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# THE “FOUNDATIONS” OF ANTI-FOUNDATIONALISM — OR, TAKING THE NINTH AMENDMENT LIGHTLY: A COMMENT ON DANIEL A. FARBER’S BOOK ON THE NINTH AMENDMENT

Thomas B. McAfee\*

An essay review of: DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007).

*The Ninth Amendment has served two purposes in constitutional discourse – to refute “textualists” and “originalists,” and to supply the historical grounds for reading the Constitution as a “rights–foundationalist” document. Professor McAfee’s review of Professor Farber’s book on the Amendment raises the question whether, given his prior rejection of “foundationalism,” Professor Farber is able to reconcile these two ends. The review also suggests that, even if the Amendment did grow from the environment that gave us the Declaration of Independence, its history gives us reason to doubt that its purpose was to provide for the legal enforcement of unstated moral claims, or natural rights. Indeed, Professor McAfee contends that the purpose of the Ninth Amendment was to protect the rights retained residually by the system of limited powers granted to the national government under the Constitution. However, even if we would read the text and history differently, Professor Farber’s work seems ultimately at least as committed to his “pragmatism” as it is to instilling reverence for the claims of unenumerated rights.*

## I. INTRODUCTION

The Ninth Amendment states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>1</sup> The Amendment has served two central functions in the constitutional discourse of the last two decades: it has, first, supplied a handy refutation of the views of “originalists” and “textualists;”<sup>2</sup> it has, second, provided

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<sup>1</sup> U.S. CONST. amend. IX.

<sup>2</sup> See, e.g., Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 134-35 (1988); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1217 (1990) [hereinafter McAfee, *Original Meaning*]. The point is illustrated in Professor Farber’s recent book. DANIEL A. FARBER,

historical and textual grounding for a "rights-foundationalist" reading of America's written Constitution.<sup>3</sup> Thus, it is novel to have Professor Daniel A. Farber, who has criticized "originalism" precisely for being a form of foundationalism,<sup>4</sup> produce a work, *Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*, that is based on arguments that appear to establish a "rights-foundationalist" account of the Constitution. On the one hand, the anti-foundationalist book Professor Farber co-authored in 2002 contended that the Constitution's framers, including James Madison, "changed their views over time," which means that any perusal of the historical record is "bound to yield conflicting expressions of intent."<sup>5</sup> Historical research may thus be potentially "illuminating," but almost never "controlling."<sup>6</sup> On the other hand, we now learn that if "it is true that history often fails to provide clear proof of what the Framers believed, there are exceptions[,]" and the "Ninth Amendment is one of them."<sup>7</sup> According to Professor Farber, the purpose of the Ninth Amendment was to prevent a narrow interpretation of the Bill of Rights, the sort advocated, for example, by legal scholar, Judge Robert Bork.<sup>8</sup>

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RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE RIGHTS MOST AMERICANS DON'T KNOW THEY HAVE 85 (2007) [hereinafter FARBER, RIGHTS RETAINED BY THE PEOPLE] (asserting that "most Americans" agree there are unenumerated rights and that "Bork's contrary view was one reason why his nomination to the Supreme Court foundered").

<sup>3</sup> 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10-11 (1991) ("[R]ights-foundationalists" are those who contend that "the American [C]onstitution is concerned, first and foremost, with their protection;" in their view, "the whole point of having rights is to trump decisions rendered by democratic institutions that may otherwise legislate for the collective welfare."). Accord Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61, 92 (1996) ("[The] rights-foundationalist account of the Constitution has potentially profound implications for our legal order, as well as for the practice of judicial review.").

<sup>4</sup> DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 10-28 (2002) [hereinafter FARBER & SHERRY, CONSTITUTIONAL FOUNDATIONS] (supplying a critique of the views of Robert Bork and other Originalists).

<sup>5</sup> *Id.* at 16.

<sup>6</sup> *Id.* Originalists are thus scholars who, perhaps naively, "look at history and find clear directions." *Id.* at 13. Considering that Professor Farber identifies himself as a nonoriginalist, however, an implication of his own position is that we are not necessarily bound even by the Framers' clear directions.

<sup>7</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 9. If we ask whether a right must be secured by the Constitution's text, Professor Farber tells us that "the Constitution speaks very plainly." *Id.* He writes: "Is the list of specific rights protected by the Constitution complete? The Ninth answers, 'Of course not,' clearly and succinctly." *Id.* One purpose of the Framers, he assures us, was "to protect what constitutional lawyers call unenumerated rights—those rights the Founders assumed and felt no need to specify in the Bill of Rights." *Id.* at ix-x. Apparently the Framers were not originalists, except when it came to rejecting originalism; then they were not only originalists, but also managed to state their view that there are unenumerated rights quite clearly.

<sup>8</sup> See generally *id.* Proponents of the Constitution believed "that a bill of rights might be not only ineffective but positively harmful, if it led to a devaluation of whatever rights were not listed." *Id.* at 28. So the narrow interpretation that Bork engages in is simply the insistence that for a right to be secured, it must be found in the text of the Bill of Rights.

What is critical, we learn elsewhere in Professor Farber's book, is that the Ninth Amendment illustrates that the Framers "did not believe that they were *creating* these liberties in the Bill of Rights. Instead, they were merely *acknowledging* some of the rights that no government could properly deny."<sup>9</sup> If the Constitution is designed to secure and protect all of our valid moral claims, our "rights"—both those "enumerated" in the Bill of Rights, as well as "unenumerated" rights—it quickly becomes difficult to conceive of why Professor Farber is not in fact advocating rights-foundationalism. That riddle is a subject to which we must return.

Professor Farber distinguishes, moreover, the Ninth Amendment from the "historical accident" by which fundamental rights jurisprudence became attached to "another—and less appropriate—part of the Constitution, the Due Process Clause of the Fourteenth Amendment."<sup>10</sup> "The result has been conceptual confusion and vulnerability to conservative critiques;"<sup>11</sup> After all, we are told, the Due Process Clause had "the wrong language and the wrong historical background[.]" considering that "text and history have become crucial to constitutional argument."<sup>12</sup>

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<sup>9</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at ix.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* In Professor Farber's mind, modern conservative legal thinkers present the kind of thinking that needs an effective critique. See also *id.* at 8-9 (stating that in denying unenumerated rights, "conservatives are doing precisely what the Framers feared: denying or disparaging the rights retained by the people"); *id.* at 11 (stating that according to "conservatives," constitutional rights are "merely the historical product of particular language adopted a century or two in the past" with "no broader roots or implications"); *id.* at 17 (contending that Justice Harlan, who dissented from many Warren Court decisions, "was also the strongest advocate for protecting unenumerated rights," and "was cast from a different mold from that of today's conservative legal thinkers"); *id.* at 70 ("[C]onservatives may consider all of this just 'pie in the sky,' suitable for political debate but lacking in legal significance. The people who wrote our Constitution disagreed."); *id.* at 208 (referring to "movement conservatives" who are said to "believe in the vigorous application of government authority as long as it does not impair their own interests," as contrasted with "libertarians" who apparently "genuinely believe in small government").

