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69 Mich. St. L. Rev. 277 (2009)

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OF INKBLOTS AND OMNISIGNIFICANCE: CONCEPTUALIZING SECONDARY AND SYMBOLIC FUNCTIONS OF THE NINTH AMENDMENT, IN A COMPARATIVE HERMENEUTIC FRAMEWORK

*Samuel J. Levine**

2009 MICH. ST. L. REV. 277

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INTRODUCTION

In recent decades, a substantial body of American legal scholarship has been dedicated to comparisons and contrasts between the Bible and the United States Constitution.¹ This scholarship is based, in part, on the pre-

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1. For examples of groundbreaking work in this area, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123 (1979); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985). See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988). For more recent scholarship, see, e.g., JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004); Jack M. Bal-

mise that these documents serve similar roles as foundational texts that delineate the supreme doctrine for their respective societies. Moreover, some scholars have found parallels in methods of biblical hermeneutics—including Jewish legal interpretation of the Torah—and American constitutional interpretation.

This brief Essay focuses on a particular hermeneutic approach common to the interpretation of the Torah and the United States Constitution: a presumption against superfluity. This presumption accords to the text a considerable degree of omnisignificance,² requiring that interpreters pay careful attention to every textual phrase and nuance in an effort to find its legal meaning and implications. In light of this presumption, it might be expected that normative interpretation of both the Torah and the Constitution would preclude a methodology that allows sections of the text to remain bereft of concrete legal application.

In fact, however, both the Torah and the United States Constitution contain sections that, notwithstanding a textual appearance of actual implementation, have been interpreted by at least some legal authorities as not susceptible to practical application. Specifically, in the case of the United States Constitution, the Ninth Amendment appears on its face to serve as a basis for the identification of constitutional rights not enumerated elsewhere

kin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 571-77 (2003); David R. Dow, *Constitutional Midrash: The Rabbis' Solution to Professor Bickel's Problem*, 29 HOUS. L. REV. 543 (1992); Gregory A. Kalscheur, S.J., *Christian Scripture and American Scripture: An Instructive Analogy?*, 21 J.L. & RELIGION 101 (2005-2006); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441 (1997); Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998); Francis J. Mootz III, *Belief and Interpretation: Meditations on Pelikan's "Interpreting the Bible and the Constitution,"* 21 J.L. & RELIGION 385 (2005-2006); Michael Sink, *Restoring our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921 (2004); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1065-69 (1999); Steven D. Smith, *What Doth It Profit? Pelikan's Parallels*, 90 MINN. L. REV. 727, 743-44 (2006); Samuel J. Levine, Miranda, Dickerson, and *Jewish Legal Theory: The Constitutional Role in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009).

2. Professor Yaakov Elman, a contemporary biblical scholar, has credited James Kugel with coining the term "omnisignificance" to capture

the basic assumption underlying all of "rabbinic exegesis" that the slightest details of the biblical text have a meaning that is both comprehensible and significant. Nothing in the Bible . . . ought to be explained as the product of chance, or, for that matter, as an emphatic or rhetorical form, or anything similar, nor ought its reasons to be assigned to the realm of Divine unknowables. Every detail is put there to reach something new and important, and it is capable of being discovered by careful analysis.

Yaakov Elman, *"It is No Empty Thing": Nahmanides and the Search for Omnisignificance*, 4 TORAH U-MADDA J. 1, 1 (1993) (quoting JAMES KUGEL, *THE IDEA OF BIBLICAL POETRY: PARALLELISM AND ITS HISTORY* 103-04 (1981)).

in the Constitution. In practice though, the Ninth Amendment has not served such a function; its harshest critics have characterized the amendment as the functional equivalent of an inkblot, while the United States Supreme Court, though not as dismissive in tone, has resisted arguments that would rely on the Ninth Amendment as a source for the derivation of unenumerated, individual constitutional rights.³

In an effort to reconceptualize the function of the Ninth Amendment in American constitutional interpretation, this Essay looks to the analogue of the Biblical account of the “stubborn and rebellious son,” one of three legal scenarios in the Torah that, in the views of some Talmudic authorities, will never occur. According to a number of Jewish legal scholars and philosophers, the Talmud ascribes to these sections of the Torah considerable legal significance, albeit of secondary or symbolic legal value. Although these legal scenarios may never occur, the lessons derived from the text have both pedagogical and practical implications for understanding and interpreting the laws of the Torah.⁴ Likewise, perhaps the Ninth Amendment functions neither as a primary source for the derivation of unenumerated constitutional rights nor as an inkblot. Instead, the Ninth Amendment may serve a secondary role, providing both practical and symbolic lessons for understanding and interpreting the United States Constitution.⁵

