THE "FOUNDATIONS" OF ANTI-FOUNDATIONALISM -- OR, TAKING THE NINTH AMENDMENT LIGHTLY: A COMMENT ON FARBER'S BOOK ON THE NINTH AMENDMENT

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The “Foundations” of Anti-Foundationalism – Or, Taking the Ninth Amendment Lightly: A Comment on Farber’s Book on the Ninth Amendment

(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 McAffee’s review of Professor Farber’s book on the amendment raises the question whether, given Farber’s prior rejection of “foundationalism,” it is possible for him to reconcile these two ends. It also suggests that, even if the amendment did grow from the environment that gave us the Declaration of Independence, the history gives reason to doubt that its purpose was to provide for the legal enforcement of unstated moral claims, or natural rights. Indeed, Professor McAffee contends that its purpose was to protect the rights retained residually by the system of limited powers granted the national government under the Constitution. But 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.

Thomas B. McAffee*

Introduction

The Ninth 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 conservative “originalists” and “textualists;”¹ it has, second, provided an historical and textual grounding for a “rights-foundationalist” reading of America’s written

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¹See, e.g., Thomas B. McAffee, The Original Meaning of the Ninth Amendment, 90 COLUM. L. REV. 1215, 1217 (1990) [hereinafter cited as Original Meaning]; Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 CHI.-KENT L. REV. 131, 134-35 (1988). Professor Levinson stated that a strategist in the fight against Judge Bork’s nomination to the Supreme Court stated frankly that the whole point was to use Bork’s own methodology against him. Id. at 138. Cf. DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE RIGHTS MOST AMERICANS DO NOT KNOW THEY HAVE 85 (2007) [hereinafter cited as RIGHTS RETAINED BY THE PEOPLE] (asserting that “most Americans” agree that there are unenumerated rights and that “Bork’s contrary view was one reason why his nomination to the Supreme Court foundered”).
Constitution. So it is at least somewhat novel to have someone who has criticized “originalism” precisely for being a form of foundationalism produce a work based on all the arguments that many take as establishing a “rights-foundationalist” account of the Constitution. On the one hand, writing in the anti-foundationalist vein of the book he co-authored in 2002, Farber has taught us that many of the Constitution’s framers, including James Madison, “changed their views over time,” an insight that yielded the conclusion that “any perusal of the historical record is bound to yield conflicting expressions of intent,” making the findings of history potentially “illuminating,” but almost never “controlling.” On the other hand, 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.”

1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 10, 11 (1991) (describing as “rights-foundationalists” those who contend that “the American constitution 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. McAffee, A Critical Guide to the Ninth Amendment, 69 TEMPLE L. REV. 61, 91-93, 92 (1996) (observing that the “rights-foundationalist account of the Constitution has potentially profound implications for our legal order, as well as for the practice of judicial review”).


4 Id. at 16. Originalists are thus characterized as scholars who, rather naively, “look at history and find clear directions.” Id. at 13. Considering that Farber identifies himself as a nonoriginalist, however, an implication of his own position is that we are not bound even by the framers’ clear directions.

5 FARBER, RETAINED BY THE PEOPLE, supra note 1, at 9. So when the question is whether a right must be secured by the Constitution’s text, Farber takes the view 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 of the framers’ purposes, we are told, was “to protect what constitutional lawyers call unenumerated rights—
The Ninth Amendment, we are told, “was designed to forestall the sort of narrow interpretation of the Bill of Rights that Bork engages in.” 6

What is critical, we learn elsewhere, 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.” 7 If the Constitution is designed to secure and protect all of our valid moral claims – both those “enumerated” in the Bill of Rights, as well as “unenumerated” rights – it quickly becomes difficult to conceive of why Farber is not in fact advocating rights-foundationalism. So that is a subject to which we must return.

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.” 8 The result has been “conceptual confusion and vulnerability to conservative critiques;” 9 after all, we are told,

6 FARBER, RETAINED BY THE PEOPLE, supra note 1, at 18. Apparently the Federalists believed “that a bill of rights might be not only ineffective but positively harmful, if it lead 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.

7 Id. at ix.

8 Id. at 2.

9 Id. Perhaps unsurprisingly, “conservatives” regularly serve as the “bogeymen” of Farber’s work, such that the “vulnerability to conservative critiques” (emphasis added) becomes a kind of shibboleth. See also id. at 9 (in denying unenumerated rights, “conservatives are doing precisely what the Framers feared: denying or disparaging the rights retained by the people”); id. at 11.
the due process clause had “the wrong language and the wrong historical background,”
considering that “text and history have become crucial to constitutional argument.”

