as guarding against a latitude of interpretation—the latter, as excluding every source of power not within the constitution itself.

Madison, *Speech in Congress Opposing the National Bank* at 489 (cited in note 10).

<sup>28</sup> Or, at least only ten amendments would be *immediately ratified*. The first amendment on the original list of twelve was finally ratified in 1992. See US Const Amend XXVII.

<sup>29</sup> Tucker, *View of the Constitution* at 140 (cited in note 12).

<sup>30</sup> See Kurt T. Lash, “Tucker’s Rule”: *St. George Tucker and the Limited Construction of Federal Power*, 47 *Wm & Mary L Rev* 1343, 1382–89 (2006).

“eleven” and “twelve”]. The few particular cases in which he submits himself to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him to a double loss, or inconvenience for the same cause.<sup>31</sup>

Tucker’s eleventh and twelfth amendments, of course, are what we call the Ninth and Tenth. Tucker not only shared Madison’s view of a “federalist” Ninth Amendment, at the time that he wrote, no one had offered any other view of the Ninth Amendment. If one is tempted to dismiss either Madison or Tucker as having unduly narrow conceptions of national power, the *same* reading of the amendment is presented by Justice Joseph Story in the first Supreme Court opinion discussing the Ninth Amendment. Story, who shared John Marshall’s broad view of national power, nevertheless understood the Ninth Amendment as calling for a limited construction of federal power in order to preserve the retained powers and prerogatives of the states. In *Houston v Moore*,<sup>32</sup> Story insisted that “the letter and spirit” of the Ninth Amendment (which he referred to as the “eleventh amendment”) called for a limited construction of the exclusive powers of the federal government in order to preserve the reserved powers of the states. As Story put it,

[A] reasonable interpretation of [the Constitution] necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. . . . In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, *not only upon the letter and spirit of the eleventh amendment of the constitution*, but upon the soundest principles of general reasoning.<sup>33</sup>

All of the available evidence from the early decades of the Constitution expressly links the Ninth and Tenth Amendments

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<sup>31</sup> Tucker, *View of the Constitution* at 151 (cited in note 12).

<sup>32</sup> 18 US 1 (1820).

<sup>33</sup> *Id.* at 49 (Story dissenting) (emphasis added).

as co-guardians of the federalist right to local self-government.<sup>34</sup> Nor is there any evidence that the adoption of the Fourteenth Amendment had any impact on the original federalist understanding of the Ninth Amendment. By the time of the Civil War, the Ninth Amendment had a long history of being associated with states' rights, to the point that the seceding states relied on the federalist understanding of the Ninth and Tenth Amendments in support of their right to leave the Union.<sup>35</sup> Although the Fourteenth Amendment required the states to respect the "privileges or immunities of citizens of the United States,"<sup>36</sup> its proponents described these privileges and immunities as including the rights listed in *the first eight* amendments.<sup>37</sup> Although some scholars have tried to argue the unenumerated individual rights of the Ninth Amendment became applicable against the states by way of the Privileges or Immunities Clause,<sup>38</sup> this reflects both an erroneous understanding of the original Ninth Amendment and an ahistorical account of the Fourteenth Amendment. Over the last few decades, historians like Professor Eric Foner, Professor William E. Nelson, and others have recognized the continued commitment to federalism in the Thirty-Ninth Congress.<sup>39</sup> During the debates of the Thirty-Ninth

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<sup>34</sup> For an exhaustive account of this history, see generally Lash, *The Lost History of the Ninth Amendment* at 139–226 (cited in note 25).

<sup>35</sup> See Cong Globe, 36th Cong, 2d Sess 212–17 (Dec 31, 1860) (Senator Benjamin).

<sup>36</sup> US Const Amend XIV.

<sup>37</sup> See Cong Globe, 39th Cong, 1st Sess 2765 (May 18, 1866) (Senator Howard); Cong Globe, 42nd Cong, 1st Sess App 84 (Mar 31, 1871) (Representative Bingham).