I. THE NINTH AMENDMENT: AN INITIAL LOOK

Over the course of more than 200 years, the United States Constitution has been the subject of detailed textual analysis. Since *Marbury v. Madison*,⁶ the United States Supreme Court has operated under a presumption against superfluity, engaging in an interpretive framework that accords legal significance to every constitutional provision. Moreover, in interpreting constitutional amendments, the Court has employed an interpretive methodology that requires a remarkably close and expansive reading of the constitutional text through which, at times, a single word can serve as the textual basis for an entire realm of rights jurisprudence. For example, in a number of leading cases addressing some of the most vital and controversial areas of American law, the United States Supreme Court has relied on an expansive interpretation of the range of rights protected under the word “liberty.”⁷

3. See *infra* Part I.

4. See *infra* Part II.

5. See *infra* Part III.

6. 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”).

7. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

In contrast, however, under current Supreme Court jurisprudence, an entire amendment to the Constitution has little, if any, direct practical application.⁸ 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 In the confirmation hearings considering Judge Robert Bork’s unsuccessful nomination to the Supreme Court, Judge Bork famously—or notoriously—deemed the Ninth Amendment to have the functional equivalent of an inkblot that covers up the text. Because we are unable to know the substance of a text that is covered by an inkblot, we are unable to interpret and apply that text. Likewise, Judge Bork reasoned, courts cannot apply the Ninth Amendment as grounds for deriving constitutional rights because courts simply have no means for uncovering the substance of the retained rights referenced in the Amendment.¹⁰

Of course, Judge Bork’s statement was highly unpopular, contributing to the failure of his nomination.¹¹ Moreover, as a matter of normative constitutional principle, Judge Bork’s approach remains the subject of considerable criticism. In contrast to his theory, scholars,¹² lower court judges,¹³ and some United States Supreme Court justices¹⁴ have offered a variety of interpretive frameworks for understanding the Ninth Amendment as a basis for the derivation and identification of specific rights retained by the people. Nevertheless, as a descriptive matter, Judge Bork may have accurately—if inelegantly—captured the dominant approach employed by the United States Supreme Court, which continues to resist interpretive methodologies

8. See DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE 1 (2007) (“The Ninth Amendment is a constitutional orphan, forgotten by most and reviled by some . . .”).

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

10. See *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*, 110th Cong. 224 (1989) (statement of Judge Robert H. Bork). Cf. *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (stating that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people”).

11. See Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 135 (1988).

12. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); FARBER, *supra* note 8; Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 187 (Myres S. McDougal & W. Michael Reisman eds., 1985).

13. See, e.g., *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff’d in part, rev’d in part*, 410 U.S. 113 (1973).

14. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1964) (Goldberg, J., concurring).

that would recognize the Ninth Amendment as a primary source for the enumeration of constitutional rights.¹⁵

II. THE TORAH AND OMNISIGNIFICANCE

If the United States Constitution can be characterized as largely omnisignificant, based on the presumption against superfluity, the Torah has been understood by legal expositors as *embodying* omnisignificance. In Jewish legal exegesis, each phrase in the Torah and each word in the Torah—indeed, even the form of the letters that comprise the words—serves as a potential source of meaningful legal interpretation.¹⁶ Nevertheless, the Talmud cites the views of various legal authorities who conclude that as many as three legal scenarios detailed in the text of the Torah have never occurred and never will occur.¹⁷

Of course, consistent with the style of Talmudic analysis and argumentation, these views are not left unchallenged. Instead, the Talmud poses the obvious question: if these legal scenarios will never occur, why are they included in the Torah? The Talmud responds with a somewhat cryptic answer: “*Darosh v’kabel s’cahr*”—“study [these sections] and receive reward.”¹⁸ Although this answer is itself open to a variety of interpretations, the message seems clear: even if these sections of the Torah are not implemented, important lessons are to be derived from these texts.

