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Retained by the People

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Book Review

RETAINED BY THE PEOPLE: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have. By Daniel A. Farber.* Basic Books 2007. Pp. 209. \$45.00.

Reviewed by Charles D. Kelso ** & R. Randall Kelso***

I. Introduction

The Ninth Amendment is part of the Bill of Rights, the first ten Amendments which in 1833 were held limited to the federal government.¹ The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” In his latest book, Professor Daniel A. Farber first observes that the Ninth Amendment appears in only one Supreme Court concurring opinion.² He then sets

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¹ Daniel A. Farber, *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have* x (Basic Books 2007), based on *Barron v. Baltimore*, 321 U.S. 243, 247-51 (1833).

² Justice Goldberg’s concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a ban on counseling the use of contraceptives, applied to a married couple).

forth how he thinks judges should reason when finding limits on government power with aid from the Ninth Amendment.³

Farber says that even without overruling *Barron v. Baltimore* the principles of the Ninth Amendment should apply to restrain powers of the states as well as the federal government. The reason is that those principles are included within the Privileges or Immunities Clause of the Fourteenth Amendment (which Farber calls the P or I Clause). The P or I Clause provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” Farber reasons that the Ninth Amendment is an acknowledgment that citizens of the United States have certain retained rights which are privileges and immunities under both natural law and the Bill of Rights. Thus, they are protected from state action by the P or I Clause.⁴

The Supreme Court has frequently applied strict scrutiny to federal or state deprivations of certain unenumerated rights designated as “fundamental.” It has done so, however, under the substantive aspect of the Due Process Clause in the Fifth and Fourteenth Amendments. Farber argues that this reasoning by the Court with regard to unenumerated rights is less soundly based than use of the Ninth Amendment would have been because that Amendment explicitly recognizes the existence of such rights. During the time of the framers, those rights were thought to inhere in natural law, as recognized in the Declaration of Independence. Today such rights are

³ Farber, *supra* note 1, at 108.

⁴ *Id.* at 68-70. The Supreme Court held, however, in *The Slaughter House Cases*, 83 U.S. 36 (1873), that those privileges were limited to a citizen’s relationships with the federal government. *Id.* at 74.

increasingly recognized in international law, and in the law and the practices of many other nations, as well as our own.⁵

Farber criticizes conservatives generally (and Justice Scalia in particular) for saying that they are unable to find a meaning in the Ninth Amendment or for refusing to use it from fear of being labeled judicial activists.⁶ At the opposite extreme, Farber challenges libertarians who would use the Ninth Amendment to protect a right to do whatever one wants whenever it is wanted.⁷ He suggests a method for dealing with the Ninth Amendment that he thinks should produce reasoned decisions.⁸ He also explores results from use of that method in dealing with current issues relating to unenumerated rights – some of which have been recognized in Supreme Court opinions, and some of which have yet to be so recognized.⁹

II. A Summary of the Book

The book is divided into four parts. Part I, on Unwritten Rights and the Constitution, builds on quotations from James Madison, Thomas Jefferson, John Marshall, and Joseph Story to show that during the Founding era the idea of unwritten rights flowing from natural law was supported in many ways, including English common law and the law of nations.¹⁰ The idea was

⁵ *Id.* at 184, 190-191. Farber also noted, “When other capable people are struggling earnestly with the same issues that concern us, it is foolish to ignore their efforts.” *Id.* at 195.

⁶ *Id.* at 10-11. Farber states that Justice Scalia “and company” are “radicals in black robes.” *Id.* at 192.

⁷ *Id.* at 12-13.

⁸ *Id.* at 108.

⁹ *Id.* in Part III, pages 111-172. The issues include Reproductive Rights, The End of Life, Gay Rights, Education, The Right to Government Protection, and the Right to Travel and Other Rights.

¹⁰ *Id.* at 25.

captured in the opening of the Declaration of Independence: “we hold these truths to be self-evident, that all men are created equal and endowed by their creator with certain unalienable rights, among them life, liberty and the pursuit of happiness.”¹¹ Farber shows how concern was expressed that the new federal government might have power to invade some of those rights, and that James Madison proposed the Bill of Rights as a defense against that eventuality. The Ninth Amendment was Madison’s answer to the “exclusivity argument,” that listing certain rights in the Constitution would be understood as a denial of other rights.¹²

Prior to the Civil War, Congress did little regulating and so there was no reason to raise the Ninth Amendment as a defense to federal regulation. As a result, says Farber, the Ninth Amendment faded from view.¹³ After the Civil War there were efforts to abolish slavery and to protect the human rights of former slaves. The Civil War Amendments resulted, and there was a new basis for protecting unenumerated rights against action by the states.