<sup>38</sup> See, for example, Randy E. Barnett, *Restoring the Lost Constitution* 60–68 (Princeton 2004).

<sup>39</sup> See Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, 242 (Harper & Row 1988) (stating that Republican moderates "accepted the enhancement of national power resulting from the Civil War, but they did not believe the legitimate rights of the states had been destroyed, or the traditional principles of federalism eradicated."); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 114 (Harvard 1988) ("Most Republican supporters of the [Fourteenth] amendment, like the Democrat opponents, feared centralized power and did not want to see state and local power substantially curtailed."); id at 27–39 (discussing the continued commitment to principles of federalism in the Reconstruction Congress). See also Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J Am Hist 65, 67 (1974) ("[M]ost Republicans [during Reconstruction] never desired a broad, permanent extension of national legislative power."); Earl M. Maltz, *Civil Rights, the Constitution, and Congress 1863-1869* 60 (Kansas 1990) ("The disposition of the Freedmen's Bureau Bill and the apportionment amendment demonstrated that only those civil rights measures that received virtually unanimous support from mainstream Republicans could be adopted."); id at 30 ("The task [of Reconstruction] was further complicated by the Republicans' firm attachment to the basic structure of American federalism.").

Congress, the drafter of § 1 of the Fourteenth Amendment, John Bingham, announced, “this dual system of national and State government under the American organization is the secret of our strength and power. I do not propose to abandon it.”<sup>40</sup> As I explore in detail elsewhere,<sup>41</sup> there is no evidence the framers of the Fourteenth Amendment drafted a clause that fundamentally altered the basic federalist system of constitutional government or altered the basic original understanding of the Ninth and Tenth Amendments.

*Griswold v Connecticut* marked the beginning of the modern transformation of the Ninth Amendment into a possible source of unenumerated rights. The factual background of *Griswold* and the manner in which it reached the Supreme Court are worthy of another book.<sup>42</sup> Suffice to say, the case was less about invalidating a moldy Connecticut law banning the distribution of contraceptives to married couples (which was never enforced anyway) and more about getting the Supreme Court to embrace the unenumerated right to privacy. Justice William O. Douglas’s majority opinion in *Griswold* has received no small degree of grief from legal scholars—including scholars who support the decision’s embrace of a right to privacy. From merely “not persua[sive]”<sup>43</sup> to “an amateur exercise in metaphysical poetry,”<sup>44</sup> Justice Douglas’s evocation of penumbral emanations has long been the subject of polite criticism among friends and open ridicule by critics—a rather ironic outcome given that Douglas’s penumbral approach was developed at the suggestion of his colleagues on the bench. Douglas’s original draft opinion had focused on the First Amendment associational rights of married couples.<sup>45</sup> Although he spoke of association as a right within the

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<sup>40</sup> Cong Globe, 39th Cong, 2d Sess 450 (Jan 14, 1867) (Representative Bingham).

<sup>41</sup> See generally Kurt T. Lash, *American Privileges and Immunities: Federalism, the Fourteenth Amendment and the Rights of American Citizenship* (Cambridge forthcoming 2014).

<sup>42</sup> Perhaps the most comprehensive discussion of the case and its background can be found in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (California 1998).

<sup>43</sup> Levinson, 64 Chi Kent L Rev at 135–36 (cited in note 5) (arguing that Justice Douglas’s “attempt to arrive at marital privacy through an exegesis of the Bill of Rights simply does not persuade”).

<sup>44</sup> Pierre Schlag, *The Aesthetics of American Law*, 115 Harv L Rev 1047, 1113 (2002) (“Justice Douglas’s opinion for the Court reads more like an amateur exercise in metaphysical poetry than law. . . . Strikingly, though, his argument seems unpersuasive. The reason is simple: it looks like all the reasoning is being done by a patchwork of images and metaphors.”).