While Professor Farber sees conservatives like Justice Harlan as from a different mold from today's conservatives because he advocated unenumerated rights, his treatment simply omits that Justice Black rejected modern fundamental rights jurisprudence, with its commitment to unenumerated fundamental rights, though he was one of the most "liberal" and "activist" members of the Warren Court.

<sup>12</sup> *Id.* at 3. Clearly, substantive due process has been subjected to withering critiques. But its harshest and most effective critics have been Charles Black, John Hart Ely, and Akhil Amar—not to mention Professor Farber himself. (All are leading "liberal" constitutional law scholars who are (or were) on the faculties of leading American law schools.) This is hardly an all-star cast of "conservatives" in interpreting the Constitution.

Professor Farber also omits that prominent legal theorists and historians have endorsed the fundamental rights construction of the Due Process Clause. See, e.g., RONALD DWORCKIN, JUSTICE IN ROBES 282 n.4 (2006) (arguing that "[t]hose who say that 'substantive due process' is an oxymoronic phrase, because substance and process are opposites, overlook the crucial fact that a demand for coherence of principle, which has evident substantive consequences, is part of what makes a process of decision making a legal process"); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320 (1999) (observing that "the expression 'law of the land' is sufficiently comprehensive to include substantive law as well as procedural safeguards"); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV.

Part II of what follows confronts the perceived connection between the Ninth Amendment and the Declaration of Independence and section 1 of the Virginia Bill of Rights. Apart from whether the documents are as closely related as is sometimes assumed, it is quite clear that the Virginia Bill of Rights presented "moral admonitions" that were not treated as legal obligations. In turn, Part III sets forth an alternative understanding of the Ninth Amendment's securing other rights "retained by the people." Since the state legislatures held "general" or plenary powers—and could thus exercise every power not "limited" expressly by the state constitutions' Declarations of Rights—the Federalists contended that there was no need for a bill of rights since the Constitution presented a "bill of powers," where the people "retained" (as rights) all that had not been granted (as powers). The risk of including a bill of rights was precisely that some might infer that the national government was empowered to do whatever it was not prohibited from doing by the Bill of Rights. The Ninth Amendment, then, was to ensure that a bill of rights would not support the inference that Congress held general or plenary powers to do whatever was not forbidden by the Bill of Rights.

Part IV sets forth the grounds for thinking that Professor Farber's treatment of the Ninth Amendment appears to yield a "rights-foundationalist" account of the Constitution—except that Professor Farber is long on record as preferring "pragmatism" to any form of "foundationalism." If the purpose of the Ninth Amendment was to secure "innate rights," as Professor Farber's book suggests, how can one insist that constitutional rulings *both* fulfill the purpose of the Ninth Amendment, while also insisting that rights holdings be grounded in history, text, or precedent?

## II. THE NINTH AMENDMENT AND RIGHTS FOUNDATIONALISM

The apparently "rights foundationalist" reading of the Ninth Amendment grows from the historical thesis that it is properly read as *in pari materia* with the Declaration of Independence and section 1 of the Virginia Bill of Rights.<sup>13</sup> Indeed, the most rigorous proponent of this reading of the Ninth Amendment, Professor Charles Black, contended that the Declaration of Independence was itself fundamental law binding on the entire country, and that therefore the

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107, 123 (1989) (relying on the Due Process Clause and contending that, on his reading, "the only authoritative text ('law') for any legitimate decisions, even *Roe v. Wade*, is the written document itself"); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 94 n.440 (2003) (concluding, based on use of word "liberty" in text of the Due Process Clause, that the Due Process Clause provides "as much meaningful guidance as does the word 'equal' in the Equal Protection Clause").

<sup>13</sup> See, e.g., Charles L. Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 26 (1991) (describing the Declaration of Independence as "an obvious precursor of the [N]inth [A]mendment, operating *in pari materia* with that amendment, and thus as an aid to the interpretation of the latter"). But see Thomas B. McAfee, *Reed Dickerson's Originalism—What it Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U. L.J. 617, 651 n.123 (1992) (observing that Black's "plain meaning" reading of the text and "attempt to shift the burden of proof to those who read it differently," simply ignores that the "rights 'retained by the people' can easily be read as a reference to the rights retained by the people when they granted enumerated powers to the national government"). See generally *id.* at 651-57.

Ninth Amendment itself is appropriately applied both to limit the powers of the nation as well as the powers of each and every state.<sup>14</sup> Professor Farber is enthusiastic about the Declaration of Independence, and the historical link between it and the thinking of Republicans during Reconstruction.<sup>15</sup> However, Professor Farber still contends, contra Professor Black, that “the 1791 Bill of Rights only limits the power of the *federal* government to violate rights.”<sup>16</sup> In offering this opinion, for some reason, Professor Farber perceived no need to explain why he rejects the arguments for a more expansive reading offered by Professor Black, even though the Republicans who created the Fourteenth Amendment—whose views he relies on—construed the original Constitution as securing rights against the states.<sup>17</sup>

Even so, the perceived connection between the Ninth Amendment and the “inalienable” and “inherent” rights clauses of the early state constitutions supplies the basic view defended in other works arguing for the “unenumerated rights” construction of the Ninth Amendment.<sup>18</sup> Consistent with their claims, Professor Farber underscores the Pennsylvania Declaration of Rights’ proclamation that “all men are born equally free and independent, and have certain natural, inherent and inalienable rights.”<sup>19</sup> In Professor Farber’s mind, the Ninth Amendment is emblematic, illustrating that the Framers “did not believe that they were *creating* these liberties in the Bill of Rights. Instead, they were merely *acknowledging* some of the rights that no government could properly deny.”<sup>20</sup> According to Professor Farber, one of the Framers’ purposes was “to protect what constitutional lawyers call unenumerated rights—those rights the Founders assumed and felt no need to specify in the Bill of Rights.”<sup>21</sup>

Professor Farber thus claims that Justice Arthur Goldberg’s concurrence in *Griswold v. Connecticut*<sup>22</sup> “demonstrated” that “the language and history of the Ninth Amendment show that the Framers of the Constitution believed in addi-

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<sup>14</sup> See, e.g., CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1997) [hereinafter BLACK, JR., A NEW BIRTH OF FREEDOM]. But see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, RESTORING] (advocating unenumerated fundamental rights construction of Ninth Amendment, but rejecting the view that the amendment served to limit the power of the states).

<sup>15</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 56-59, 61-70.

<sup>16</sup> *Id.* at 62.

<sup>17</sup> See, e.g., *id.* at 62, 66-67.

<sup>18</sup> See, e.g., BARNETT, RESTORING, *supra* note 14; BLACK, JR., A NEW BIRTH OF FREEDOM, *supra* note 14; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 241-60 (1999); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS (1995); DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 202-47 (1989) [hereinafter RICHARDS, FOUNDATIONS]; BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 15, 26-30 (1980).

<sup>19</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 27. Compare PA. CONST. of 1776, Declaration of Rights, art. I, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3081, 3082 (Francis Newton Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS], with VA. CONST. of 1776, Declaration of Rights, § 1, reprinted in 7 STATE CONSTITUTIONS *supra*, at 3812, 3813.

<sup>20</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at ix.

<sup>21</sup> *Id.* at ix-x.