I. The Ninth Amendment and Rights Foundationalism

A. The Assumptions of Rights Foundationalism and the Ninth Amendment

(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 18 (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 (“conservatives
may consider all of this just ‘pie in the sky,’ suitable for political debate but lacking in legal
significance;” but 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
inapparently “genuinely believe in small government”). “Conservatives” of the ilk of Justice
Harlan, we learn, are satisfactory because they are from a “different mold” from today’s
conservatives; Farber simply omits that Justice Black rejected modern fundamental rights
jurisprudence, resting on unenumerated fundamental rights, though it is clear that he was one of
the most “liberal” and “activist” members of the Warren Court.

10Id. at 3. It certainly is true that substantive due process has been subjected to withering
critiques, but the most articulate critics have been Charles Black, John Hart Ely, and Akhil Amar
— not to mention Professor Farber himself. This is hardly an all-star cast of leading
“conservatives” in interpreting the Constitution.

Professor Farber also fails to note that some prominent legal theorists and historians have
endorsed the fundamental rights construction of the Due Process Clause. See, e.g., RONALD
DWORKIN, 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”); Robert C.
Post, Foreward: 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”); James W. Ely, Jr., The Oxymoron Reconsidered: Myth
(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
and contending that, on his reading, “the only authoritative text (‘law’) for any legitimate
decision, even Roe v. Wade, is the written document itself”).
The “rights foundationalist” reading of the Ninth Amendment grows from the claim that it is properly read as *in pari materia* with the Declaration of Independence and section 1 of the Virginia Bill of Rights.\(^{11}\) Indeed, the most rigorous proponent of this reading of the Ninth Amendment, Professor Black, contended that the Declaration of Independence was itself fundamental law binding on the entire country, and, to wit, therefore the Ninth Amendment itself applied both to limit the powers of the nation as well as the powers of each and every state.\(^{12}\) The connection to “inalienable” and “inherent” rights clauses of the early state constitutions supplies the basic view defended in other books arguing for a “fundamental rights” construction of the Ninth Amendment.\(^{13}\) Following their lead, Professor Farber underscores the

\(^{11}\) At least this is the suggestion offered by Professor Charles Black. See 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 ninth amendment, operating *in pari materia* with that amendment, and thus as an aid to the interpretation of the latter”). *But see* Thomas B. McAffee, *Reed Dickerson’s Originalism—What it Contributes to Contemporary Constitutional Debate*, 16 S. I. 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. Professor Black’s insistence that “clear evidence” in support of a conflicting reading had never been provided, Black, *supra*, at 29, added mainly an ironic twist to his overall argument, considering that the article in which it appeared was published by a New York university’s law review in 1991, a year after my non-cited article was published across town. *Cf.* McAffee, *Original Meaning*, *supra* note 1.

\(^{12}\) Despite his own enthusiasm for the Declaration of Independence, and the perceived connection between it and the thinking of Republicans during Reconstruction, *see* Farber, *Retained by the People*, *supra* note 1, at 56-59, 61-70, Professor Farber clearly adopts the view, contra Professor Black, that “the 1791 Bill of Rights only limits the power of the federal government to violate rights.” *Id.* at 62. For some reason, he apparently felt 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 – read the Constitution to secure rights against the states. *E.g.*, *id.* at 66-67.

Pennsylvania Declaration of Rights’ proclamation that “all men are born equally free and independent, and have certain natural, inherent and inalienable rights.” In 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.” One of their 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.”

The consequence is that Farber claims that the Goldberg concurrence in Griswold “demonstrated” that “the language and history of the Ninth Amendment show that the Framers of the Constitution believed in additional fundamental rights, protected from government violation, alongside those listed in the Bill of Rights.” In fact, the Ninth Amendment’s reference to the “others” that are “retained by the people” is simply a way of referring to “innate human rights.”

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15 Id. at ix-x.

16 Id. at ix-x.

17 FARBER, RETAINED BY THE PEOPLE, supra note 1, 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
It is thus Farber’s purpose “to revive our understanding of the American tradition of reverence for fundamental rights.” Unenumerated fundamental rights “were based in ‘natural law’ and the ‘law of nations.’” If the inclination of some to completely deny the existence of these innate human rights is a source of frustration for 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.