Part II, on Protecting Fundamental Rights, is preceded by Farber making clear that floor debate on the Fourteenth Amendment suggested that the P or I Clause was intended to overrule *Barron v. Baltimore*.¹⁴ In 1873, however, the Court gave the P or I Clause a narrow interpretation in the *Slaughterhouse Cases*,¹⁵ saying that the P or I Clause protected only a short list of rights which owed their existence to the Federal government, its National character, its Constitution, or its laws. Supplying a few examples, the Court spoke of coming to the seat of

¹¹ *Id.* at 22, citing *The Declaration of Independence*.

¹² *Id.* at 40-41.

¹³ *Id.* at 46.

¹⁴ *Id.* at 68-70, citing, *Barron v. Baltimore*, 321 U.S. 243, 247-51 (1833).

¹⁵ 83 U.S. 36, 79-80 (1873).

government to assert any claim on the government, free access to its seaports, the privilege of the writ of habeas corpus, the right to use navigable waters, and the right to peacefully assemble and petition government for redress of grievances. When the Court began to expand the protection of unenumerated rights in the 1900s in cases like *Meyer v. Nebraska* (1923) (right to teach and learn in English); *Skinner v. Oklahoma* (1942) (strict scrutiny of classifications in a compulsory sterilization law); and *Griswold v. Connecticut* (1965) (use of contraceptives by married persons),¹⁶ the Court had long since stopped talking about natural law, it had never used the Ninth Amendment, and it settled on the Due Process Clause as the primary source for reasoning about unenumerated rights that could be considered “fundamental,” and whose deprivation triggered strict scrutiny.¹⁷

As for determining what rights are “fundamental,” the Court said in the 1930s that the test was whether a right was essential to “ordered liberty,” so that abolishing it would violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.¹⁸ Since then the Court has gradually softened its test and has enlarged the scope of personal interests that qualify as being fundamental. Farber praises as true to the vision of James Madison and his generation the opinion of Justice Kennedy in *Lawrence v. Texas*,¹⁹ where the Court struck down the Texas statute which made homosexual sodomy a crime. Justice Kennedy there spoke of intimate and personal choices central to personal dignity and autonomy, and relied on a variety of sources summarized by Farber:

¹⁶ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

¹⁷ Farber, *supra* note 1, at 83.

¹⁸ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁹ 539 U.S. 558, 566-75 (2003).

- * The general thrust of the Supreme Court's jurisprudence on privacy issues, which tended to reject interference with intimate relationships
- * State court decisions holding sodomy laws unconstitutional under their own state constitutions
- * A strong trend toward abolition of sodomy laws by state legislatures
- * Decisions of international human rights tribunals, particularly in Europe, that had rejected sodomy bans²⁰

Farber says that Justice Kennedy's approach is not an invitation to judicial activism. It actually restrains the Court by making it a part of a larger community of courts and lawmakers.²¹

Farber concludes Part II by setting out three theories under which the principles of the Ninth Amendment could be applied, and his own list of criteria for determining when an alleged right deserves Ninth Amendment protection. The first of the three theories is that Congress can use the Necessary and Proper Clause to pass whatever legislation is necessary and proper to implement its own powers or those of the other branches.²² This theory is very questionable in view of the fact the Court has never held that the Necessary and Proper Clause does any more than allow Congress a wide choice of means to carry out one of its great powers, such as the power to regulate commerce. Of course, as Farber notes, if Congress finds that states have violated the Fourteenth Amendment, it can use its § 5 enforcement power. Finally, Farber suggests that the policy of the Ninth Amendment should result in statutes not being construed to

²⁰ Farber, *supra* note 1, at 89.

²¹ *Id.* at 95.

²² *Id.* at 102.

deviate from well established principles of international human rights law, unless that interpretation is absolutely unavoidable.²³

The list of seven factors that Farber says should be considered in determining under the Ninth Amendment whether a given right is fundamental is as follows:

- * Supreme Court precedent establishing the right or analogous rights
- * Connections with specific constitutional guarantees
- * Long standing, specific traditions upholding the right
- * Contemporary societal consensus about the validity of the right
- * Decisions by American lawmakers and judges recognizing the right
- * Broader or more recent American traditions consistent with the right
- * Decisions by international lawmakers and judge recognizing the right²⁴

In Part III, on Applying the Ninth Amendment, Professor Farber considers some specific issues that the Court has dealt with or may consider in the future. Using his approach to identifying fundamental rights under the Ninth Amendment, he offers suggestions on how those matters should be resolved. On abortion, Farber says that a state should not be able to ban all abortions before the 8th week,²⁵ and should not be able to prevent abortions for the life or health of the mother, rape or incest, or because of a deformed fetus.²⁶ He approves the “undue burden” test of *Casey*.²⁷

²³ *Id.* at 103.