<sup>22</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

tional fundamental rights, protected from government violation, alongside those listed in the Bill of Rights."<sup>23</sup> The Ninth Amendment's reference to the "others" that are "retained by the people" is simply a way of referring to "innate human rights."<sup>24</sup> Professor Farber's purpose is thus "to revive our understanding of the American tradition of reverence for fundamental rights."<sup>25</sup> Unenumerated fundamental rights "were based in 'natural law' and the 'law of nations.'"<sup>26</sup> If the inclination of some to completely deny the existence of these innate human rights is a source of frustration for Professor Farber, it is altogether exasperating that

Some conservatives acknowledge that the Ninth Amendment, like the Declaration of Independence, refers to innate human rights. But they contend that these unenumerated rights lack any legal weight and were merely entrusted to the political process. This theory conveniently allows these conservatives to pretend belief in innate rights without ever having to do anything about them.<sup>27</sup>

Professor Farber thus concludes that conservatives "refuse to look seriously at what the Framers believed, how they saw the world."<sup>28</sup>

If we begin with Professor Farber's own assumption, linking the Ninth Amendment to the Virginia Declaration's "inherent rights" clause, a serious legal historian would have profound doubts about whether its language was designed to make natural rights legally enforceable.<sup>29</sup> Professor G. Alan Tarr, perhaps the leading modern scholar on state constitutions, referred specifically to section 1 of the Virginia Declaration of Rights in describing the purposes of the Framers in drafting such provisions:

[T]he insusceptibility of various provisions to judicial enforcement was not a flaw, because the declarations were addressed not to the state judiciary primarily but to the people's representatives, who were guided by them in legislating, and even more to the liberty-loving and vigilant citizenry that was to oversee the exercise of governmental power.<sup>30</sup>

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<sup>23</sup> *Id.* at 1-2. For another conclusion about how persuasive and compelling Justice Goldberg's construction of the Ninth Amendment in *Griswold* was, see the treatment of that case in THOMAS B. MCAFEE, JAY S. BYBEE & A. CHRISTOPHER BRYANT, POWERS RESERVED FOR THE PEOPLE AND THE STATES: A HISTORY OF THE NINTH AND TENTH AMENDMENTS 226-38 (2006).

<sup>24</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 4.

<sup>25</sup> *Id.* at 15. Professor Farber also contends "advocates of fundamental rights should stop being defensive and should make it clear that they, rather than their opponents, best represent the American constitutional tradition." *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 4-5. Professor Farber is especially critical of Justice Antonin Scalia for combining an acknowledgment that a claimed right may be "retained" by the Ninth Amendment with the conclusion that it still may in effect have "no legal standing." *Id.* at 5. *But see* Thomas B. McAfee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 792-93 (2001) [hereinafter McAfee, *Inalienable Rights*].

<sup>28</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 11.

<sup>29</sup> My own views on the relation between Virginia's "inherent" rights clause and the Federal Constitution are set forth in THOMAS B. MCAFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY: THE FOUNDERS' UNDERSTANDING (2000) [hereinafter MCAFEE, INHERENT RIGHTS]; McAfee, *Inalienable Rights*, *supra* note 27.

<sup>30</sup> G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 78 (1998).

We learn from others that the state declarations, then, presented “moral admonitions” that were not treated as binding legal obligations.<sup>31</sup> This is what enabled Alexander Hamilton to argue that expressly stating the doctrine of popular sovereignty, and thereby acknowledging the authority of the people to amend their constitutional system to better meet their needs and to secure their rights, was more effective than a bill of rights.<sup>32</sup> According to Hamilton, the Preamble’s reference to the power of “the people” was “a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.”<sup>33</sup> Modern Americans have difficulty understanding that, for Hamilton and many others, the most important “right” held by the people was the right to “alter or abolish” their form of government; this “right” enabled them to amend the Constitution to more effectively serve their needs, including protecting their rights.<sup>34</sup> From this perspective, ultimately “the proper guardians of rights are the people—whose sovereignty constitutes the most basic right of all.”<sup>35</sup> The critical difference between the state Declarations of Rights and the Federal Bill of Rights was precisely that James Madison, apparently inspired by words supportive of a bill of rights offered by Thomas Jefferson, substituted words of command and prohibition for the hortatory language that had dominated the Declarations of Rights.<sup>36</sup>

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<sup>31</sup> LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 74 (1991). See also Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 328 (1989) (observing that eighteenth century state constitutions “were not viewed as legalistically as they are today”).

<sup>32</sup> THE FEDERALIST NO. 84, at 578-79 (Alexander Hamilton) (Jacob Cooke ed., 1961).

<sup>33</sup> *Id.* at 579. For a useful treatment, see Nathan N. Frost, Rachel Beth Klein-Levine & Thomas B. McAfee, Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States, 2004 UTAH L. REV. 333, 360-62. Hamilton’s perspective reflected not only a skepticism of declarations of rights as mere “parchment barriers,” but also a conviction that the people as the perpetual sovereign were empowered to amend the Constitution if government acted in ways that threatened rights. Cf. James Wilson, Speech to the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382-84 (Merrill Jensen ed., 1976) [hereinafter RATIFICATION OF THE CONSTITUTION] (“We the People” is “tantamount to a volume and contains the essence of all the bills of rights that have been or can be devised.”).

<sup>34</sup> VA. CONST. of 1776, Declaration of Rights, § 3, reprinted in 7 STATE CONSTITUTIONS, *supra* note 19, at 3812-13 (providing that “a majority of the commonwealth hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish . . . [their government], in such manner as shall be judged most conducive to the public weal”).

<sup>35</sup> GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 153 (1989). Accord JEREMY WALDRON, LAW AND DISAGREEMENT 244 (1999) (stating if the question framed is, “[w]ho shall decide what rights we have,” his answer is, “[t]he people whose rights are in question have the right to participate on equal terms in that decision;” also supplying reasons for concluding that we should not “instead entrust final authority to a scholarly or judicial elite”).

<sup>36</sup> For a historical treatment of Jefferson’s role and Madison’s decision to redraft the language that had been proposed by the state ratifying conventions, see McAfee, *Inalienable Rights*, *supra* note 27, at 769-71. At one point, Professor Farber himself makes a point of underscoring that the Ninth Amendment “is an explanation, not a command.” FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 9. Even if it were a command, it does not even purport to limit the scope of federal powers.



Whatever the originally intended meaning of the Ninth Amendment, at least twenty-six states adopted state constitutional provisions that significantly tracked the language of the federal Ninth Amendment.<sup>37</sup> Even though some have attempted to justify deriving unenumerated fundamental rights from such provisions,<sup>38</sup> when the United States Supreme Court decided *Griswold v. Connecticut*,<sup>39</sup> not a single state in the union held that such provisions secured rights beyond those specified in constitutional text.<sup>40</sup> This bit of history simply confirms that "the state counterparts to the Ninth Amendment have not generally been viewed as stating enforceable limits on government power."<sup>41</sup>

A number of modern thinkers believe that proponents of using seemingly open-ended rights provisions may well be motivated by high ideals, but are overestimating the capacities and inclinations of real-world judges.<sup>42</sup> Such proponents often assume that the Justices could ensure that all our lives will be protected by natural law.<sup>43</sup> However, as the legal theorist, Philip Soper, has observed, when judges feel free to implement natural law, "the system remains positivist in the most significant sense, with the judges simply serving as the sovereign in place of the legislature."<sup>44</sup> The very purpose of having a written

<sup>37</sup> Frost, Klein-Levine & McAfee, *supra* note 33, at 362 n.152 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST* 203 n.87 (1980)).