As a generalization, their overall work leads Farber to conclude that conservatives “refuse to look seriously at what the Framers believed, how they saw the world.”

B. The Federal Bill of Rights and the Idea of Inherent Rights

If we begin with Farber’s own assumption, linking the Ninth Amendment to the Virginia Declaration’s “inherent rights” clause, a serious legal historian would have profound doubts.

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18 FARBER, RETAINED BY THE PEOPLE, supra note 1, at 4.

19 *Id.* at 15. Farber also contends that “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.*

20 *Id.* at 4.

21 *Id.* at 4-5. Farber is especially critical of Justice Scalia combining an acknowledgment that a claimed right may be “retained” by the Ninth Amendment, yet in effect have “no legal standing.” *Id.* at 5. *But see* Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST LAW REVIEW 747, 792-93 (2001) [hereinafter cited as *Inalienable Rights*]. For additional understanding, see *infra* notes 52-60 and accompanying text.

22 *Id.* at 11.
about whether its language was designed to make natural rights legally enforceable. Perhaps the leading modern scholar on understanding state constitutions, Professor Tarr, referred specifically to § 1 of the Virginia Declaration of Rights in describing the purposes of the framers of 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.24

Elsewhere we learn that “the state declarations, then, presented ‘moral admonitions’ that were not treated as binding legal obligations.”25 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, “is 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.”26 Modern Americans


25LESLIE FRIEDMAN GOLSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 74 (1991). See also GEORGE D. BRADEN & RUBIN G. COHN, THE ILLINOIS CONSTITUTION 8 (1969) (noting that a state constitution’s inalienable rights clause “is not generally considered, of itself, an operative constitutional limitation upon the exercise of governmental powers”); 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”).

26ALEXANDER HAMILTON, THE FEDERALIST NO. 84, at 579 (JACOB COOKE ED., 1961). For a useful treatment, see Nathan N. Frost, Rachel Beth Klein-Levine, & Thomas B. McAffee, Courts Over
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—to amend the Constitution to more effectively serve their needs, including protecting their rights. From this perspective, ultimately “the proper guardians of rights are the people—whose sovereignty constitutes the most basic right of all.” 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.

Constitutions Revisited: Unwritten Constitutionalism in the States, 2004 Utah Law Review, 333, 361, 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, in 2 The Documentary History of the Ratification of the Constitution 383-84 (Merrill Jensen ed., 1976) [hereinafter cited as 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”). See id. at 339, 348-49, 362.

27 Virginia Declaration of Rights § 3, reprinted in, 7 State Constitutions, supra note 12, at 3812, 3813 (providing that “a majority hath in 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”).

28 George W. Carey, The Federalist: Design for a Constitutional Republic 153 (1989). Accord, Jeremy Waldron, Law and Disagreement 244 (1999) (if the question framed is, “who shall decide what rights we have,” his answer is, “the 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”).

29 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 21, at 769-71. At one point, Farber himself makes a point of underscoring that the Ninth Amendment “is an explanation, not a command.” Farber, Retained by the People, supra note 1, at 9. Even if it were a command, it does not even purport to limit the scope of federal powers.
It is noteworthy that, whatever the originally intended meaning of the Ninth Amendment, historically at least twenty-six states adopted state constitutional provisions that significantly tracked the language of the federal Ninth Amendment. \(^{30}\) Even though some have attempted to justify deriving unenumerated fundamental rights from such provisions, \(^{31}\) at least as significant is that when the United States Supreme Court decided *Griswold v. Connecticut*, not a single state in the union was holding that such provisions secured rights beyond those specified in constitutional text. \(^{32}\) 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.” \(^{33}\)

A number of modern thinkers believe that proponents of using seemingly open-ended rights provisions may well be motivated by high ideals, but are over-estimating the capacities, and inclinations, of real-world judges. \(^{34}\) Such proponents often assume that the Justices could


\(^{32}\) McAffee, *Inalienable Rights*, supra note 21, 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”).

\(^{33}\) Id. at 779.