To consider the implications of the Talmud’s answer more fully, it may be helpful to focus on one of these three exceptional scenarios: the case

15. Cf. BARNETT, *supra* note 12, at 234-35 (stating that Bork’s view was “sadly, well within the mainstream of legal thought” and that “to this day courts have rarely been willing to rely upon [the Ninth Amendment] when assessing the constitutionality of statutes”); Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875, 875 (2008) (stating that courts are “reluctant to rely on the Ninth Amendment at all” and that “the modern Supreme Court has studiously avoided the Ninth Amendment despite being prodded by parties before the court to rely on it”); Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 89-90 (2000) (“[N]o Supreme Court decision, and few federal appellate decisions, have relied on the Ninth Amendment for support. Indeed, federal courts that have discussed the Ninth Amendment have almost exclusively held that it does not confer any substantive rights.”).

16. See *supra* note 2; JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 100 (Lawrence Kaplan trans., 1983) (originally published in Hebrew as *Ish ha-halakhah*, in 1 TALPIOT 3-4 (1944)) (“Our Torah does not contain even one superfluous word or phrase. Each letter alludes to basic principles of Torah law, each word to ‘well-fastened,’ authoritative, everlasting [laws]. From the beginning to end it is replete with statutes and judgments, commandments and laws.”). See also RABBI ARYEH KAPLAN, THE HANDBOOK OF JEWISH THOUGHT 143 (1979) (“[E]ven the most seemingly trivial passages and variations in the Torah can teach many lessons to the person who is willing to explore its depths.”).

17. See *Talmud Bavli*, *Sanhedrin* 71a.

18. *Id.*

of the *ben sorer u'moreh*—the “stubborn and rebellious son.”¹⁹ The case of the stubborn and rebellious son is described in *Deuteronomy* 21:18-21, and is expounded in detail in the Talmud and later sources. Briefly, within three months after reaching the age of thirteen, a male child defies his parents, steals from them, eats a certain quantity of meat, and drinks a certain quantity of wine; as a result, the son is subject to capital punishment.²⁰ As the Talmud observes, the son’s conduct does not inherently warrant such a harsh penalty. Instead, according to the Talmud, the Torah prescribes this punishment as a reflection of the Divine determination that, under these exceptional circumstances, the son’s conduct will inevitably deteriorate until ultimately he will develop into a violent criminal. The son is executed while still relatively “innocent,” rather than being allowed to continue along the path that will unavoidably result in his commission of a capital crime.²¹

In addition to the decidedly anomalous—indeed, *sui generis*—nature of the punishment,²² under Talmudic jurisprudence, a number of highly unusual conditions must be met to satisfy the elements of the son’s offense. For example, the Torah states that, as part of the adjudicative process, the son’s parents must declare to the court that “our son . . . does not listen to our voice.”²³ Engaging in a characteristically close reading of this verse, the Talmud observes that, although the parents are depicted as speaking in the first-person plural, their statement refers to their singular “voice.” Applying a hermeneutic of omnisignificance to the biblical grammar, the Talmud interprets this verse to require that the parents’ voices share the same physical properties, thereby comprising a single voice.²⁴ In turn, the delineation of such an unlikely condition gives rise to the position that this case will never occur.²⁵ Somewhat paradoxically, further application of the principle of omnisignificance leads to the Talmud’s response that the study of the biblical scenario will nevertheless prove rewarding.²⁶

Scholars of Jewish law and philosophy have offered numerous theories in an effort to elucidate the Talmud’s conclusion. Rabbi Samson Raphael Hirsch, a leading nineteenth century biblical and legal scholar, sug-

19. See *Deuteronomy* 21:18-21. The other two exceptional scenarios are those depicted in *Leviticus* 14:33-53 and *Deuteronomy* 13:12-18.

20. See *Talmud Bavli, Sanhedrin* 68b-71a.

21. See *id.* at 71b-72a. See also MAIMONIDES, COMMENTARY ON THE MISHNA, *Sanhedrin* 71b; CHAIM SHMULEVITZ, SICHOTH MUSSAR 87-88 (1980).

22. See Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. REV. 277, 295-96 (2001).

23. *Deuteronomy* 21:20.

24. See *Talmud Bavli, Sanhedrin* 71a. Notably, in the original Hebrew, the distinction between the words denoting “our voice” and “our voices” is dependent on the presence or absence of one letter; thus the Talmud’s careful analysis of this word serves as an instructive illustration of the principle of omnisignificance.

25. See *id.*

26. See *id.*

gests that the scenario of the stubborn and rebellious son presents a variety of salient insights about raising children.²⁷ For example, drawing upon the Talmud's analysis of the case, Rabbi Hirsch explains that, in addition to the legal rule that the parents' voices must be physically identical, on a secondary level, the Torah provides a symbolic illustration of the importance of parental equality, harmony, and accord.²⁸ If the parents are not clear, consistent, and unified in the way they educate and raise their child—"speaking in the same voice"—the son will not be punished for his conduct because the fault may lie with them rather than being an indication that he is an irredeemably culpable individual.²⁹ Thus, according to Rabbi Hirsch, the procedural requirement that the parents of the stubborn and rebellious son literally speak with the same voice carries a symbolic—perhaps more universal—message for other parents as well.

