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Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment

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OF INKBLOTS AND ORIGINALISM: HISTORICAL AMBIGUITY AND THE CASE OF THE NINTH AMENDMENT

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Ever since Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,[1] the Ninth Amendment has been a flashpoint in debates over the merits of originalism as an interpretive theory. Judge Bork's comparison of interpreting the Ninth Amendment to reading a text obscured by an inkblot[2] has been particularly subjected to intense criticism.[3] The metaphor has been attacked as erasing the Ninth Amendment from the Constitution, and as representing the inevitably selective and inconsistent use of text and history by so-called originalists.[4]

It turns out, however, that not only was Judge Bork right to reject Justice Goldberg's reading of the Ninth Amendment, his inkblot metaphor illustrates precisely the approach that a principled originalist must take in the face of historical silence or ambiguity. The more historical evidence that comes to light regarding the Ninth Amendment, the more Judge Bork's original instincts have been vindicated.

I. A BRIEF INTRODUCTION TO THE MODERN PRACTICE OF ORIGINALISM

Originalism has evolved during the last several decades. Although past formulations sometimes looked for the Founders'

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1. 381 U.S. 479 (1965).

2. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork).

3. *See, e.g.*, Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 10–11, 80 (2006).

4. *See, e.g.*, Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 192–93 (2003).

intent, today the more sophisticated forms of originalism seek the meaning of the text as it was likely understood by those who added the provision to the Constitution.[5]

This emphasis on the original understanding of the ratifiers can be traced back to the Founding generation itself. James Madison, for example, expressly embraced the idea that the meaning of the Constitution should reflect the understanding of the state ratifying conventions.[6] According to Madison, the Constitution as proposed by its framers "was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."[7]

Madison's emphasis on the ratifiers' understanding reflects the Founders' belief in popular sovereignty. A political theory in ascendancy at the time of the Founding, popular sovereignty distinguishes the government from the governed, with only the latter having the sovereign right to establish (or amend) fundamental law.[8] The governed speak as "the People" when they meet in convention and debate, vote, and reduce to writing the People's fundamental law. Because these conventions of the People are responsible for "breathing life" into the document, it is their understanding of the words that controls.

II. THE NINTH AMENDMENT

When it comes to the Ninth Amendment, the modern practice of originalism might seem problematic because, for many years, we had little information about its original meaning. The text of the Ninth Amendment states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[9] When Justice Goldberg relied on this text in his *Griswold* concurrence, the consensus

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5. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

6. James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), *in* 6 THE WRITINGS OF JAMES MADISON 263, 272 (Gaillard Hunt ed., 1906).

7. *Id.*

8. For an elegant presentation of the development of popular sovereignty theory in the early Republic, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1998).

9. U.S. CONST. amend. IX.

among scholars and jurists was that the Ninth Amendment lacked any kind of identifiable and relevant history.[10] Despite the lack of historical evidence regarding its original understanding and application, Justice Goldberg nevertheless concluded that the "other rights" referred to by the Ninth Amendment included libertarian rights, such as the right to privacy—and that these rights were enforceable against the states.[11]

Although neither the majority opinion in *Griswold* nor the majority opinions in later privacy cases like *Roe v. Wade*[12] was actually premised on the Ninth Amendment, the Clause was widely viewed as providing critical textual and rhetorical support for the right to privacy.[13] It was perhaps inevitable, therefore, that the Ninth Amendment would become a subject of intense examination when nominees to the Supreme Court appeared before the Senate Judiciary Committee.

When the Committee asked Judge Bork about the Ninth Amendment, he replied:

> 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.[14]

Notice that Judge Bork did not equate the Ninth Amendment with an inkblot. He equated a judge confronting an ambiguous text with an ambiguous history with a judge confronting an inkblot. Throughout his testimony, Judge Bork spoke of being open to new historical evidence.[15] Absent evidence of the original understanding of the text, however, a principled originalist judge has no authority to interfere with the political process. Judicial authority is derived from and limited by the meaning of the text as understood by those with the sovereign authority

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10. *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 598–99 (2005).

11. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

12. 410 U.S. 113 (1973).

13. *Id.* at 120–22, 129, 152; *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring)

14. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork).

15. *Id.*

to entrench fundamental law. Absent an understanding of the people's sovereign will, courts lack authority to interfere with the political process.