<sup>38</sup> E.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 280-83 (1998); ELY, *supra* note 37, at 203 n.87; Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 182 (1992); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 1008-35 (1993). For a strikingly different reading of the same history, see Frost, Klein-Levine & McAfee, *supra* note 33, at 362-71; McAfee, *Inalienable Rights*, *supra* note 27, at 771-92.

<sup>39</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>40</sup> McAfee, *Inalienable Rights*, *supra* note 27, at 791.

[T]hat it was not until 1965 that the Ninth Amendment was invoked to justify heightened scrutiny of legislation impacting on unenumerated fundamental rights, and in a federal rather than a state court, suggests the significance of the silence that had previously prevailed on the issue of the applicability of the incorporation of an "unenumerated rights" interpretation of the Ninth Amendment state equivalents.

*Id.*

<sup>41</sup> *Id.* at 779.

<sup>42</sup> For exemplary efforts at articulating such concerns, see STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998); Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501 (1995) [hereinafter McAfee, *Utopian Vision*]; Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997); Larry Alexander, Book Review, 7 CONST. COMMENT. 396 (1990) (reviewing RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE* (1989)).

<sup>43</sup> See, e.g., BLACK, JR., *A NEW BIRTH OF FREEDOM*, *supra* note 14; see also BARNETT, *RESTORING*, *supra* note 14.

<sup>44</sup> Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2415 (1992). Given the freedom Professor Farber's reading of the Ninth Amendment potentially grants to judges, Professor Alexander suggests that "perhaps one of our moral rights is a right against judicial imposition of specific rights that lack a textual basis." Alexander, *supra* note 42, at 403. Professor Alexander concludes:

If the [N]inth [A]mendment was intended to legitimize such judicial imposition, then, on the basis of proper preconstitutional norms, those that tell us why and to what extent the Constitution is authoritative and what interpretive methodology we should apply to it, we should reject the constitutional authority of the [N]inth [A]mendment.

Constitution is to enable government leaders to determine whether they have the power and authority to act in a certain way by empowering judges to vindicate “the legal entitlements of one party or another.”<sup>45</sup> Professor Larry Alexander has contended that there are three reasons to “advert to a text—to provide certainty, separate powers, and monitor decisionmakers.”<sup>46</sup> But when the text is taken as an open-ended invitation, “these rule of law values” are simply abandoned in favor of an “unbridled naturalism.”<sup>47</sup> It would be useful if “thoughtful American lawyers realized that rights-grounded foundational accounts of our constitutional order are bad history that produce bad law.”<sup>48</sup>

### III. THE NINTH AMENDMENT AND ENUMERATED POWERS

When Pennsylvania’s James Wilson attempted to explain and justify the proposed Constitution’s omission of a bill of rights, he stated:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case [of the states] everything which is not reserved is given, but in the latter [case of the federal Constitution] the reverse of the proposition prevails, and everything which is not given, is reserved.<sup>49</sup>

Wilson stated a general understanding of the power granted to the legislatures by the state constitutions.

That the premise underlying Wilson’s argument was fundamentally positivist in nature is illustrated powerfully by the example he uses to make the point. Wilson contended that if Congress had been granted a power “to regulate literary publications,” it would have been essential to “stipulate that the liberty of the press should be preserved inviolate.”<sup>50</sup> Virtually all the Framers,

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*Id.* (citation omitted).

<sup>45</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 6 (1999).

<sup>46</sup> Alexander, *supra* note 42, at 401.

<sup>47</sup> *Id.*

<sup>48</sup> McAfee, *Inalienable Rights*, *supra* note 27, at 794.

<sup>49</sup> James Wilson, Speech in the State House Yard (Oct. 6, 1787), in *2 RATIFICATION OF THE CONSTITUTION*, *supra* note 33, at 167-68. When it came to the state constitution Declarations of Rights, Wilson accordingly embraced “the sort of narrow interpretation of the Bill of Rights that Bork engages in.” FARBER & SHERRY, *CONSTITUTIONAL FOUNDATIONS*, *supra* note 4, at 18.

As the historian, James H. Hutson observed, Madison feared that without a Ninth Amendment, “it could be assumed that the people retained only the rights contained in the first eight amendments; every other right/power would, according to the example of the state bills, be ceded to the government, which would become a leviathan in possession of virtually unlimited power.” James H. Hutson, *The Bill of Rights and the American Revolutionary Experience*, in *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, at 62, 94 (Michael J. Lacey & Knud Haakonssen eds., 1991).

<sup>50</sup> James Wilson, Speech in the State House Yard (Oct. 6, 1787), in *2 RATIFICATION OF THE CONSTITUTION*, *supra* note 33, at 167, 168. For a demonstration that Wilson’s arguments

including James Wilson, would have seen freedom of the press as one of the inalienable rights to which they were entitled.<sup>51</sup> Thus, Wilson was not relying on a general implication that inalienable rights are in fact constitutional rights. The necessity of a bill of rights, if rights were to be secured in the states, was an implication that followed from the presumption that the states held plenary powers. The implication was the starting point for analysis by Wilson, Madison, and the other Federalist proponents of the Constitution.<sup>52</sup> The plenary powers of the state legislatures was the basis for the Federalist argument that there was no need for a federal bill of rights under its system of enumerated and limited powers.<sup>53</sup> However, that power remains unmentioned in the two hundred pages of Professor Farber's book on the Ninth Amendment.

The history of the ratification debates demonstrates that *both* the Federalist proponents of the Constitution and the Constitution's Antifederalist opponents agreed that the *only rights* that the people had "retained" under their state constitutions, as a matter of law, were the express limitations on government power found in that states' Declarations of Rights.<sup>54</sup> The debate between these parties concerned whether the people's rights were adequately secured by the federal system of enumerated and limited powers, and whether there were undue risks to attempting to supplement that protection by the inclusion of a federal bill of rights.<sup>55</sup> The purpose of the Ninth Amendment was therefore not to secure "unenumerated" natural and inalienable rights, but to assure that the insertion of a federal bill of rights would not undermine the security already provided by the enumerated powers scheme.

Professor Farber observes that Justice James Iredell of North Carolina stated that it would "not only be useless, but dangerous" to enumerate rights, because "it would be implying in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to list them all."<sup>56</sup> Professor Farber thus con-

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were that a bill of rights would threaten the rights-protective scheme of enumerated powers, see McAFFEE, *INHERENT RIGHTS*, *supra* note 29, at 94, 137, 140-42.

<sup>51</sup> See, e.g., Plain Truth: Reply to an Officer of the Late Continental Army, in 2 RATIFICATION OF THE CONSTITUTION, *supra* note 33, at 219 (stating as "Congress can only have the defined powers given, it was needless to say anything about liberty of the press, liberty of conscience, or any other liberty that a freeman ought never to be deprived of").

<sup>52</sup> See DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 60 (1980) (Framers of state constitutions "assumed that government had all power except for specific prohibitions contained in a bill of rights.").

