

## ORIGINALISM AS JUJITSU

**RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE.** By Daniel A. Farber.<sup>1</sup> New York: Basic Books, 2007. Pp. xiv + 236. \$26.95.

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### I. INTRODUCTION

*Jujitsu:*

*The art of using an opponents’ energy against them*

The Ninth Amendment<sup>3</sup> presents an irresistible mystery. It speaks of “other rights” retained by the people and it prohibits interpretations which “deny or disparage” those rights. The Amendment, however, tells us nothing about what these rights are or how they can be enforced. On the one hand, this makes the Ninth rather difficult to apply. On the other hand, the lack of definitional clarity also makes the Ninth Amendment something of a desideratum for those seeking expanded judicial protection of previously unrecognized individual rights. Accordingly, the Ninth Amendment has been cited in support of everything from Dial-a-Porn<sup>4</sup> to freedom from second hand smoke.<sup>5</sup>

The Supreme Court has generally shied away from discussing, much less relying upon, the Ninth Amendment. It has been left to legal academics to try and convince judges that the

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3. “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.

4. PAUL R. ABRAMSON, STEVEN D. PINKERTON & MARK HUPPIN, *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* (2003).

5. *See Gasper v. La. Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976).

Amendment can be explained and applied in a principled manner. To date, the effort has been no more than sporadically successful. The Supreme Court, for example, has generally ignored the Ninth Amendment the last quarter century.<sup>6</sup> Judicial enforcement of unenumerated rights, however, has continued unabated in one form or another ever since the modern Supreme Court initiated its privacy jurisprudence in *Griswold v. Connecticut*.<sup>7</sup> The right to privacy, for example, has expanded from protecting the right to contraception, to guaranteeing the right to abortion<sup>8</sup> and, most recently, guarding the right to sexual autonomy in *Lawrence v. Texas*.<sup>9</sup> Although Justice Kennedy's lead opinion in *Lawrence* did not expressly declare that sexual autonomy was a fundamental right, he nevertheless couched his opinion in language traditionally associated with the Court's heightened scrutiny for freedoms which should be beyond the reach of political majorities.<sup>10</sup> In one of the more controversial aspects of his opinion, Justice Kennedy looked to international law to support his conclusion that laws imposing particular burdens on homosexuals were constitutionally suspect.<sup>11</sup> Kennedy's reliance on foreign legal sources ignited a firestorm of criticism from the right and an on-going debate regarding the legitimacy of relying on foreign law in interpreting the American Constitution.<sup>12</sup>

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6. The last Supreme Court opinion (in the majority) to invoke the Ninth Amendment as an enforceable provision was the plurality opinion by Justice Burger in *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 579 (1980). The plurality in *Casey* came close, but ultimately affirmed the right to obtain an abortion on the basis of *stare decisis*. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (plurality opinion). Cf. *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J. dissenting) (describing parental rights as parts of the “other rights” referred to in the Ninth Amendment but claiming the clause is not judicially enforceable).

7. 381 U.S. 479 (1965).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. 539 U.S. 558 (2003).

10. See, e.g., *Lawrence*, 539 U.S. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” [citing *Casey*]).

11. *Lawrence*, 539 U.S. at 576–77 (citing decisions by the European Court of Human Rights and amicus briefs discussing international protection of homosexuality).

12. For the political response to judicial use of foreign sources, see American Justice for Americans Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) (forbidding federal courts from interpreting the Constitution by employing contemporary foreign or international legal authorities not relied upon by the Framers); Constitution Restoration Act of 2004, S. 2323, 108th Cong. § 201 (2004) (“In interpreting and applying the Constitution . . . a court . . . may not rely upon any . . . law . . . of any foreign state or international organization or agency, other than English constitutional and common law.”); H.R. Res. 568, 108th Cong. (2004) (“[J]udicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pro-

Enter Daniel Farber. In his new book, *Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*, Farber claims that conservatives are wrong to criticize either the result or the reasoning in *Lawrence*. According to Farber, the Founders themselves framed the Ninth Amendment with the understanding that courts would look beyond the borders of the United States in determining the nature of the people's retained fundamental rights. Although not an originalist himself (Farber has criticized the approach in prior works<sup>13</sup>), Farber uses originalism in order to illustrate what he believes is the hypocritical refusal of conservatives to apply their purported commitment to text and history when it comes to the Ninth Amendment. As Farber exclaims, if conservatives do not like his call to consider the norms of international law, don't blame him, "blame the Framers!" (p. 90).

Using originalism against (conservative) originalists is nothing new.<sup>14</sup> This kind of argumentative jujitsu, however, is a risky endeavor. Non-practitioners who use originalist methodology may not be familiar with the most sophisticated (and defensible) forms of originalism. But even if perfectly applied, originalism is a dangerous choice for a political partisan.<sup>15</sup> A historical record which supports your preferred outcome today may well expand in a manner that undermines your argument tomorrow. Worse, having yourself validated the use of history in constitutional interpretation, the inevitable counter-move will be all the more effective.

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nouncements of foreign institutions unless such foreign judgments, laws, or pronouncements . . . inform an understanding of the original meaning of the laws of the United States.")

13. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

14. Examples abound, from Bruce Ackerman's series, *WE THE PEOPLE: FOUNDATIONS* (1993), *WE THE PEOPLE: TRANSFORMATIONS* (2000), to Jack Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007).

15. Farber's book has rather obvious partisan goals. From the opening pages of his book, and throughout the work, Farber makes clear that "conservatives" are the particular target of his analysis. Just a few examples: The Ninth Amendment is "reviled by some—especially on the conservative end of the spectrum" (p. 1). There is a "conservative flight from the ninth amendment" (p. 3). "It is conservatives who should fear and deny the Ninth—and many do" (p. 3). "For all their talk about fidelity to the constitution, however, [conservatives] prefer to ignore inconvenient parts of it" (p. 3). "Since many conservatives do not want to hear its message, they pretend it does not exist" (p. 4). The usual conservative suspects, Justice Antonin Scalia and Judge Robert Bork are singled out as among the worst offenders when it comes to misconstruing the Ninth Amendment (p. 5).

Also in the category of “be careful what you wish for,” Farber’s insists that the Ninth Amendment should be read in light of the Founders’ embrace of the “law of nations” and the writing of early internationalists like Emmerich de Vattel (pp. 6–9). Here, Farber is more correct than he knows. Members of the Founding generation *did* rely on Vattel in their understanding of the Ninth Amendment, but their use of the law of nations points in the opposite direction of what Farber proposes. Internationalists like Vattel were particularly concerned about preserving the retained rights of sovereign nations. A sovereign might need to delegate away some of its sovereign prerogatives (in a treaty, for example), but such delegations were to be strictly construed, with the sovereign retaining all rights not clearly delegated away. The Founders shared this understanding of the retained rights of sovereignty and insisted that the law of nations called for a narrow construction of delegated federal power.<sup>16</sup> In the first constitutional treatise, St. George Tucker expressly read the Ninth and Tenth Amendments in light of Vattel’s law of nations rule regarding the strict construction of delegated power. International law thus informed the Founders’ original understanding of the Ninth Amendment as limiting federal power to intrude upon powers and rights left to sovereign control of the people in the states. This is the *opposite* of Farber’s assumption that the original understanding of the Ninth Amendment supports federal imposition of unenumerated human rights on dissenting state majorities.

After briefly sketching Farber’s approach to the historical Ninth Amendment, I will consider Farber’s work in the context of contemporary debates regarding originalism and the Ninth Amendment. Moving to particular historical issues, I then analyze Farber’s claims in light of a newly expanded historical record.

## II. THE BOOK

Farber divides his book into roughly two halves. The first half explores the history of the Ninth Amendment. The second presents Farber’s theory of judicial protection of individual rights and the methods by which courts can enforce these rights without reproducing the sin of *Lochner*, or imposing subjective judicial preferences on the rest of the country.

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16. See *infra* note 52 and accompanying text.

With the exception of his discussion of international human rights, Farber's story of the Ninth Amendment tracks what until recently has been a rough scholarly consensus regarding the Ninth since *Griswold v. Connecticut*.<sup>17</sup> According to this traditional view, Federalists like James Wilson (in his famous State House Speech<sup>18</sup>) and James Madison insisted that adding a Bill of Rights might be understood to imply that all non-enumerated rights had been "assigned" into the hands of the national government.<sup>19</sup> Although eventually pressed into adopting a Bill of Rights, Madison proposed the Ninth Amendment in order to prevent any erroneous assumptions about the existence of "other rights" beyond those listed in the Bill.<sup>20</sup> According to Farber, these "other rights" were fundamental natural rights "embedded in the law of nations" (pp. 24–25). Although the Ninth Amendment originally applied against the federal government, the same set of individual natural rights apply against the states by way of the Fourteenth Amendment's Privileges or Immunities Clause (p. 16).

Farber devotes the second half of his book to explaining how the historical understanding of the Ninth Amendment can be put into principled operation by the courts. Abandoning the originalist methodology of the first half, Farber advocates a "pragmatic" approach to judicial review and sets out a number of factors that courts can follow in deciding whether to recognize a new fundamental right (p. 108). Applying his theory to a num-

17. 381 U.S. 479 (1965).

18. See James Wilson, *State House Speech* (Oct. 6, 1787), in 1 THE FOUNDERS' CONSTITUTION 449 (Philip B. Kurland & Ralph Lerner eds., 1987).

19. James Madison, *Speech in Congress Proposing Constitutional Amendments* (June 8, 1789), in JAMES MADISON: WRITINGS 448–49 (Jack Rakove ed., 1999) [hereinafter WRITINGS]. As James Iredell declared in the North Carolina ratifying convention:

[I]t would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; 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. Let anyone make what collection or enumeration of rights he pleases. I will immediately mention twenty or thirty more rights not contained in it.

*Remarks of James Iredell in the North Carolina Ratifying Convention* (July 29, 1788), in 4 THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 167 (Jonathan Elliot ed., 2d ed., J.B. Lippincott Co. 1941) (1836) [hereinafter THE DEBATE]. For a general discussion of these arguments by Wilson, Madison, and Iredell, see KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 14, n.4 (2009).