²⁴ *Id.* at 108.

²⁵ *Id.* at 113.

²⁶ *Id.* at 114.

²⁷ *Id.* at 114.

Regarding the end of life, he would find, with the Court, that there is a right to refuse medical treatment.²⁸ However, he thinks not enough is known about the effect of laws barring assisted suicide for the Court to hold today that there is fundamental right to assisted suicide, at least in the absence of permanent, agonizing pain.²⁹

He favors the conclusion, in accord with Justice Kennedy's decision in *Lawrence v. Texas*, that homosexual sodomy cannot be criminalized.³⁰ However, limiting "marriage" to heterosexuals might rationally be justified by a need for greater stability in such relationships because of children. Accordingly, he says, the time has not yet come for finding a fundamental right to same-sex marriage.³¹

Farber unhesitatingly affirms that at least a minimum level of education is a fundamental right that states must provide, as must the federal government in the District of Columbia. Farber disagrees with the Court's failure to hold, in *San Antonio Independent School District v. Rodriguez*, that there is a fundamental right to education.³² A fundamental right should also be

²⁸ *Id.* at 124.

²⁹ *Id.* at 129.

³⁰ *Id.* at 137.

³¹ *Id.* at 141.

³² *Id.* at 153, *citing* *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1 (1973) (no right to equal educational funding under the United States Constitution). The Court has not yet definitively resolved the question of a right to minimal funding, as opposed to equal funding addressed in *Rodriguez*. *See generally* *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (*Rodriguez* has "not yet definitively settled . . . whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

recognized, says Farber, of obtaining protection from violence when a law enforcement official is aware that violence is occurring, and has a reasonable opportunity to deal with it.³³

According to Farber, there is a fundamental right to travel within a state, between states, and internationally.³⁴ Going well beyond the cases, he suggests that there is also a fundamental right to possess one's home unless there is a need for building a highway or urban renewal, and no feasible and prudent alternative exists.³⁵ And the Constitution should give some protection to informational privacy by restricting the government from disclosure of personal information.³⁶

In Part IV on Broader Implications, Farber analyzes what kind of decisionmaking should accompany use of the Ninth Amendment and the P or I Clause to define and protect minority rights. He expresses the matter in a variety of ways, summarized in this statement:

Good constitutional decisions involve neither the mechanical application of formal rules nor the freewheeling ways of pure politics. They rely instead on judgment and discretion, which by definition incorporate both flexibility and constraints.³⁷

Regarding the existence of constraints on the recognition of further unenumerated fundamental rights, Farber mentions the selection process, the isolation of judges, the extensive use of precedent in constitutional law, and a common preference for evolutionary rather than radical change. With regard to considering and citing foreign and international law, Farber points out that this has been done in many Supreme Court opinions since the beginning, and

³³ *Id.* at 139.

³⁴ *Id.* at 166.

³⁵ *Id.* at 169.

³⁶ *Id.* at 171.

³⁷ *Id.* at 176.

makes sense primarily because “when other capable people are struggling earnestly with the same issues that concern us, it is foolish to ignore their efforts.”³⁸

Farber closes his book by noting that protecting fundamental rights is one of the great American traditions. It stretches from the Declaration of Independence to Madison’s framing of the Ninth Amendment, and from the creation of the Fourteenth Amendment to the Supreme Court’s modern case law.³⁹ It seems clear that Farber’s vision for using the Ninth Amendment and the P or I Clause to protect individuals from government action does not signal a campaign for extremely creative extensions of existing law. For example, speaking of informational privacy, Farber approves a statement by Justice Breyer that it may be useful for courts to take small steps in this area.⁴⁰

III. An Analysis of the Book

Professor Farber has selected a topic not much discussed in legal literature. He has addressed what could be a dry subject in a remarkably readable fashion. The reader is sent back into history, brought forward, presented with a theory of interpretation, and then shown how it can be applied to a variety of fact situations. The basic materials should be familiar to any person who has taken a course on constitutional law. But Professor Farber has provided interesting details that would not ordinarily be provided in a basic course,

Fans of Justice Kennedy will enjoy Professor Farber’s frequent praise of how Justice Kennedy’s views accord with those of the framers. Fans of Justice Scalia may be turned off by frequent criticism. The underlying tension is of course quite familiar to anyone who has been

³⁸ *Id.* at 195.