Other legal scholars, such as the author of the influential Medieval work *Sefer-Ha-Chinuch*, explain the scenario of the stubborn and rebellious son as a cautionary tale, dramatically highlighting some of the potentially deleterious results of drunken and gluttonous behavior.³⁰ Accordingly, the Torah presents the paradigmatic—if unlikely—case of an individual who, upon reaching the age of maturity and legal responsibility (the age of 13, or *bar-mitzva*), engages in a particularly egregious pattern of disrespectful overindulgence.³¹ More broadly, this section of the Torah has practical—if

27. See VII SAMSON RAPHAEL HIRSCH, COLLECTED WRITINGS 333-48 (Feldheim 1996).

28. See *id.* at 347.

The son should not be more impressed by one parent than by the other; he must be equally impressed by both. In a case where the parents are not alike, even in such supposedly superficial traits as physical appearance, and hence do not leave the same impression upon the senses, the court of justice has grounds to suspect that even this difference between the parents may have had an adverse effect on the education of the child. . . .

From this word of our Sages we infer (*darosh v'kabel s'char*) a basic prerequisite that may well be the most important factor of all in the raising of a child. In order for their endeavors to succeed, the child's father and mother must be equals, completely in agreement, of one heart and mind with regard to the education of their child and their influence upon him.

Id.

29. See *id.* at 347-48:

But the damage is infinitely greater if the child's father and mother differ from one another not merely in their educational methods but on the fundamental rules and principles by which the child is to be raised. If the child sees that his parents cannot agree on what is permitted and what is forbidden . . . then the child will often make his own decision. He will listen neither to his father nor to his mother but will turn . . . inside himself . . . to disobey both his parents.

Id.

30. See SEFER HA-CHINUCH 333 (Chaim Dov Chavel ed., 1986).

31. See *id.*

secondary—legal application as well, implying a general warning against less severe forms of such dangerous and excessive behavior.³²

Finally, in addition to identifying legal and pedagogical lessons, scholars derive more general principles from the very presence in the Torah of cases that are not to be implemented. On one level, the Torah serves as a source of normative guidance for both the individual and the community, to be applied to all facets of the human condition.³³ However, as indicated by the inclusion of cases such as the stubborn and rebellious son, the Torah functions as a source of profound philosophical, theological, and mystical principles as well.³⁴ In this perspective, the case of the stubborn and rebellious son proves highly significant precisely because it defies implementation, thereby shedding light on the rest of the laws in the Torah, which likewise are understood to contain additional levels of meaning beyond their practical application.³⁵

32. See *id.* (explicating *Leviticus* 19:26). See also ISAAC ABRAVANEL, COMMENTARY ON THE TORAH (explicating *Deuteronomy* 21:18). Indeed, this warning is consistent with other biblical narratives and exhortations against such forms of excess. See, e.g., Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 547 & nn.69-73 (2003). For a discussion of another example of the secondary but practical relevance of the laws of the stubborn and rebellious son, in the context of the commandment delineated in *Leviticus* 23:15-16, see SHLOMO YOSEF ZEVIN, HAMOADIM B'HALACHA 295 n.34 (1955).

33. See, e.g., Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 183 (2007) (“[T]he substance of Jewish law comprises a comprehensive set of obligations, in principle addressing every area of human endeavor. Thus, the Jewish legal system regulates activities both public and private, both interpersonal and ritual, both individual and communal, thereby extending the notion of religious observance and ethical obligation to all realms of life.”).

34. See KAPLAN, *supra* note 16, at 143 (“The Torah can be understood according to its simple meaning, or according to more complex exegesis. Besides this, many allusions and mysteries can be found when one probes beneath its surface.”); SOLOVEITCHIK, *supra* note 16, at 100 (“The mystics discern in our Torah divine mysteries, esoteric teachings, the secrets of creation . . . ; the halakhic sages discern in it basic halakhot, practical principles, laws, directives, and statutes.”).