\(^{34}\) For exemplary efforts at articulating such concerns, see STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON (1998); Michael W. McConnell, *The Importance of Humility in*
ensure that all our lives will be protected by natural law. But as a noted legal theorist 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 the place of the legislature.”35 The very purpose of having a written 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.”36 Many agree that 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.”37


35 Philip Soper, Some Natural Confusions About Natural Law, 90 Mich. L. Rev. 2393, 2415 (1992). Given the freedom that 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 31, at 403. He concludes:

If the ninth amendment 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 ninth amendment.

Id.

36 Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 6 (1999). Professor Alexander has observed that there are three reasons to “advert to a text – to provide certainty, separate powers, and monitor decisionmakers.” Alexander, supra note 31, at 401. 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.” Id.

37 McAffee, Inalienable Rights, supra note 21, at 794.
II.
The Ninth Amendment and Enumerated Powers

In defending the proposed Constitution’s omission of a bill of rights, James Madison in The Federalist, posed the question: “Is a Bill of Rights essential to liberty?” His response was that the “Confederation had no Bill of Rights.” This analogy to America’s first constitution, The Articles of Confederation, reflected the belief of the Federalist defenders of the proposed Constitution, that the justification for the omission of a bill of rights was a critical difference between the proposed national government and the governments of the states. Prior to the Pennsylvania Ratifying Convention, one of the Constitution’s leading defenders, James Wilson, attempted to explain this omission, and to justify it:

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] every thing 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.

Wilson stated a general understanding of the power granted to the legislatures by the state constitutions. When the Constitution was briefly considered by Congress prior to its transmittal to the states, Nathaniel Gorham of Massachusetts explained that “a bill of rights in state governments was intended to retain certain power [in the people] as the legislatures had

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38 The Federalist No. 38, supra note 23, at 247 (James Madison).

39 James Wilson’s Speech in the State House Yard (Oct. 6, 1787), in 2 RATIFICATION OF THE CONSTITUTION, supra note 26, at 388. So apparently, when it came to the state constitution Declarations of Rights, Wilson fully embraced “the sort of narrow interpretation of the Bill of Rights that Bork engages in.” FARBER, RETAINED BY THE PEOPLE, supra note 1, at 18.
unlimited powers.” The idea that the legislatures of the states held plenary powers not only was the dominant theme of the ratification debates, it has remained almost standard hornbook law throughout American history – though a rule of law that has, often enough, been honored in the breach.

The Federalist proponents of the Constitution not only stressed the distinction between governments of “general” power versus governments of “enumerated” power, it was this very distinction that explains the feared “danger” of the prospect of a bill of rights being added to the Constitution. The Federalist fear was that adding a bill of rights to the Constitution might actually transform the Congress from a legislative body of enumerated powers to one of general powers, subject only to the exceptions contained within the bill of rights. Considering that a bill of rights would “contain various exceptions to powers which are not granted,” this “would afford a colourable pretext to claim more than were granted.” Thus the Federalists argued that “an

40 1 Ratification of the Constitution, supra note 26, at 335 (Sept. 27, 1787).


42 See generally Frost, Klein-Levine, McAfee, supra note 26.

43 Alexander Hamilton, The Federalist No. 84, supra note 23, at 434, 437. Hamilton’s argument was viewed historically as the basis for the Ninth Amendment – by among such notable figures in American constitutional history, for example, as Joseph Story and Thomas Cooley. McAfee, Original Meaning, supra note 1, at 1312-14. Farber acknowledges that the argument produced the Virginia proposal that eventually became the Ninth Amendment, but contends that the omission of “enlarged powers” language from the final version of the amendment proposed by Congress reflected a dramatic change in emphasis. Farber, Retained by the People, supra note 1, at 204-05. But see McAfee, Original Meaning, supra note 1, at 1277-1305 (portion entitled “The Drafting and Ratification Process: Fulfillment or Revision?”). Compare Farber, Retained by the People, supra note 1, at 37 (quoting Story that the Ninth was “to prevent any ‘perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others,’ a corollary of which was
imperfect enumeration would throw all implied power into the scale of the government; and the
rights of the people would be rendered incomplete." This unique reference to the nature of the
grant of federal powers is what explains James Wilson’s assertion “that a bill of rights would
have been improperly annexed to the federal plan, and for this plain reason, that it would imply
that whatever is not expressed was given [as in the state constitutions], which is not the principle
of the proposed Constitution.” Having fully embraced this argument, Madison wrote to
Jefferson that he could support a bill of rights “provided it be so framed as not to imply powers
not meant to be included in the enumeration.”