³⁹ *Id.* at 200.

⁴⁰ *Id.* at 172.

reading current Supreme Court opinions. Justice Scalia, as well as Justices Thomas and Alito, tend to approach constitutional interpretation as formalists, who believe in a static or fixed Constitution that does not evolve in meaning over time, but rather whose meaning is determined primarily by literal interpretation and respect for historical traditions.⁴¹ Justice Kennedy's approach mirrors the early natural law lawyers, including Chief Justice John Marshall, who believed more in an evolving Constitution based on enlightened reasoning about the natural law principles placed into the Constitution by the framers and ratifiers.⁴² A complete theory of current Supreme Court decisionmaking would have to note that there are two other views regarding constitutional interpretation: the liberal instrumentalism of Justices Stevens, Ginsburg, and Breyer,⁴³ and the deference to government Holmes-like posture of Chief Justice Roberts.⁴⁴ Justice Souter sometimes joins with Justice Kennedy, but often he votes with the liberal instrumentalists.⁴⁵

There is no reason to believe that any of the Justices are not doing their sincere best to discover and apply interpretations of the Constitution in a way which comports with their most deeply held views on the nature of the Constitution and the role of the Court. Thus, Professor

⁴¹ See generally Charles D. Kelso & R. Randall Kelso, *The Path of Constitutional Law* 12, 35-41, 278-302 (2007) (an E-Treatise available at www.vandeplaspublishing.com).

⁴² *Id.* at 12, 54-62, 354-404 (discussing the natural law approach of Chief Justice John Marshall, Justice Story, and, more recently, to various degrees, Justices Powell, O'Connor, Kennedy, and Souter).

⁴³ *Id.* at 11, 47-54, 325-53 (discussing the instrumentalist approach of Justices like Chief Justice Warren, and Justices Brennan, Marshall, Douglas, Fortas, Blackmun, and Stevens).

⁴⁴ *Id.* at 12, 41-46, 303-24 (discussing the Holmesian deference to government approach of Professor James Bradley Thayer, and Justices like Justices Holmes, Brandeis, Frankfurter, and, more recently, Chief Justice Rehnquist).

⁴⁵ See generally *id.* at 373-404.

Farber might well have taken a slightly more temperate view of Justices other than Kennedy. However, he is to be praised for the reasoned way that he applies his criteria for deciding Ninth Amendment cases. It is clear from those applications, as described above, that his approach does not necessarily lead to a revolution in constitutional law, as he several times assures his readers.⁴⁶

As noted above, Farber indicates that seven factors should be used in determining rights under the Ninth Amendment: text, related guarantees, traditions, modern consensus, legislation, recent traditions, and international lawmaking.⁴⁷ A more structured approach, related to the four styles of deciding used by current Justices, would first note that these sources can be organized under two broad headings: contemporaneous sources of meaning and subsequent considerations. Contemporaneous sources exist at the time a constitutional provision is ratified. They include the text of the Constitution; the context of that text, including verbal and policy maxims of construction; related provisions in the Constitution or other related documents; the structure of government contemplated by the Constitution (structural arguments of federalism and separation of powers); and the history surrounding the provision's drafting and ratification. Subsequent considerations involve matters that occur after a constitutional provision is ratified. They include the sub-categories of (a) subsequent events, which involve legislative, executive, and social practice under the Constitution, and judicial precedents interpreting the Constitution, and (b) prudential considerations, which involve judicial speculation concerning the consequences of any particular judicial construction, including arguments of justice or sound social policy.

⁴⁶ Farber, *supra* note 1, at 91, 181, 198.

⁴⁷. See *supra* text accompanying note 24.

