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

*Randy E. Barnett**

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 book¹ 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.

DISCUSSION

PROFESSOR MICHAEL KENT CURTIS: Yes, I have a *Lochner* question for you, Randy. My question is, when is John Marshall Harlan's approach in *Lochner* the correct approach? Harlan first recognizes liberty of contract and then he says, well, we have all of these occupational disease texts and all the problems with bakers and so on, and so the government really does have a substantial interest here in regulating it. It is a liberty that gets some heightened scrutiny. They've got to prove it. They've proven it quite adequately. And, if that is the case, why do you suppose that Pat Goodman and all these people in script cases, and all the rest did such a miserable job?

PROFESSOR RANDY BARNETT: First of all, I want to say that *Lochner* is one of the finest cases ever decided by the Supreme Court, so it just shows how much we disagree about *Lochner*. I will say this, when you go back and read *Lochner*—the facts of *Lochner*—you should take a good look at the Bakeshop Act. The Bakeshop Act, of which this one provision was stricken down in *Lochner*, was a very detailed regulation of health and safety in the baking industry. It regulated how high the ceilings had to be, how much white wash you had to use, and how hot the environment could be, the ventilation in bake shops. It was a health and safety regulation of the bake shop industry and it was never seriously challenged. The Bakeshop Act was assumed to be constitutional by the Supreme Court. Only one small provision was ever challenged and that was the maximum-hours-worked provision, which said that the bakers could not work beyond a certain number of hours. This was a pretty unusual law in the sense that pretty much anybody else could work as many hours as they wanted to. Law clerks and lawyers could work as many hours as they wanted, but bakers could not.

There was a suspicion by the court that this really wasn't a health and safety regulation. Harlan came forward with his opinion that these really were not justifications that were necessarily presented to the court and they suspected that this was really a siding by the New York Legislature with one side—the labor group's side—of a labor dispute, and under current due process law at the time, that was considered unconstitutional. Essentially what you have in *Lochner*, and what you have Justice Marshall arguing for in *McCulloch*, is that this is pretextual legislation. It's legislation that is being offered under the pretext that it is a health and

safety law, but it was actually passed under other motives. Now, they could have been wrong about that, and if so, *Lochner* could have been wrongly decided in that it really was a health and safety measure and could have been upheld as a health and safety measure, but in that instance, it's not a very threatening case. But I do think what *Lochner* represents is what *McCulloch*, correctly understood, represents. In fact, John Marshall defended his decision [in *McCulloch*] in anonymous letters posted by him in newspapers, including the Alexandria Gazette, where he noted that if the government passed legislation based on one valid reason, but they are really trying to pass it for other reasons, then that legislation should be struck down as invalid. That part of *McCulloch* usually gets cut out of constitutional law case books because it ends up confusing students into thinking that *McCulloch* actually means more than it does.

PROFESSOR DANIEL FARBER: I am interested in your efforts to map the landscape here intellectually. Could you say something about your views about liberty, and specifically about the Ninth Amendment and the Privileges or Immunities Clause, and how would you relate those to Richard Epstein's? The reason I ask that is because I think Richard would also think that the rest of the Bakeshop Act was unconstitutional because the market can handle those aspects of health and safety as well. So, I wonder how you see that issue.

PROFESSOR RANDY BARNETT: I have to confess ignorance in that I don't know what Richard Epstein would think. Richard Epstein is not an originalist, first of all, so he rarely ever talks about the original meaning of any provision of the Constitution, and I have no idea what he thinks about the Ninth Amendment or the Privileges or Immunities Clause and how it would apply to the *Lochner* case, and so I have no idea how my views would compare to his. I assume he is a smart guy and so he must agree with me.

PROFESSOR KURT LASH: One of the issues that is kind of haunting everything we do here has to do with constrained discretion of justices and whether or not we should constrain the discretion of justices—this idea of whether the Ninth Amendment is a roving commission for justices to do whatever they like. It's not surprising then that *Lochner* would come up, which is generally treated as an example of something that

justices should never do. Ultimately, this whole *Lochner* period of substantive due process comes to a substantial end at the time of the New Deal, when the Supreme Court says it will no longer follow *Lochner* and it will no longer enforce the unenumerated liberty to contract. Basically, we are going to behave ourselves, and we are going to begin constructing a limited analysis going forward of only protecting fundamental rights. One of the reasons they say they are doing so—one of the reasons they are going to save strict scrutiny only for fundamental rights and not as a general analysis of legislative reasonableness—is because they believe they are not justified in intruding into the political process except under extraordinary conditions. Your analysis, however, says it is appropriate for the justices to review the reasonableness of legislation, give people their day in court, and give them the opportunity to challenge laws that are affecting their liberty, even if it is not a fundamental right enumerated in the Constitution. I'd like you to explore just a little more that, at the time of the New Deal, the reason they put in these heightened levels of scrutiny was to constrain the court. How would you answer critics that say, by opening the door to judicial analysis of reasonableness, you really have created a roving commission?

