THE NINTH AMENDMENT AND INDIVIDUAL RIGHTS: A REPLY TO PROFESSOR MCAFFEE

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The editors of the *Nevada Law Review* have very graciously invited me to reply to Professor McAffee'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*.[1] As readers may infer from his title, Professor McAffee is not a fan of my book.[2] This does not come as a surprise, however, because he has previously advocated a quite different view of the Amendment.[3]

As he explained in an earlier work, Professor McAffee 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."[4] This seems to me a somewhat strained reading of the text of the Ninth Amendment.[5] 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.[6]

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[1] Thomas B. McAffee, *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).

[2] 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].

[3] *See* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

[4] *Id.* at 1226.

[5] "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.

[6] 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 McAffee characterizes me as a "rights-foundationalist"–meaning someone who believes that the "American constitution is concerned, first and foremost" with protecting rights.[7] 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.[8] On the other hand, I do think that the purpose of the Bill of Rights is–not too surprisingly–to protect rights.[9]

Second, Professor McAffee 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.[10] Yet, this was not the way that moral reasoning was generally used by the Framers,[11] nor is it how the Supreme Court has gone about protecting fundamental rights under the Fourteenth Amendment.[12] I see no reason why the Ninth Amendment should be immune from the normal tools of legal thought. In my view, Professor McAffee'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 McAffee suggests that if taken seriously, my view of the Ninth Amendment would imply that moral rights would legally trump even the Constitution itself.[13] 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.

[7] McAffee, *supra* note 1, at 227 & n.3.

[8] *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.

[9] 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.

[10] McAffee, *supra* note 1, at 239-242. This is the theme of part IV of the essay review.

[11] *See* FARBER, "SILENT" NINTH AMENDMENT, *supra* note 2, at 21-27.

[12] *See id.* at 8-82, 88-90.

[13] McAffee, *supra* note 1, at 241-242.

recent Ninth Amendment book, but it is one that I have discussed elsewhere.[14] In general, the law of nations made interstitial use of natural law, but acknowledged that it could be overridden by positive law.[15] Thus, to the extent that some constitutional provisions might be viewed as inconsistent with moral rights–and I assume Professor McAffee 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 McAffee 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 McAffee'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 McAffee'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 McAffee strike me as contestable.

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[14] 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").

[15] *See id.* at 371-75.