That the premises underlying these arguments were fundamentally positivist in their
orientation is illustrated powerfully by the example James Wilson used to make the point. He
contended that if Congress had been granted a power “to regulate literary publications,” it would

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44 Statement by James Wilson at the Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2
RATIFICATION OF THE CONSTITUTION, supra note 26, at 388. Thus even though a free press
guarantee – one of the rights that had been proposed for an amendment – would be “merely
nugatory,” since Congress had not been granted any power to regulate the press, such a
guarantee could actually be dangerous because it could be construed “to imply that some degree
of power was given, since we undertook to define its extent.” Id. at 168.

45 Id. at 391 (emphasis added).

46 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 BERNARD SCHWARTZ,
THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 614, 615 (1971). For additional evidence that
Madison viewed the danger of a bill of rights as the risk it would create the inference that this
was not a government of enumerated powers, see MCAFEE, INHERENT RIGHTS, supra note 23, at
142-47.
have been essential to “stipulate that the liberty of the press should be preserved inviolate.”

Given that virtually all the framers, including James Wilson, would have seen freedom of the press as one of the inalienable rights to which they were entitled, it is clear that Wilson was not relying on a general implication that inalienable rights are in fact constitutional rights. The acknowledged necessity of a bill of rights if rights were to be secured in the states – an implication that followed from the presumption that the states held plenary powers – was the starting point for analysis by Wilson, Madison, and the other Federalist proponents of the Constitution. The plenary powers of the state legislatures – 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 – remains unmentioned in the two hundred pages of Professor Farber’s book on the Ninth Amendment.

The implication of this analysis of the history of the ratification debates is that both the Federalist proponents of the Constitution, and the Constitution’s Antifederalist opponents, agreed that the only rights which 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. The debate between these parties concerned whether the people’s rights were adequately secured by the 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. The purpose of the Ninth Amendment, then, was 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.

472 RATIFICATION OF THE CONSTITUTION, supra note 26, at 168. For a demonstration that Wilson’s arguments were that a bill of rights would threaten the rights-protective scheme of enumerated powers, see MCAFEE, INHERENT RIGHTS, supra note 23, at 94, 137, 140-42.
Farber observes that James Iredell in 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 enumerate every one.”

Farber thus concludes: “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.” But 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

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48 Farber, Retained by the People, supra note 1, at 34, citing, 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 167 (July 29, 1788) [hereinafter cited as Elliot’s Debates]. In the same speech Iredell argued that it “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.

49 Farber, Retained by the People, supra note 1, 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 13, 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 1, at 1268 n. 210 (observing that Richard’s “lengthy quotation ends at the point where Iredell focused on the uniqueness of the federal Constitution and acknowledged that a bill of rights would be both ‘necessary’ and ‘proper’ if ‘we had formed a general legislature’”). See infra note 50 and accompanying text.
have given, a bill of rights is not only unnecessary, but would be absurd and dangerous.\textsuperscript{50}

The Federalist fear was uniformly stated that a bill of rights could be understood as acknowledging that the legislature was empowered to act generally, so long as it did not violate the provisions of the bill of rights; the insertion of the bill itself might be read, in other words, as “converting” the federal government to one of general powers. For example, Samuel Parsons contended that inserting a bill of rights would carry the implication “that nothing more was left with the people than the rights defined and secured in such bill of rights.”\textsuperscript{51}

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 “inkblot” following the words “The enumeration . . . of certain rights, shall not be construed to . . . .” — and the inkblot prevents an “interpretation” of particular individual rights.\textsuperscript{52} The strong appeal of the “inkblot” analogy for 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; thus Judge Bork

\textsuperscript{50}Elliott’s Debates, supra note 48, at 149 (July 28, 1788). 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 (July 28, 1788) (emphasis added).

\textsuperscript{51}Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788) in 3 Ratification of the Constitution, supra note 26, at 569.

\textsuperscript{52}Farber, Retained by the People, supra note 1, at 4 (concluding that the comparison to an “inkblot” meant, for Bork, that “unenumerated rights simply do not exist”); id. at 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, supra note 12, at 79, 242, 253-55, 325; Randy E. Barnett, Ninth Amendment (Update) in 4 Encyclopedia of the American Constitution 1813, 1813 (Leonard W. Levy & Kenneth L. Karst eds., 2000); Black, A New Birth of Freedom, supra note 13, at 35; Sotirious Barber, The Ninth Amendment: Inkblot or Another Hard Nut to Crack?, 64 Chi.-Kent L. Rev. 67 (1988).
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 aren’t expressly stated in the Constitution.