<sup>53</sup> E.g., Melancton Smith's Notes, (Sept. 27, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 335 (Merrill Jensen ed., 1976) (Nathaniel Gorham explaining that a "bill of rights in state governments was intended to retain certain powers [in the people] as the legislatures had unlimited powers.").

<sup>54</sup> See, e.g., Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 422 (1953) (quoting Theophilus Parsons as emphatically asserting that right "ought to be settled and established, previous to the ratification of any constitution for the State").

<sup>55</sup> *FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION* 151-52 (John P. Kaminski & Richard Leffler eds., 1998) (observing that Federalists thought a bill of rights "not only unnecessary, but . . . even dangerous").

<sup>56</sup> FARBER, *RIGHTS RETAINED BY THE PEOPLE*, *supra* note 2, at 34; see also 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE*

cludes: "So the effect of a bill of rights would be to imperil every right that got left off the list. In short, what the Federalists were afraid of was that someone would use the listing of some rights as an excuse for trampling others."<sup>57</sup> However, Justice Iredell himself was very clear that, just as there was a highly debatable need for a federal bill of rights, what made such a bill of rights dangerous was the analogy that might be drawn to the state constitutions:

If we had formed a general legislature, with undefined powers, a bill of rights would not only have been proper, but necessary; and it would have then operated as an exception to the legislative authority in such particulars. It has this effect in respect to some of the American constitutions, where the powers of legislation are general. But where they are powers of a particular nature, and expressly defined, as in the case of the [proposed] Constitution before us, I think, for the reasons I have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.<sup>58</sup>

The Federalist fear was uniformly stated that a bill of rights could be understood as acknowledging that Congress was empowered to act generally, as long as it did not violate the provisions of the bill of rights.<sup>59</sup> The insertion of the bill itself might be read, in other words, as "converting" the federal government to one of general powers. For example, Justice Samuel Parsons contended that inserting a bill of rights would carry the implication "that noth-

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FEDERAL CONSTITUTION 167 (William S. Hein & Co. 1996) (1836) [hereinafter ELLIOT'S DEBATES]). In the same speech Iredell argued that "[i]t would be the greatest absurdity for any man to pretend that, when a legislature is formed for a particular purpose, it can have any authority but what is expressly given to it . . ." *Id.* at 166. He concluded that "Congress can have no right to exercise any power but what is contained in that paper," and though "unalienable rights ought not to be given up," such rights "are not alienated." *Id.* at 166-67. Why are they not alienated? "They still remain with the great body of the people." *Id.* at 167.

<sup>57</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 34. Using the same argument as advanced by Iredell, Professor Richards goes so far as to assert that Iredell was fearful that one day a strict constructionist positivist-like Judge Bork-would reject a proffered rights claim because the right was not included in the enumeration of the Bill of Rights. Compare RICHARDS, FOUNDATIONS, *supra* note 18, at 221 (describing Iredell's argument as "the most prophetic expression of the founders' fears about a Bill of Rights not protecting unenumerated rights"), with McAfee, *Original Meaning*, *supra* note 2, at 1268 n.210 (observing that Richard's "lengthy quotation ends at the point where Iredell focused on the uniqueness of the [F]ederal [C]onstitution and acknowledged that a bill of rights would be both 'necessary' and 'proper' if 'we had formed a general legislature'"). See *infra* note 60 and accompanying text.

<sup>58</sup> ELLIOT'S DEBATES, *supra* note 56, at 149. Iredell's speech was part of a colloquy with Samuel Spencer, who had argued that a bill of rights was essential to secure "those unalienable rights which ought not to be given up." *Id.* at 137 (emphasis added). It was also Spencer who contended that if the Constitution included a clause that stated "that all [that] was not given up to the United States was retained by the respective states," the clause "would have superseded the necessity of a bill of rights." *Id.* at 152. For helpful discussion, see Hutson, *supra* note 49, at 95.

<sup>59</sup> See, e.g., James Wilson, Speech to the Pennsylvania Ratifying Convention (Nov. 28, 1787), 2 RATIFICATION OF THE CONSTITUTION, *supra* note 33, at 387-88 ("A proposition to adopt a measure, that would have supposed that we were throwing into the general government every power not expressly reserved by the people would have been spurned at, in that house, with the greatest indignation.").

ing more was left with the people than the rights defined and secured in such bill of rights."<sup>60</sup>

Professor Farber joins a well-established tradition of ridiculing Judge Bork's thought that the apparent reference to unenumerated rights in the Ninth Amendment should be treated as the equivalent of an "ink blot" following the words "The enumeration . . . of certain rights, shall not be construed to . . . ."—and the inkblot prevents an "interpretation" of particular individual rights.<sup>61</sup> The strong appeal of the "inkblot" analogy for Judge Bork critics is that it implicitly suggests that the central issue in Ninth Amendment interpretation relates to the presumed vagueness of referring to protected rights without supplying even a clue as to their identity.<sup>62</sup> Thus, Judge Bork can be perceived as simply imposing his "moral skepticism" on the Constitution—even though the text and (presumed) original understanding seem to embrace the reality of moral rights, as well as a willingness to secure natural rights that are not expressly stated in the Constitution.<sup>63</sup>

Even apart from the fact that the Virginia Bill of Rights' "inherent" rights provision has been given a standard interpretation over the years that effectively treats it as the equivalent of an "inkblot,"<sup>64</sup> the decisive question raised by the historical materials concerns the "ambiguity" of the Ninth Amendment's reference to "others retained by the people," not its "vague" reference to unenumerated rights.<sup>65</sup> In Ninth Amendment analysis, the crucial question is

<sup>60</sup> Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 569 (Merrill Jensen ed., 1978). Hence the Ninth Amendment "is a disclaimer, denying that the federal Bill of Rights is similar to any of the other American bills of rights adopted since independence." Hutson, *supra* note 49, at 95. The Federal Bill of Rights would in effect concede all power not reserved there; it would create a government of plenary powers—similar to the power held by state legislatures.

<sup>61</sup> See FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 4. Professor Farber also concludes that the comparison to an "inkblot" meant, for Bork, that "unenumerated rights simply do not exist." *Id.* at 4, 11-12 (contending that "inkblot" analogy reflected Bork's fear "that if we paid any attention to the Ninth Amendment at all, we would be mesmerized into giving the federal judiciary a blank check"). For similar disparagements, see BARNETT, RESTORING, *supra* note 14, at 79, 242, 253-55, 325; BLACK, JR., A NEW BIRTH OF FREEDOM, *supra* note 14, at 35; Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988); Randy E. Barnett, *Ninth Amendment (Update)*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1813, 1813 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

<sup>62</sup> See McAfee, *Inalienable Rights*, *supra* note 27, at 792-93.

<sup>63</sup> *Id.* at 792 (citing to authorities who viewed Bork's "inkblot" analogy as reflecting a deep moral skepticism; Bork's view made the Ninth Amendment "another hard nut to crack").

<sup>64</sup> See *supra* notes 29-36 and accompanying text.