Each of these sources can be used for relatively specific and limited interpretive tasks, or they can be used to support reasoning on more general principles. Table 1 shows how these various approaches to constitutional interpretation are used by each of the four general perspectives on judicial decisionmaking.⁴⁸

Table 1
Sources of Constitutional Meaning and Styles of Interpretation

<u>Interpretation Style</u>	<u>Main Focus of Interpretation Style</u>	<u>More Specific Interpretive Tasks</u>	<u>General Kinds of Reasoning</u>
<u>Formalism</u>	<u>Contemporaneous Sources</u>		
	Text	Literal or Plain Meaning of Text	Purpose or Spirit of Text
	Context	Verbal Maxims Related Provisions	Policy Maxims Structural Arguments
	History	Specific Historical Evidence Specific Historical Intent General Historical Intent	General Historical Evidence Specific Historical Intent General Historical Intent
	<u>Subsequent Considerations</u>		
<u>Holmesian</u>	Practice	Legislative or Executive Practice	Social Practice
<u>Natural Law</u>	Precedent	Core Holdings of Precedent	Reasoned Elaboration of Law
<u>Instrumentalism</u>	Prudential Considerations	Consequences Evaluated in Light of Text, Context/Structure, And Purpose/History, Mostly Focused on Judicial Restraint	Consequences Evaluated in Light of Practice and Precedent; Background Principles of Justice and/or Social Policy Embedded in the Law; or Not So Embedded

As this Table indicates, a formalist, like Justices Scalia, Thomas, and Alito, will focus on text, context, and historical sources of constitutional interpretation, believing that only sources contemporaneous with ratification of a constitutional provision should be used (in Farber's terms, connections with specific guarantees in the Constitution; and long-standing, specific traditions existing at the time of ratification upholding the right). Under this approach, the Constitution's meaning will be fixed at ratification. For a Holmesian judge, such as Chief Justice Roberts and the late Chief Justice Rehnquist, it is appropriate also to look for the purpose behind a provision and to consider and often defer to subsequent practice (in Farber's terms,

⁴⁸ See generally Kelso & Kelso, *supra* note 41, at 100, 172. A complete discussion of these sources of constitutional interpretation and their use appears at *id.* at 99-172.

decisions by American lawmakers after ratification recognizing the right; and broader or more recent American traditions consistent with the right since ratification). For a natural law judge, like Justice Kennedy or former Justices O'Connor and Powell, interpretation begins with the text, context, history, and subsequent practice. However, beyond these sources used by formalists and Holmesians, great weight is also given to the core holdings of precedent and reasoned elaboration of general principles that can be found in the Constitution or precedents (in Farber's terms, Supreme Court precedent establishing the right or analogous rights; and recent recognition of a right by American judges). Instrumentalist Justices consider all of these sources and, in addition, the predicted consequences of alternative decisions, evaluated in light of prudential or policy considerations (in Farber's terms, contemporary social consensus).

In his list of seven factors, Farber emphasizes that decisions by international lawmakers and judges recognizing a right are also properly considered.⁴⁹ For a natural law judge, like Justice Kennedy, whose general perspective Farber seems to favor, such international decisions should be used by American judges only to the extent they help in understanding some general principle that the framers and ratifiers placed into the Constitution, and should not be viewed from the instrumentalist focus on whether the international decision is simply good public policy. Since many of the framers and ratifiers believed in natural law, many of the individual rights in the Constitution were likely understood to have a universal natural law base.⁵⁰

⁴⁹ Farber, *supra* note 1, at 108.

⁵⁰ See generally Kelso & Kelso, *supra* note 41, at 365-66, citing, *inter alia*, David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539 UCLA L. Rev. 539, 575-83 (2001) (discussing judicial practice from 1789 through the Civil War); Sarah H. Cleveland, *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify the territorial scope of the Constitution, the powers of the national government, delineate structural relationships within the federal system, or individual rights cases).

Perhaps the most relevant impediment to Professor Farber's approach for direct use of the Ninth Amendment by the Court is not the views of formalists, who of course can be expected to oppose this development on grounds that the Ninth Amendment does not literally specify any particular rights, or a Holmesian judge, on grounds the Court should defer to government action unless the unconstitutionality of the law is clear, but the great respect for precedent held by the natural law swing Justice – Justice Kennedy. As Professor Farber indicates, the Supreme Court has never explicitly relied upon the Ninth Amendment as an independent source for recognizing rights. To the extent Professor Farber wishes additional unenumerated fundamental rights to be protected by the Supreme Court, it seems that the Ninth Amendment is more likely to be used, if at all, as “collateral support” for rights developed through expansion of existing substantive due process doctrine (or reinterpretation of the P or I Clause⁵¹).