But 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,” it is critical to appreciate that 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. In Ninth Amendment analysis, the crucial question is 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.

Modern thinkers seldom even note the parallels between the text of the Ninth Amendment and Article II of the Articles of Confederation. Article II stated that each state “retains every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States.” When one stops to realize that “the people,” as the popular

53 See supra notes 22-25 and accompanying text.

54 The difference between over-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; 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.


56 1 Ratification of the Constitution, supra note 26, at 86 (emphasis added).
sovereign, represents the functional equivalent of the states under the Articles of Confederation – in 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 – it becomes clearer how it was that 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.” 57 As Professor 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. 58

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.” 59 Similarly, in private correspondence, Richard Parker wrote to 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.” 60

57 Letter from George Washington to Lafayette, in 29 THE WRITINGS OF GEORGE WASHINGTON 475, 478 (John 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 26, at 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 SCHWARTZ, supra note 44, at 1091 (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 38 and accompanying text.


59 4 ELLIOT’S DEBATES, supra note 48, at 141 (July 28, 1788) (emphasis added).

60 Letter from Richard Parker to Richard Henry Lee (July 6, 1789), reprinted in, CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 260 (HELEN
When he presented a proposed bill of rights to Congress, Madison articulated the sound reasons that had convinced most participants in the ratification debates of the need for a federal Bill of Rights. Madison struck in both directions: on the one hand, he confirmed that the national government’s enumerated and limited powers probably rendered some proposed rights guarantees unnecessary; on the other hand, he acknowledged that the Constitution’s proponents had perhaps overstated the case for omitting a bill of rights, especially in light of the Necessary and Proper Clause. In that speech, his comments included these:

The general government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes for which it was supposed at the framing of their constitutions that state governments had in view. If there was reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government.

In a recent book on the history of the Ninth and Tenth Amendments, the authors confirm that both amendments were designed to keep the national government as limited to those powers enumerated in the Constitution:

Madison’s analysis strikes a fair balance between the Federalists’ somewhat inflated claims about the rights-protective capacity of enumerated powers and the overblown anti-Federalist claims that the Constitution portended an unlimited national government. For at least a century, the federal government under the

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61 Thus Madison recalled that Federalist proponents of the Constitution had contended that “the Constitution is a bill of powers, the great residuum being the rights of the people,” insisting that “a bill of rights cannot be necessary as if the residuum was thrown into the hands of the government.” James Madison, June 8, 1789, Debates in House of Representatives reprinted in, Creating the Bill of Rights, supra note 60, at 82.

62 Id. at 82-83. Compare Farber, Retained by the People, supra note 1, at 40-41.
Constitution remained a government directed toward a small number of national concerns, suggesting that the Federalist defense of the omission of a bill of rights was not wholly implausible. At the same time, it seems difficult to deny the force of the anti-Federalist arguments that if it was essential to secure the right to jury trial in criminal cases, it was equally essential to secure the other procedural rights traditionally associated with due process of law. The Federalists never managed to provide an effective response to such arguments. 

III. 
Foundationalism Versus Pragmatism

A. Farber’s Pragmatism

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, Farber contends that an argument “that surfaced repeatedly was that it would be impossible to enumerate all the rights and that leaving some out might be taken as a negative signal.” He assures us that the “Ninth Amendment was a direct response to this concern.” So 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. So he rejects completely any view that unenumerated rights “lack any legal weight” or were “entrusted to the political process,” and urges us to grasp “that basic premise of the Founding Fathers: human rights come first, and legal regimes come second.” So at first blush, it appears that Farber is committed to rights foundationalism.

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63 MCAFFEE, BYBEE, & BRYANT, supra note 16, at 48.
64 FARBER, RETAINED BY THE PEOPLE, supra note 1, at 29-30.
65 Id. at 30.
66 Id. at 4.
67 Id. at 4-5.
68 Id. at 6.
At the same time, Farber implicitly 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.”\(^{69}\) In general, the tone and texture of Farber’s treatment appears to track with that of his former colleague and co-author, Professor 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.”\(^{70}\) A straightforward reader of the work of Farber and Sherry would fully expect their 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.\(^{71}\)

But a “straightfoward” 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-case theory into an upper-case Grand Theory,”\(^{72}\) and

\(^{69}\)Id. at 8.