<sup>65</sup> The difference between overly vague terms and ambiguity can be crucial precisely because, since ambiguity refers to "equivocation," it is frequently resolvable by a careful reading of the provision in its broadest context. See, e.g., REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 43-48 (1975); *id.* at 48 (concluding that when a careful reading dissolves what initially appeared as ambiguity, the term "apparent ambiguity" is often used). By contrast, while vagueness often adds to the "flexibility" of statutes, the whole point may be to leave the resolution of uncertainties to others than the legislature adopting the enactment. *Id.* at 49-50. For the treatment of the importance of ambiguity versus vagueness in accurately construing the Ninth Amendment, see Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty*

whether the other rights are “retained” by virtue of the grant of enumerated, limited powers to the national government, or are “retained” as people leave the state of nature and join the social contract.<sup>66</sup>

Modern thinkers seldom even note the parallels between the text of the Ninth Amendment and Article II of the Articles of Confederation. Article II provided “[e]ach state *retains* . . . every Power, Jurisdiction, and *right*, which is not by this confederation expressly delegated to the United States.”<sup>67</sup> If one realizes that “the people,” as the popular sovereign, were the functional equivalent of the states under the Articles of Confederation, it becomes clear that it is “the people” who grant, or delegate, power to the national government, and reserve or “retain” whatever is not granted or delegated, just as “the states” did under the Articles. This is why President George Washington could argue that there was no need for a bill of rights, because “the people evidently retained every thing which they did not in express terms give up.”<sup>68</sup> As Professor Kurt T. Lash has argued,

that the Ninth Amendment speaks of the people’s retained rights does not establish the character (collective or individual) of the rights so retained. Nor does the fact that many Founders believed in natural rights conflict with a federalist reading of the rights retained under the Ninth.<sup>69</sup>

At the North Carolina Ratifying Convention, Archibald Maclaine, a Federalist proponent of the Constitution, analogized to Article II when he contended that the people “*retain* all of those rights which we have not given away to the general government.”<sup>70</sup> Similarly, in private correspondence, Richard Parker wrote to fellow Virginian, Richard Henry Lee, that “we declare that we do not abridge our Rights by the reservation but that we *retain* all we have not specifically given.”<sup>71</sup>

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*Over Law and the Court Over the Constitution*, 75 U. CIN. L. REV. 1499, 1506 n.25, 1573-74 (2006).

<sup>66</sup> For my own efforts to work through this puzzle, see Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People*, 16 S. ILL. U. L.J. 267 (1992).

<sup>67</sup> ARTICLES OF CONFEDERATION, art. II, in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 53, at 86, 86 (emphasis added).

<sup>68</sup> Letter from George Washington to Marquis de Lafayette (Apr. 28, 1788), in 29 THE WRITINGS OF GEORGE WASHINGTON 475, 478 (John C. Fitzpatrick ed., 1939). *Accord* Statement of Thomas Hartley at the Pennsylvania Ratifying Convention (Nov. 30, 1787), *reprinted in* 2 RATIFICATION OF THE CONSTITUTION, *supra* note 33, at 429, 430 (contending that the people had “retained” all the rights they had not transferred “to the government”); Thomas Hartley, House of Representatives Journal (Aug. 15, 1789), *reprinted in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1050, 1091 (1971) (asserting that “all the rights and powers that were not given to the Government were retained by the States and the people thereof”) (emphasis added). Washington and Hartley were advancing the same defense of the initial omission of a bill of rights that Madison had relied on in The Federalist Papers. See *supra* note 50 and accompanying text.

<sup>69</sup> Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 364 (2004).

<sup>70</sup> ELLIOT’S DEBATES, *supra* note 56, at 141 (emphasis added).

<sup>71</sup> Letter from Richard Parker to Richard Henry Lee (July 6, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 260, 260 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (emphasis added).

## IV. FOUNDATIONALISM VERSUS PRAGMATISM

Professor Farber's book consists of both a historical synopsis of the Ninth Amendment and a review of how the Ninth Amendment might be implemented. In summing up the history, Professor Farber contends that an argument "that surfaced repeatedly was that it would be impossible to enumerate all of the rights and that leaving some out might be taken as a negative signal."<sup>72</sup> He assures us that the "Ninth Amendment was a direct response to this concern."<sup>73</sup> According to Professor Farber, the Ninth Amendment is properly read as premised on the idea that there are "innate human rights," and that they should be given legal effect.<sup>74</sup> Hence, he rejects any view that unenumerated rights "lack any legal weight" or were "entrusted to the political process[.]"<sup>75</sup> and urges us to grasp "that basic premise of the Founding Fathers: human rights come first, and legal regimes come second."<sup>76</sup> At first blush, it appears that Professor Farber is committed to "rights foundationalism."

Professor Farber acknowledges that positivism has come to dominate twentieth century legal thought even as he underscores that "[n]atural law continues to play an important role in American law well into the nineteenth century."<sup>77</sup> In general, the tone and texture of Professor Farber's treatment appears to track with that of his former colleague and co-author, Professor Suzanna Sherry, who once suggested that modern state court judges should be committed – as earlier courts were – to "the goal of doing justice," not invoking the "judicial restraint and strict constructionism" that has prompted them to forget "the natural law heritage they once shared with the federal courts."<sup>78</sup> A reader of the works of Professors Farber and Sherry would quite straightforwardly expect the authors to set forth a full-blown theory of natural law and natural rights as the means of implementing their vision of the Ninth Amendment and its purpose.<sup>79</sup>

However, a "straightforward" natural law/natural rights theory of constitutional decision-making is an unlikely request to be fulfilled by either of these law professors—such an approach, we should know, only "transforms a lower-

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<sup>72</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 29-30.

<sup>73</sup> *Id.* at 30.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 4-5.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> *Id.* at 8.

<sup>78</sup> Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935, 943 (1994). See also Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) [hereinafter Sherry, *Unwritten Constitution*]. As with Professor Farber, a relevant question is whether "Sherry's more recently articulated views are reconcilable with those set out" in her work on the state constitutions. Frost, Klein-Levine & McAfee, *supra* note 33, at 338 n.20.

<sup>79</sup> There are some who have made just such an attempt. See, e.g., BARNETT, RESTORING, *supra* note 14. Professor Farber tells us, however, that Barnett, a libertarian, confuses "rights, which come in discrete packages, and liberty, which is a vaguer concept of unrestricted action." FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 209. But a reader of Professor Farber's book might come away unconvinced that he even believes in natural rights.

case theory into an upper-case Grand Theory,”<sup>80</sup> and hence would be altogether too foundationalist and insufficiently pragmatic.<sup>81</sup> Professor Farber thus underscores that he wants to use the Ninth Amendment “in a sensible way, not just as an open-ended invitation for judges to select their own preferred social values for constitutional protection.”<sup>82</sup> One should not hope to find an exposition of how to go about finding “innate human rights;” after all, for these professors, they do not have much to do with it. Instead, to Professor Farber it is clear that “[w]hether the source is divine sanction, the social contract, the inherent nature of human dignity, or evolving social values, the key point is that these rights are basic to our understanding of individual freedom in modern society.”<sup>83</sup>