<sup>45</sup> According to Douglas’s original draft:

penumbra of the First Amendment, his analysis was limited to that particular text. When Douglas circulated his original draft to his fellow justices on the Court, however, Justice William Brennan worried that the broad First Amendment analysis might be used in later cases to protect the associational rights of *Communists*.<sup>46</sup> Accordingly, in a private note, Brennan urged Douglas to find some other way to reach the same result:

If a suitable formulation can be worked out, I would prefer a theory based on privacy, which, as you point out, is the real interest vindicated here. . . .

Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of

The association of husband and wife is not mentioned in the Constitution nor in the Bill of Rights. Neither is any other kind of association. The right to educate a child in a school of the parents' choice—whether public or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those peripheral rights.

William O. Douglas, *Draft Griswold Opinion 3*, available at the Library of Congress, Papers of William O. Douglas, Box 1347, no 496 (typed draft, riders, penciled draft). See also *id.* at 5:

Marriage does not fit precisely any of the categories of First Amendment rights. But it is a form of association as vital in the life of a man or woman as any other and perhaps more so. We would indeed have difficulty protecting the intimacies of one's relationship to NAACP and not the intimacies of one's marriage relation.

<sup>46</sup> According to the case notes prepared by Brennan's clerks that year:

Justice Douglas showed an early draft of his opinion in *Griswold v. Connecticut*, 381 U.S. 479, to Justice Brennan, and asked for his suggestions. In that draft, Justice Douglas adopted a First Amendment approach, likening the husband-wife relationship to other forms of association already given First Amendment protection. Somewhat alarmed by this approach, Justice Brennan sent a note the following morning outlining the approach eventually adopted by the Court. It was possible to persuade Justice Douglas to abandon the First Amendment approach by showing that the "association" of married couples had little to do with advocacy—and that so broad-gauged an approach might lead to First Amendment protection for the Communist Party simply because it was a group, an approach Justice Douglas had rejected in the original Communist Party registration case. To save as much of the original approach as possible, it was suggested that the expansion of the First Amendment to include association be used as an analogy to justify a similar approach in the area of privacy. . . . [Brennan] did join Justice Goldberg's opinion, which elaborated the same basic ideas at somewhat greater length.

William T. Finley Jr and S. Paul Posner, *Case Notes on Griswold*, available at the Library of Congress, Papers of William J. Brennan, Box II: 6.

the other fundamental guarantees of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the Framers. Whether, in doing for other guarantees what has been done for speech and assembly in the First Amendment, we proceed by an expansive interpretation of those guarantees or by application of the Ninth Amendment admonition that the enumeration of rights is not exhaustive, the result is the same. The guarantees of the Bill of Rights do not necessarily resist expansion to fill in the edges where the same fundamental interests are at stake.<sup>47</sup>

Following Brennan's advice, Douglas abandoned his original "marital association" approach and drafted an opinion tracking Brennan's suggestion that he locate the right to privacy in an amalgam of several provisions in the Bill of Rights. Scholars have generally viewed Douglas's opinion as an unpersuasive effort to avoid repeating the sin of *Lochner v New York*.<sup>48</sup> But by moving to a general metaphor of penumbras emanating from the Bill of Rights in general (rather than just a penumbral reading of the First Amendment itself), Douglas lost touch with the text of the Constitution altogether, far more so than he would have had he followed his original instinct and focused on the associational aspect of the First Amendment. The result was an opinion that elicited "giggles" from the other Supreme Court clerks at the time<sup>49</sup> and knowing smiles from law students ever since.

### III. JUSTICE ARTHUR GOLDBERG'S OPINION

Uneasy about Justice Douglas's approach, Chief Justice Earl Warren initially resisted joining his opinion and apparently discussed his doubts with Justice Arthur Goldberg.<sup>50</sup> Goldberg, who was eager to follow up on his Ninth Amendment query at

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<sup>47</sup> William Brennan, *Note from William Brennan to William O. Douglas* (Apr 24, 1965), available at the Library of Congress, Papers of William O. Douglas, Box 1347, no 496.