35. See HERSHEL SCHACHTER, GINATH EGOZ 3 (2007). For other views of the pedagogical value of the case of the stubborn and rebellious son, see, for example, 3 ELIYAHU DESSLER, MICHYAV M'ELIYAHU 297-98 (Aryeh Carmell & Chaim Friedlander eds., 1964); Irene Merker Rosenberg, Yale L. Rosenberg & Bentzion S. Turin, *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511 (1998-1999). Cf. Aaron Kirschenbaum, *The Role of Punishment in Jewish Criminal Law: A Chapter in Rabbinic Penological Thought*, 9 JEWISH L. ANN. 123 (1991).

III. RECONCEPTUALIZING THE NINTH AMENDMENT

In light of this brief survey of approaches to the function of the case of the stubborn and rebellious son, perhaps the Ninth Amendment can be conceptualized through a similar framework. Of course, the comparison between these legal provisions may be seen as inapposite on a number of grounds, ranging from general distinctions between religious and secular legal texts to more specific differences between the roles of these particular provisions within their respective legal systems. In addition, as a threshold matter, those scholars who reject Judge Bork's position outright, who instead contend that the Ninth Amendment should provide a textual basis for the identification of individual constitutional rights,³⁶ may likewise reject similarities between the Ninth Amendment and the stubborn and rebellious son.³⁷

Alternatively, however, given the range of scholarship that has documented parallels between the Bible and the Constitution,³⁸ coupled with the Supreme Court's resistance to implementing the Ninth Amendment,³⁹ the exegesis of the case of the stubborn and rebellious son may prove instructive. Indeed, not unlike the case of the stubborn and rebellious son, consistent with notions of omnisignificance that underlie presumptions against superfluity in the constitutional text,⁴⁰ the Ninth Amendment may serve secondary and symbolic functions as well.

For example, Kurt Lash has proposed a theory sympathetic to Judge Bork's skepticism toward deriving unenumerated constitutional rights on the basis of the Ninth Amendment.⁴¹ In fact, Lash cites recently uncovered

36. See *supra* note 12.

37. To be sure, the opinion that the case of the stubborn and rebellious son will never occur is likewise not universally accepted. Indeed, other Talmudic authorities contend that the case has concrete application, see *Talmud Bavli, Sanhedrin* 71a, thus suggesting a further parallel to the Ninth Amendment, which is likewise the subject of conflicting views regarding its practical applicability.

38. See *supra* note 1.

39. See *supra* note 15 and accompanying text.

40. Cf. Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1, 80 (2006) ("When Robert Bork compared the Ninth Amendment to an inkblot, he violated John Marshall's famous dictum that '[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.'"); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 316-17 (1987) ("Construing the [N]inth [A]mendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise. This view is at odds with the contextual historical evidence and the specific, articulated concerns of its framers, and violates the premise of *Marbury v. Madison* that the Constitution contains judicially discoverable and enforceable principles.").

41. See Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J.L. & PUB. POL'Y 467 (2008).

historical evidence in support of the argument that the Ninth Amendment is unrelated to the identification of unnamed individual liberties.⁴² At the same time, however, Lash does not conclude that the Ninth Amendment remains bereft of legal significance. Instead, he proposes a “federalist” reading of the Ninth Amendment as a counterpoint to the Tenth Amendment. In Lash’s theory, the Tenth Amendment posits a doctrine of enumerated federal powers that reserves other powers to the states; in turn, the Ninth Amendment emphasizes the existence of powers reserved to the states, thereby mandating a narrow construction of enumerated federal powers.⁴³ Under this framework, rather than articulating substantive legal doctrine, the Ninth Amendment serves a secondary function, conceptually similar to the case of the stubborn and rebellious son, indicating how to interpret other legal provisions.⁴⁴

Although Lash’s theory remains the subject of lively scholarly debate,⁴⁵ the notion that the Ninth Amendment serves a secondary interpretive function may be reflected in other approaches as well, perhaps most prominently in prevailing United States Supreme Court jurisprudence. While lower court judges and individual Supreme Court justices have relied on the Ninth Amendment as a primary source of unenumerated individual rights,⁴⁶ the Supreme Court has resisted arguments advocating such an approach.⁴⁷ Instead, the Ninth Amendment has been referenced in support of the Court’s reliance on expansive interpretation of other constitutional provisions to derive unnamed individual liberties.⁴⁸ Thus, not unlike the function of the

42. See Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005).

43. See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801 (2008).

44. Cf. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857, 884 (2009) (referring to “the obvious textual fact that the Ninth Amendment is a rule of construction, not a substantive rule”).