The attempt to do more, by resorting to “sweeping ethical precepts,” at the cost “of close reading of legal texts,” will yield a result that sounds “more like a moralist than a lawyer.”<sup>84</sup> Such a moralist will portray the Bill of Rights “as a manifesto of high moral principle rather than a limited set of eighteenth-century precepts;”<sup>85</sup> he or she will likely, as a result, be “equivocal about how much judges are restrained by their need to remain faithful to governing legal sources.”<sup>86</sup> Such moralists’ views are “agenda-driven rather than grounded in constitutional history, text, or precedent.”<sup>87</sup> What Professor Farber never really explains is how judges, let alone constitutional law scholars, are to be faithful to the purposes for including the Ninth Amendment in the Bill of Rights without becoming a “foundationalist,” who is also a “moralist.”<sup>88</sup>

At least as fundamental, Professor Farber offers no help at all in resolving the question whether and how the “pragmatism” he advocates is at all reconcilable with charging judges with discerning and enforcing “innate” human

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<sup>80</sup> FARBER & SHERRY, CONSTITUTIONAL FOUNDATIONS, *supra* note 4, at 8 (quoting M.H. Abrams, *The Transformation of English Studies: 1930-1995*, in AMERICAN ACADEMIC CULTURE IN TRANSFORMATION: FIFTY YEARS, FOUR DISCIPLINES 123, 134 (Thomas Bender & Carl E. Schorske eds., 1997)).

<sup>81</sup> For a sense of how one might go about formulating a “pragmatic” approach to judicial review, see Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163 (1995); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003).

<sup>82</sup> FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 14.

<sup>83</sup> *Id.* at 16.

<sup>84</sup> FARBER & SHERRY, CONSTITUTIONAL FOUNDATIONS, *supra* note 4, at 122.

<sup>85</sup> *Id.* at 133. A reader of Professor Farber’s recent book might well imagine that the whole point of the Ninth Amendment was to clarify that the Bill of Rights *was intended* as a “manifesto of high moral principle.” The other rights “retained by the people” is said to include all the rights identified as “innate human rights” by natural law theory.

<sup>86</sup> *Id.* at 134.

<sup>87</sup> *Id.* at 137.

<sup>88</sup> Professor Farber suggested that a reading of the Ninth Amendment premised on the view that, like the “inalienable rights” clauses, it was not written to be legally enforceable “conveniently allows these conservatives to pretend belief in innate rights without ever having to do anything about them.” FARBER, RIGHTS RETAINED BY THE PEOPLE, *supra* note 2, at 5. Does the demand that a claimed right be adequately “grounded in constitutional history, text, or precedent,” FARBER & SHERRY, CONSTITUTIONAL FOUNDATIONS, *supra* note 4, at 137, almost equally allow pragmatists to “pretend belief in innate rights” without doing much about them?



rights.<sup>89</sup> Should a court encounter a previously unknown right, but conclude that it fits within the category of "innate" rights, even though it lacks an antecedent in positive law, the legal tradition, or societal consensus, Professor Farber's own pragmatism should prompt him to doubt whether the judges' beliefs about moral facts should prevail over conflicting beliefs of legislators or litigants.

Professor Farber, in short, does not offer his reader a full understanding of why the "straightforward" reading of the Ninth Amendment he presents—the one that focuses on "innate" human rights—would not amount in practice to a form of "radical anti-constitutionalism."<sup>90</sup> The natural law/natural rights adjudication, suggested by Professor Farber's reading of the Ninth Amendment, appears to raise doubts about the constitutional validity of all morally controversial enactments of positive law, including provisions of our written Constitution—even amendments adopted recently by an aroused public.<sup>91</sup> Indeed, if the considered judgment of a Supreme Court Justice was that "equal representation of jurisdictions of unequal population violates the principle of one person, one vote[,]" that Justice, using Professor Farber's reading of the Ninth

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<sup>89</sup> If there are truly "innate" human rights, whether found in constitutional text or not, it is difficult to conceive of how they would not pose potential substantive limits on the power of the people to amend their constitutions. See, e.g., Sherry, *Unwritten Constitution*, *supra* note 78, at 1132-35, 1145-46. But see McAfee, *INHERENT RIGHTS*, *supra* note 29, at 14-19, 123-27.

<sup>90</sup> Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 97 (1988). A nearly standard reading of the unenumerated fundamental rights construction of the Ninth Amendment is to "assume that these unwritten rights were in conflict with the written constitution;" it would follow that the "unwritten rights could trump the positive law of the Constitution." Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1, 2-3 (1994). For a description and critique of various attempts to address this objection to the fundamental rights interpretation of the Ninth Amendment, see McAfee, *Utopian Vision*, *supra* note 42, at 534-47. Professor Farber only distinguishes himself in not even making the attempt to address the objection, or even to explain how the search for innate human rights is to be done so "pragmatically" as to avoid any need to consider it.

<sup>91</sup> Compare Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991) (contending that the proposed constitutional amendment to permit the statutory prohibition of flag burning conflicts with the free speech that is an inalienable natural right that is secured by the Ninth Amendment), with McAfee, *Inalienable Rights*, *supra* note 27, at 781 n.136 (pointing to evidence that the concept of being ruled by the "consent of the governed" is at the foundation of the American republic).

The author of this student note, Jeffrey Rosen, became a law teacher and scholar, and recently published a book. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006). In the book's "Preface," Rosen suggested that: the book defends the "tradition of bipartisan judicial restraint." *Id.* at xiii. Associated with Holmes, Frankfurter, and Hand, this view "holds that courts should play an extremely modest role in American democracy." *Id.* "They should hesitate to strike down laws unless the constitutional arguments for second-guessing the decisions of a political majority are so powerful that people of different political persuasions can readily accept them." *Id.* The assumption is "that the most controversial political issues in American history have been resolved in the political arena rather than the courts." *Id.* at xiv. "When judges take it upon themselves to decide the most divisive questions of politics, technology, and culture, who can blame both liberals and conservatives for selectively embracing judicial activism when it suits their purposes?" *Id.* It is difficult to discern whether Rosen has repudiated his initial interpretation of the Ninth Amendment or just become a pragmatist.

Amendment, should properly hold that “the equal representation of the fifty states in the Senate” is unconstitutional.<sup>92</sup>

## V. CONCLUSION

There was a time when advocates of an activist judiciary in fulfilling the promise of individual rights freely stated that the Constitution—and in particular the Ninth Amendment—justified the use of “non-interpretive” judicial review.<sup>93</sup> More recently, the trend has been to follow scholar Ronald Dworkin, who contends that a basically moral reading of the American Constitution is justified by a fair reading of the Constitution’s text.<sup>94</sup> Despite this trend, however, the legal scholar who initially insisted that the Ninth Amendment could justify the employment of “non-interpretive” judicial review, Professor Thomas Grey, has suggested that appropriate and legitimate constitutional decision-making would be adequately characterized—given the Ninth Amendment—as at least “supplemental,” rather than as purely “textual[ ].”<sup>95</sup> However, neither Professor Grey nor Professor Farber supplies adequate grounds for reading a provision dedicated to “innate human rights” as one that creates an “exception” that invariably upholds positive law, which also happened to be written and ratified as fundamental law.<sup>96</sup>

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<sup>92</sup> McConnell, *supra* note 90, at 96. If one were sufficiently committed to the Ninth Amendment’s embracing all “innate human rights,” one might even deem that commitment as overriding the strict instruction of Article V of the Constitution. *See* U.S. CONST. art. V (providing “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”).