<sup>48</sup> 198 US 45 (1905). For an example, see Jed Rubenfeld, *The Right of Privacy*, 102 Harv L Rev 737, 802 (1989) (suggesting that "what drove privacy into the penumbras . . . was a perceived need to differentiate the privacy doctrine from the language of substantive due process"). Rubenfeld continued, "[T]his insecurity on privacy's part . . . resulted in the very thing feared; by resorting to shadows, the right to privacy has simply invited critics to expose it—and to brand it, of course, with the scarlet letter of *Lochnerism*." *Id.*

<sup>49</sup> See Garrow, *Liberty and Sexuality* at 249 (cited in note 42).

<sup>50</sup> *Id.*

oral argument, decided to use the unease over Douglas's opinion as an opportunity to draft an opinion focusing on the Ninth. Expanding on Justice Douglas's brief citation to the Ninth Amendment in the majority opinion, Justice Goldberg argued that the Ninth Amendment "lends strong support" to the idea that liberty protected against state action by the Fourteenth Amendment "is not restricted to rights specifically mentioned in the first eight amendments."<sup>51</sup> Building his historical case on his partial knowledge of the works of James Madison and Joseph Story,<sup>52</sup> Goldberg insisted that "[t]he Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language."<sup>53</sup> Goldberg was wrong on both counts: the Amendment was first suggested by the Virginia Assembly, and Madison's initial draft was significantly altered before being submitted to the states (half of Madison's original draft was erased).<sup>54</sup> Goldberg's biggest mistake, however, was his assumption that the Ninth Amendment protected only individual unenumerated rights and had nothing to do with preserving the collective rights of the people in the several states. By assuming that the retained rights of the Ninth Amendment were solely individual in nature, Goldberg was able to make a direct analogy between the unenumerated *individual* rights of the Ninth Amendment (which bound the federal government) and the undefined *individual* liberties of the Fourteenth Amendment (which bound the states). Accordingly, Goldberg concluded that limiting the scope of the Fourteenth Amendment to just those incorporated rights expressly mentioned in the Constitution would "ignore the Ninth Amendment and to give it no effect whatsoever."<sup>55</sup>

What we now know, however, is this is precisely the effect the Ninth Amendment was supposed to have. Together with the Tenth Amendment, the Ninth Amendment was meant to prevent federal intrusion (including federal judicial intrusion) into the affairs of the states except in regard to those matters "expressly mentioned in the Constitution." Justice Goldberg did not know this, of course, much of the history remaining yet

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<sup>51</sup> *Griswold*, 381 US at 493.

<sup>52</sup> *Id.* at 488–90.

<sup>53</sup> *Id.* at 488.

<sup>54</sup> See Lash, *The Lost History of the Ninth Amendment* at 17–64 (cited in note 25).

<sup>55</sup> *Griswold*, 381 US at 491.

undiscovered (or unnoticed). Absent this history, Goldberg could look at the Ninth Amendment the way a person might look at an inkblot: perceiving within its shape ideas more reflective of the internal preferences of the observer than any intended pattern on the page.

#### CONCLUSION

This brings us back to Judge Robert Bork. In the face of epistemic uncertainty, Judge Bork refused to pour content into the unexplored Ninth Amendment. Judge Bork's inkblot did not represent his rejection of the text, but an altogether appropriate stance of judicial humility. In time, scholars would investigate the history of the Amendment and uncover evidence pointing in a very different direction than that presumed by Justice Goldberg in *Griswold*. Some of that history had already been discovered by Philip Kurland himself when he testified against Judge Bork's confirmation. The fact that Kurland's discovery remained in a box instead of being published to the world says something about the power of preconceived assumptions about the Constitution and its history. It also confirms that Judge Bork was right to recommend nonenforcement until we knew something about what it was that the People were trying to enforce.