45. See, e.g., Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008); Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 DRAKE L. REV. 897 (2008); Daniel A. Farber, *Constitutional Cadenzas*, 56 DRAKE L. REV. 833 (2008).

46. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff’d in part, rev’d in part*, 410 U.S. 113 (1973).

47. See *supra* note 15 and accompanying text.

48. See Niles, *supra* note 15, at 89 (“[A] few Supreme Court justices have mentioned the [Ninth Amendment]—usually to provide a kind of indirect thematic support for the assertion of an unenumerated right identified in another provision of the Constitution”); *id.* at 89 nn.11 & 12 (citing Supreme Court cases in which the Ninth Amendment is discussed).

scenario of the stubborn and rebellious son, the Ninth Amendment may shed light on the meaning of other sections of the Constitution, providing secondary grounds for interpreting enumerated rights to infer and identify unenumerated rights as well.

Finally, on a more theoretical or symbolic level, perhaps the Ninth Amendment should be understood as functioning outside of the realm of practical application. Once again, similar to the case of the stubborn and rebellious son, the Ninth Amendment may serve as a more general expression of the nature of the Constitution as the foundational text of the American legal system. Under such an approach, the Ninth Amendment may be understood to capture the Constitution's emphasis on rights and liberties—whether on the individual or collective level—basic to the American legal system. Thus, through a symbolic reading, the Ninth Amendment might serve an important expressive function that frames our understanding of American law and society.⁴⁹

CONCLUSION

As Rabbi Joseph Soloveitchik observed, Jewish legal tradition “sees the entire Torah as consisting of basic laws and [legal] principles,” such that “[e]ven the Scriptural narratives serve the purpose of determining everlasting law.”⁵⁰ Accordingly, in the context of biblical hermeneutics, principles of omnisignificance are applied to narrative portions of the text as well. Scholars of Jewish law “discern[] in every divine pledge man’s obligation to bring about its fulfillment, in every promise a specific norm, in every eschatological vision an everlasting commandment The conversations of the servants, the trials of the fathers, the fate of the tribes, all teach the sons Torah and commandments.”⁵¹ Indeed, Rabbi Soloveitchik expands upon a central theme in the Jewish hermeneutic tradition, exploring the comple-

49. For discussions of expressive theories of law, see, for example, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492 (2001).

50. SOLOVEITCHIK, *supra* note 16, at 99.

51. *Id.* at 100. See also KAPLAN, *supra* note 16, at 143 (“Even the seemingly simple narratives in the Torah contain many secret meanings and lessons.”). Cf. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2267 (1989) (“The entire Jewish tradition of . . . interpretive storytelling, is a tradition of lawmaking.”).

mentary functions of the *halacha* and the *aggada*—the legal and narrative sections of the Torah and other legal texts.⁵²

Relying in part on the complementary functions of *halacha* and *aggada* in Jewish legal theory, Robert Cover developed a similar approach to the relationship of law and narrative in the American legal system.⁵³ As Cover put it, “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”⁵⁴

Ultimately, perhaps the Ninth Amendment functions in a manner similar to the role of biblical narrative in Jewish legal tradition. Notwithstanding differences in both form and substance, biblical narrative is no less significant than the legal sections of the Torah, teaching normative lessons that lend further meaning to the legal rules and precepts. Likewise, in both form and function, the Ninth Amendment seems to differ from the rest of the constitutional text.⁵⁵ Nevertheless, far from being superfluous, the Ninth Amendment may be understood to serve a variety of significant functions, lending deeper meaning to our understanding of the Constitution as embodying principles central not only to a system of rules, but to the society in which we live.

52. SOLOVEITCHIK, *supra* note 16, at 99-105. See generally Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465 (1998) [hereinafter Levine, *Halacha and Aggada*].

53. See Cover, *supra* note 1. Indeed, as I have suggested elsewhere, “Cover’s very conception of ‘*nomos*’ and ‘*narrative*’ appears influenced by, if not a direct application of, the parallel notions of ‘*halacha*’ and ‘*aggada*’ in Jewish legal thought.” Levine, *Halacha and Aggada*, *supra* note 52, at 483. See also *id.* at 483-85 & nn.93-102.

54. Cover, *supra* note 1, at 4-5.

55. Cf. Paulsen, *supra* note 44; John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 967-68 (1993) (“Unlike other provisions of the Bill of Rights, the Ninth neither acts solely as a limitation on the federal government nor creates new rights through positive enactment. . . . A declaratory vision of the Ninth Amendment is a dynamic one . . .”).