<sup>93</sup> Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 714 (1975).

<sup>94</sup> RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). *See, e.g.*, CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006); *see also* LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

<sup>95</sup> Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 211 (1988).

<sup>96</sup> If our conclusions about the appropriate substantive content of fundamental rights leads to legitimate change over time as our understanding and appreciation of basic principles improves—prompting us to recognize the need to “supplement” the rights guarantees provided for in the text—it would be equally impossible to determine a priori that these changing conclusions might not conflict with positive law provisions already included in the Constitution.

# THE NINTH AMENDMENT AND INDIVIDUAL RIGHTS: A REPLY TO PROFESSOR McAFFEE

Daniel A. Farber\*

The editors of the *Nevada Law Review* have very graciously invited me to reply to Professor McAfee's essay review, *The "Foundations" of Anti-Foundationalism—Or, Taking the Ninth Amendment Lightly: A Comment on Daniel A. Farber's Book on the Ninth Amendment*.<sup>1</sup> As readers may infer from his title, Professor McAfee is not a fan of my book.<sup>2</sup> This does not come as a surprise, however, because he has previously advocated a quite different view of the Amendment.<sup>3</sup>

As he explained in an earlier work, Professor McAfee views the Ninth Amendment as being designed to negate a possible inference—that inference being that adopting a bill of rights “would reverse the Constitution’s premise that all not granted was reserved; instead, the government would hold all power except what was prohibited in the bill of rights.”<sup>4</sup> This seems to me a somewhat strained reading of the text of the Ninth Amendment.<sup>5</sup> Could not clearer language have been used if the Amendment was aimed at limiting federal power or protecting the reserved powers of the states?

Such language is not only conceivable, it was actually considered by Congress and rejected. Madison’s proposal for the Bill of Rights had contained language speaking directly about federal powers. His version of the Ninth Amendment read:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, *or as to enlarge the powers delegated by the Constitution*; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>6</sup>

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<sup>1</sup> Thomas B. McAfee, *The “Foundations” of Anti-Foundationalism—Or, Taking the Ninth Amendment Lightly: A Comment on Daniel A. Farber's Book on the Ninth Amendment*, 9 NEV. L.J. 226 (book review).

<sup>2</sup> DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007) [hereinafter FARBER, “SILENT” NINTH AMENDMENT].

<sup>3</sup> See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

<sup>4</sup> *Id.* at 1226.

<sup>5</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Also, the original Constitution already protected certain rights (e.g., the Bill of Attainder and ex post facto clauses), so this inference was not limited to the Bill of Rights. *Id.* art. I, § 9, cl. 3.

<sup>6</sup> James Madison, Speech to the House of Representatives Proposing Constitutional Amendments (June 8, 1789) *reprinted in* DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF*

The italicized language about federal powers was deleted from the final version of the Amendment, leaving only the reference to individual rights. If the focus had been on the scope of federal power, the revisions would have been in the opposite direction: to keep this language about powers and delete the language about retained rights.

Of course, one snippet of history is not conclusive, though the drafting history of a constitutional provision seems unusually probative as historical evidence goes. But, at least readers should agree that it is not implausible to read the Amendment as being about the same kinds of individual rights found in the previous eight amendments, rather than being about federal powers.

I would like to address three other points briefly. First, Professor McAfee characterizes me as a “rights-foundationalist”—meaning someone who believes that the “American constitution is concerned, first and foremost” with protecting rights.<sup>7</sup> I’m not sure what leads him to that conclusion. In fact, I think the main purpose of the Constitution is to empower the federal government—indeed, this seems to me to be beyond dispute.<sup>8</sup> On the other hand, I do think that the purpose of the Bill of Rights is—not too surprisingly—to protect rights.<sup>9</sup>

Second, Professor McAfee seems to think the Ninth Amendment, if viewed as providing enforceable protection at all, must be interpreted as a moral injunction rather than a legal one, so that all the usual tools used by judges in constitutional cases become irrelevant.<sup>10</sup> Yet, this was not the way that moral reasoning was generally used by the Framers,<sup>11</sup> nor is it how the Supreme Court has gone about protecting fundamental rights under the Fourteenth Amendment.<sup>12</sup> I see no reason why the Ninth Amendment should be immune from the normal tools of legal thought. In my view, Professor McAfee’s inability to imagine that moral considerations could be part of legal reasoning is the barrier that makes it so difficult for him to understand the very different world views of the Framers and of those he derides as rights fundamentalists today.

Finally, Professor McAfee suggests that if taken seriously, my view of the Ninth Amendment would imply that moral rights would legally trump even the Constitution itself.<sup>13</sup> Perhaps I was not clear enough about this point in my

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THE AMERICAN CONSTITUTION 323, 326 (2d ed. 2005) (emphasis added). For the rejected language preserving governmental powers, see *id.* at 326-27.

<sup>7</sup> McAfee, *supra* note 1, at 227 & n.3.

<sup>8</sup> See DANIEL FARBER, LINCOLN’S CONSTITUTION 39-42 (2003). If the main purpose had been to limit federal power and uphold state sovereignty, the Framers could just as well have stuck with the Articles of Confederation. Perhaps I should say that the *immediate* goal was to strengthen the federal government, this in turn was in the service of the broader purposes set forth in the Preamble. *Id.* at 40. Securing the “Blessings of Liberty” was one of those purposes, but not the only one. U.S. CONST. pmbl.

<sup>9</sup> I also think that this is the primary purpose of the Fourteenth Amendment; what else could guarantees of due process, equal protection, and privileges and immunities be other than protections of rights? U.S. CONST. amend. XIV.

<sup>10</sup> McAfee, *supra* note 1, at 239-242. This is the theme of part IV of the essay review.

<sup>11</sup> See FARBER, “SILENT” NINTH AMENDMENT, *supra* note 2, at 21-27.

<sup>12</sup> See *id.* at 8-82, 88-90.

<sup>13</sup> McAfee, *supra* note 1, at 241-242.

recent Ninth Amendment book, but it is one that I have discussed elsewhere.<sup>14</sup> In general, the law of nations made interstitial use of natural law, but acknowledged that it could be overridden by positive law.<sup>15</sup> Thus, to the extent that some constitutional provisions might be viewed as inconsistent with moral rights—and I assume Professor McAfee would agree that (say) the Fugitive Slave Clause fits this description—they would simply override any natural rights so far as courts and government officials were concerned. The position that Professor McAfee criticizes is not exactly a straw man but it is not the position that I myself take, nor one that the Americans of the Eighteenth and Nineteenth Centuries would have taken.

My purpose here is not to prove my views of these matters or disprove Professor McAfee's. These issues are far too complex to make that feasible. Readers who want to dig more deeply into the details should turn to Professor McAfee's earlier writings and to my book. Instead, I have tried here to clarify my position and to explain why some views that seem self-evident to Professor McAfee strike me as contestable.

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<sup>14</sup> FARBER & SHERRY, *supra* note 6, at 375 (for moderates likes Lincoln, "natural law was like the law of nations, interstitial and capable of being displaced by positive law").

<sup>15</sup> *See id.* at 371-75.





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