PROFESSOR RANDY BARNETT: The story of *Lochner* is a very interesting one—the way that *Lochner* became vilified. It really wasn't that controversial a case at the time; there were some editorials for and against it. It became controversial because it was made an issue by many political progressives that were opposing the Supreme Court, and it was made into one of their items about judicial activism of the Court, and they used it to ask for what they wanted—a more constrained Court. It became part of the substantial wisdom that Michael agrees with that *Lochner* is one of the worst cases ever decided by the Supreme Court, along with *Dredd Scott* as examples of things that justices should never ever do.

Jerry Gunther had this great constitutional law case book that was used in pretty much all constitutional law classes. When *Griswold v. Connecticut* and *Roe v. Wade* were decided, he did something innovative: he paired *Lochner* with *Griswold* and *Roe v. Wade* in his casebook. He said “If you don't like *Lochner*, then how do you justify *Griswold*?” It doesn't seem like such a different thing that the court was trying to do. I wrote an essay years ago saying that because of what Gunther had done, he sort of revived *Lochner* into a popular case again. Though *Lochner* may

have been decided wrongly, it wasn't something terrible the Court was trying to do, and it wasn't the end of the world. I got a letter from Jerry Gunther after that, saying he was appalled by the article I wrote because the whole point of him putting *Lochner* where he did was to undermine *Griswold* and *Roe*; he did not want to revive *Lochner*, but it was an unintended consequence via law professors, I think. Now you are taught *Lochner* by your law professors with a strange cognitive dissonance going on. You are taught that *Lochner* is one of the worst cases ever decided, but you are not really told why it's so terrible, given the fact that *Griswold* and *Roe* are done the way they are done. So, there is this kind of residual antipathy that remains about *Lochner*, but the reasoning for such has all but disappeared, and many people believe that substantive due process is okay.

In answer to Kurt's question about the role of the judiciary: one of the things that is really left unsaid about the New Deal decisions is that in *Carolene Products* itself, the Court said that it would be a denial of due process of law if a person could not go into court and challenge the irrationality of a statute as applied to them, which is essentially substantive due process. But they just put the burden on the individual to establish the irrationality, rather than what I would do, which is put the burden on the state to satisfy the rationality of it. It wasn't until the 1956 case of *Williamson v. Lee Optical*, where the lower court had struck down the provision as being unconstitutional and cited *Carolene Products* and the New Deal cases, which say everybody has a right to go in and prove a law is irrational. Then the majority, Justice Douglas, who wrote *Griswold* by the way, said that the Court presumes these laws are rational; if we can go in and find a reason why the legislature might have passed the law that might be rational, then that makes it constitutional. We don't actually enter into any factual inquiry as to whether they are rational or not.

The Golden Age of judicial restraint, which judicial conservatives want a return to, turns out not to be the New Deal after all, but it turns out to be this Golden Era between 1956 and 1965, when *Griswold* was decided. There was a nine-year period in which the Court allegedly operated under this doctrine of restraint that we want to go back to, but we don't actually want to go back to the New Deal cases where they said you ought to be able to go in and challenge the rationality, and obviously we don't want to go back to after *Griswold* when you were allowed to challenge the

rationality. It is true that when originalism became revived in the 1980s, one of the reasons for reviving it was to constrain judges because the idea was that judges were unconstrained. But the new originalism that is widely accepted by most originalists today is not an enterprise in constraining judges, but an enterprise in determining what the writing really means. Sometimes that will constrain judges and sometimes that will empower judges, and for the new originalists it would be as much activism to uphold a law that violates the Constitution as it would be to strike down a law that doesn't violate the Constitution. In either one, judges would be putting what they like or don't like about the Constitution ahead of what the Constitution actually requires.

PROFESSOR MAURA STRASSBERG: On the question of the rights of the people, I wonder what each of the three of you think about the Second Amendment, which uses the “rights of the people” language, and whether your position on that is informed by the Ninth Amendment, and what you understand Madison thought that meant?

PROFESSOR RANDY BARNETT: This gets us into the nuances of the evidence which none of us can really grapple with, but I will just say—and I summarize this in response to Kurt's *Stanford Law Review* piece—if you actually break down the first eight amendments, they are all individual rights, including the Second Amendment. Even those that oppose the use of the Second Amendment in the *Heller* case to try and strike down the D.C. gun ban concede that it's an individual right. I went to the oral arguments and Walter Dellinger conceded that it was an individual right, but it was only to be used in the context of being a member of an organized militia, so that it was a conditioned individual right. But everyone agrees that it is an individual right. There really is only one provision in the first eight amendments that protects a collective right, and that is the Establishment Clause, which inferentially protects the rights of states to have established religions by saying that “Congress shall make no law respecting an establishment of religion . . .” This says that they cannot establish a religion at the national level and cannot make a law to disestablish a religion at the state level. That is a state rights protective provision—notice it is not put in terms of a right. It doesn't say the people have a right to establish religion, it says “Congress shall make no law respecting an establishment of religion . . .” So, even in the one provision that has an implication of protecting the rights of people who have an established religion, it is not expressed in the language of a right at all.