Under a “collateral support” view, the Ninth Amendment means just what it says, that is, that the enumerated of certain rights in the Constitution should not be construed to deny or disparage others retained by the people. From this perspective, the Ninth Amendment is a reminder of the background natural law theory that individuals have unalienable rights the government is created to protect.⁵² As has been noted, “The Founding generation disagreed about many things, but the existence of natural rights was not one of them. From James Madison to Roger Sherman, from *The Federalist Papers* to the Antifederalist papers, both supporters and opponents of the Constitution repeatedly affirmed their shared belief in natural rights. Virtually

⁵¹ That door was partially opened in *Saenz v. Roe*, 526 U.S. 489 (1999) (citizens of the United States have a right protected by the P or I Clause to go any state they choose and become citizens therein with an equality of rights with every other citizen).

⁵² On this natural law background, see generally David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAfee*, 16 S. Ill. U. L.J. 313 (1992); Randy Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1 (1988); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987).

all commentators agree that the [f]ramers and ratifiers of the Bill of Rights believed in natural rights as a general matter.”⁵³

As Farber indicates, one concern that Madison and others had in drafting the Bill of Rights was that under the maxim of construction, *expressio unius est exclusio alterius* (the expression of one thing implies exclusion of others), the enumeration of certain rights in the Bill of Rights might suggest that the federal government had plenary power over all other matters. Since that view was inconsistent with the intent of the framers and ratifiers that the federal government be a government of limited, delegated power, the Ninth Amendment was an attempt to craft language to prevent federal governmental power from being construed in any broader way. Based on an exhaustive look at the history and precedents of the Ninth Amendment, Professor Kurt Lash has noted:

One of the original purposes of the Ninth Amendment was to prevent the Bill of Rights from being construed to suggest that congressional power extended to all matters except those expressly restricted. As Joseph Story would later write in his *Commentaries on the Constitution*:

[The Ninth Amendment] was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and *é converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.⁵⁴

From this perspective, the Ninth Amendment is a reminder that in interpreting all of the other clauses of the Constitution, including the first eight Amendments and the Civil War

⁵³ Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 Yale L.J. 1073, 1974-75 (1991) (citations omitted).

⁵⁴ Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597, 619 (2005), *citing* Joseph Story, *Commentaries on the Constitution of the United States* § 1898 (1833).

Amendments, there is reason to use a natural law theory of interpretation which supports background natural rights, even if they are not specifically enumerated in constitutional text. Farber's book promotes this result, but it differs from his precise recommendation, since under a "collateral support" view the development of rights will be accomplished primarily under substantive due process analysis, as it is currently done by the Court, and not by direct use of the Ninth Amendment.

IV. Conclusion

Professor Farber has written an interesting and readable book on a clause in the Constitution not discussed much in the constitutional literature, the Ninth Amendment. While provocative in trying to resuscitate the Ninth Amendment as an independent source of fundamental rights that persons may have against both state and federal governments, long-standing Supreme Court precedent suggests that the Court will likely continue to develop the fundamental rights doctrine through the Due Process Clauses of the 5th and 14th Amendments, and not the Ninth Amendment made applicable to the states through the Privileges and Immunities Clause of the 14th Amendment, as Farber advocates. In short, a book developing what fundamental rights might be added to the list of current substantive due process rights through use of the natural law methodology of reasoned elaboration of the law might have greater real-world impact on the Supreme Court than a book trying to resuscitate at this late date in constitutional history the Ninth Amendment as an independent source of fundamental rights.

In addition, no matter which specific clause of the Constitution is used – Ninth Amendment or Due Process – there is still the question of which of Farber's seven factors regarding interpretation a majority of the Supreme Court will adopt in developing a fundamental

rights analysis. Which of those seven factors get used will depend, as indicated above,⁵⁵ on whether the controlling votes on the Supreme Court are held by formalist, Holmesian, natural law, or instrumentalist Justices. It is unlikely in any near future that a majority of the Supreme Court will adopt all seven of Farber's factors, which would reflect an instrumentalist approach to judicial decisionmaking. Despite his praise for Justice Kennedy at many places in the book, that is not likely to be even Justice Kennedy's approach, although it may be close to the views of Justice Souter.⁵⁶

⁵⁵ See *supra* text accompanying notes 48-50.

⁵⁶ See generally Kelso & Kelso, *supra* note 41, at 12, 54-62, 354-404 (discussing the natural law theory of interpretation, and its use by, among others, Chief Justice John Marshall, Justice Story, and, more recently, to various degrees, Justices Powell, O'Connor, Kennedy, and Souter). The instrumentalist leanings of Justice Souter are discussed at *id.* at 400-04. The non-instrumentalist, and occasionally formalist, leanings of Justice Kennedy are discussed at *id.* at 393-94.