Nonetheless, when applied to the Ninth Amendment, Judge Bork's approach seems to present a bit of a problem. Until very recently, the consensus view was that the Ninth Amendment was born in obscurity and drifted at sea for two hundred years until washing up on Justice Goldberg's shore in 1965.[16] If this were true, then the Clause could never be applied—at least not by a judge committed to the original understanding of the text. Judge Bork's position thus appears to erase the Ninth Amendment from the Constitution altogether—at least as an enforceable text.

The beauty of historical inquiry, however, is that the endeavor is cumulative—and the door is never closed on additional discovery. In the case of the Ninth Amendment, a growing body of evidence uncovered in the last few years reveals that the "historical obscurity" model of the Ninth Amendment is almost embarrassingly incorrect.[17] There are literally hundreds of citations to, and discussions of, the Ninth Amendment in federal and state court decisions throughout the nineteenth and early twentieth centuries.[18] All of these cases link the Ninth Amendment with the Tenth as together establishing a zone of state autonomy.

This view goes all the way back to the Founding. The original draftsman of the Ninth Amendment, James Madison, viewed the Ninth as working alongside the Tenth Amendment in a manner preserving the right to local self-government. In a speech delivered to the House of Representatives while the Bill of Rights remained pending in the States, Madison declared that the Ninth Amendment represented a rule of strict construction of federal power—one which preserved the people's retained right to regulate local matters free from federal inter-

16. *See* Lash, *supra* note 10, at 598.

17. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 101 (2007); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. (forthcoming 2007); Lash, *The Lost Jurisprudence*, *supra* note 10; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

18. *See* Lash, *supra* note 10.

ference.[19] As Madison put it, the Tenth Amendment restricts the federal government to the powers enumerated in the Constitution, and the Ninth Amendment guards "against a latitude of interpretation" when it comes to interpreting the scope of those powers.[20]

Finally, there has been renewed scholarly interest in the first Supreme Court opinion discussing the Ninth Amendment, written by no less a judicial luminary than Justice Joseph Story. In an opinion that remained influential for over a century, Justice Story described the Ninth Amendment as calling for the preservation of concurrent state power whenever possible.[21]

All of this historical evidence reflects an original understanding of the Ninth Amendment as a federalism provision protecting the people's retained right to local self-government. It turns out that the Founders were indeed committed to the protection of natural rights—but they were even more committed to leaving the protection of such retained rights to the people of the several States.

None of this history was known at the time of Judge Bork's confirmation hearings before the Senate Judiciary Committee, or when Judge Bork repeated the same general view of the Ninth Amendment in *The Tempting of America*.[22] Even there, however, Judge Bork tentatively suggested that the Ninth Amendment might well be viewed as a companion to the Tenth in preserving rights placed in state constitutions.[23] In general Judge Bork concluded that the evidence simply did not then allow for any definite conclusions—and certainly did not support Justice Goldberg's reading of the Ninth Amendment in *Griswold*.[24]

In this, Judge Bork's instincts and approach have been vindicated. Indeed, his position stands as an example of how an originalist judge should approach a text whose history is either ambiguous or missing altogether. When faced with such a

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19. *See* James Madison, Speech on the Constitutionality of the Bank of the United States (Feb. 2, 1791), *in* JAMES MADISON: WRITINGS 480, 489 (Jack Rakove ed., 1999).

20. *Id.*

21. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 48–50 (1820) (Story, J., dissenting).

22. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 185 (1990).

23. *Id.*

24. *Id.*

situation, the temptation is to associate the text with a higher principle of some kind and proceed to enforce the principle. But without history as a guide, a judge can only assume what those principles might be—and the choice will almost certainly reflect more personal predilection than historical accuracy.

The proper stance of an originalist judge in the face of historical ambiguity, then, is one of humility. If the original meaning of the text remains obscured, then courts lack authority to use the text to interfere with the political process. Put another way, in a case of historical ambiguity, the very legitimacy of judicial review is obscured—as if by an inkblot.

In such a case, originalism calls for a judge to stay his hand pending further investigation and analysis. Such an approach does not ignore the text, much less erase it from the Constitution. It simply ensures that judicial action will be grounded upon the identified sovereign will of the people themselves.