\(^{71}\)There are some who have made just such an attempt. See, e.g., Barnett, supra note 13. But Farber tells us that Barnett, a libertarian, confuses “rights, which come in discrete packages, and liberty, which is a vaguer concept of unrestricted action.” Farber, Retained by The People, supra note 1, at 209. But a reader of Farber’s book might come away unconvinced that he even believes in natural rights.

hence would be altogether too foundationalist and insufficiently pragmatic.\textsuperscript{73} 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.”\textsuperscript{74} One should not hope to find an exposition of how to go about finding “innate human rights;” they don’t have much to do with it. Instead, to 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.”\textsuperscript{75}

The attempt to do more, by resorting to “sweeping ethical precepts,” at the cost “of a close reading of legal texts,” will yield a result that sounds “more like a moralist than a lawyer.”\textsuperscript{76} 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;”\textsuperscript{77} 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.”\textsuperscript{78} Such moralists’ view are “agenda-drive rather than grounded in constitutional

\textsuperscript{73}For a sense of how one might go about formulating a “pragmatic” approach to judicial review, see Suzanna Sherry, Judges of Character, 38 Wake Forest L. Rev. 793 (2003); Daniel A. Farber, Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century, 1995 U. Ill. L. Rev. 163; Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331 (1988).

\textsuperscript{74}Farber, Retained by the People, supra note 1, at 14.

\textsuperscript{75}\textit{Id.} at 16.

\textsuperscript{76}Farber & Sherry, Constitutional Foundations, supra note 3, at 122.

\textsuperscript{77}\textit{Id.} at 133. A reader of 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.”

\textsuperscript{78}\textit{Id.} at 134.
history, text, or precedent.” 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.”

B. Alternatives?

One might contrast Professor Farber’s advocacy of reliance on the Ninth Amendment with Professor Conkle’s recent article setting forth three theories of substantive due process. On one hand, for Conkle there is a lack of evidence to establish that substantive due process was “embraced by the original, objective public meaning of the clause,” with the implication that its values emerge “from a process of nonoriginalist decisionmaking.” The history does not clearly establish judicial authority to establish a fundamental rights constitutional jurisprudence. And the Court should always remember that Supreme Court justices “are neither trained as political philosophers nor selected on that basis,” suggesting that they should avoid an “extravagant conception of the judicial role, one that takes the Court well beyond the customary limits of judging.”

Consequently, Conkle recommends that, rather than embracing the narrowest theory of substantive due process, based exclusively on “historical tradition,” or the most expansive theory, based on “reasoned judgment,” the Court should adopt the theory that looks to “Evolving National Values.” This third theory, he contends, would enable courts “to operate

79 Id. at 137.
81 Id. at 77.
82 Id. at 114.
83 Id. at 124-45.
in relative harmony with the principle of majoritarian self-government,” even as “it constrains the Court’s discretion in a manner that honors the criterion of judicial objectivity and competence.”

One of the most persuasive criticisms of the activism of the Supreme Court during the first third of the twentieth century was the observation that the Court seemed overconfident of its ability to discern universal values and therefore to determine the content of unenumerated “inalienable” rights. Conkle contends that “[w]hen societal thinking changes to the point of creating a national consensus, no less than when a national consensus is longstanding, there is reason to believe that the liberty embraced by that consensus is worthy of recognition as a matter of political morality—perhaps not universally, but at least in the contemporary United States.”

It is difficult to perceive a huge difference in the actual content of the fundamental rights jurisprudence advocated by Professors Conkle and Farber. The main advantage, if it be one, of Conkle’s approach, is that it lays no claim at all to capturing what the Constitution’s founders thought they were doing in establishing the Constitution. Professor Farber might offer the complaint that, at most, Professor Conkle has managed to “out-pragmatize” him in setting forth how to continue the fundamental rights constitutional tradition. And Professor Conkle would undoubtedly contend for little more than more congruity with our constitutional development, and perhaps would argue that his approach displays more candor about the Court’s role. It is not

84 Id. at 140.


86 Conkle, supra note 79, at 140.
clear that either scholar can offer much to reassure those who are expecting one to justify judicial review by showing that he or she advocates following Court-independent constitutional "law."  