20. James Madison, *Speech on Proposed Constitutional Amendments* (1789), in WRITINGS *supra* note 19, at 448–49.

ber of contemporary controversies, Farber concludes that much of the modern Supreme Court's substantive due process jurisprudence is justified, though he would expand the list of fundamental rights to include a positive right to education and government protection from private harm. Farber closes his book with a short "Appendix" that briefly presents alternate views of the Ninth Amendment and explains why they fail to do full justice to the original understanding of the text (p. 201).

Throughout the book, Farber employs a straight-forward and easily accessible narrative that is unencumbered by copious footnotes or detailed analysis of historical documents. Indeed, Farber expressly declines to engage the historical debate, insisting instead that he has presented "the best interpretation of history" (p. 5). This approach has the benefit of making the work far more accessible to a lay audience unfamiliar with this particular area of law (or indeed of constitutional law in general). Had Faber attempted to simply summarize a commonly held view of the Ninth Amendment, his light approach might have been appropriate. But Farber has a more ambitious agenda. He seeks to both discredit what he calls "conservative" readings of the Ninth Amendment and establish a textual and historical basis for judicial enforcement of international human rights. Given the current level of debate regarding the Ninth, neither of Farber's goals can be reached without a close engagement of an expanded (and expanding) corpus of historical materials.

### III. ORIGINALISM AND THE NINTH AMENDMENT

In the 1980s, conservatives hitched their wagons to the interpretive theory of original intent in response to what they viewed as the excesses of the Warren and Burger Courts. Brandishing terms like "strict construction" and "judicial restraint," figures like Edwin Meese and Robert Bork called for a return to the original intentions of the Framers.<sup>21</sup> The idea that the Constitution should reflect the intentions of the Founders had substantial rhetorical appeal, particularly for conservatives who were fairly sure that the Framers did not envision reproductive rights and sexual autonomy. Restoring the "original intent of the framers" thus became a kind of call to arms for conservative scholars and politicians alike.

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21. See generally ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

The call did not go unchallenged. Defenders of the Supreme Court's privacy jurisprudence called into question the very idea of discovering any "original intent." The assault came from two directions: First, legal theorists argued that determining a single "intent" was impossible.<sup>22</sup> Secondly, historians like H. Jefferson Powell argued that the framers themselves rejected the concept of using their intentions as a guide to constitutional meaning.<sup>23</sup> Although these critics were successful in terms of discrediting the search for framers' intent, the ultimate result of their efforts was to force originalists into rethinking both the methodology and normative justification for an historical approach to constitutional interpretation.<sup>24</sup> Today, most originalists have moved away from instrumentalist justifications like "judicial restraint," and instead tend to ground the originalist enterprise on the normative theory of popular sovereignty.<sup>25</sup> Instead of seeking original intent, most originalists today seek the likely public meaning of the text as understood by those with the sovereign right to alter or amend the Constitution—the ratifiers. The search for original understanding or "original meaning" avoids many of the theoretical pitfalls of the earlier search for original intent while at the same time placing the entire enterprise on firmer normative ground.

A more successful attack on the conservative originalism of the 1980s came from a group of scholars who adopted the methods of originalism and deployed them against conservative theories of constitutional meaning. Yale professor Bruce Ackerman, for example, discovered the foundations of modern liberal government in the public debates and constitutional commitments of the Founding generation.<sup>26</sup> Ackerman challenged the conservative idea that judicial enforcement of individual liberties presented a "counter-majoritarian difficulty" which called for the exercise of judicial restraint.<sup>27</sup> According to Ack-

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22. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

23. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (2001).

25. See, e.g., WHITTINGTON, *supra* note 24.

26. See ACKERMAN, *supra* note 14; AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

27. Compare ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1986) (presenting the counter-majoritarian difficulty) with ACKERMAN, *supra* note 14 (persuasively resolving the same).

erman, the Founders established a dualist system of government in which the sovereign people enshrined their supermajoritarian will in a written Constitution (higher law), which courts then enforced against the majoritarian political process (ordinary law). Far from being counter-majoritarian, judicial review under such a system vindicated the people's sovereign authority to establish their own fundamental law.

By using their own historical commitments against them, liberal legal theorists were able to place conservative critics of "judicial activism" on the defensive. One of the biggest conservative complaints had been judicial recognition of the right to privacy. Their argument was (and remains) the fact that the right is nowhere mentioned in the text of the Constitution. In response, liberal scholars cited the Ninth Amendment, a text that seemed to clearly vindicate the unenumerated rights approach of the Supreme Court in cases like *Griswold* and *Roe v. Wade*. Instead of producing a counter-historical narrative regarding the original understanding of the Ninth, however, conservative legal thinkers had literally *nothing* to say. In one of the most famous exchanges in modern American constitutional law, Judge Robert Bork, one of the top constitutional theorists of his generation, testified to the Senate Judiciary Committee that he could no more find meaning in the Ninth Amendment than he could in a text obscured "by an inkblot." To his critics, Bork's refusal to find meaning in the Ninth seemed to illustrate conservative hypocrisy when it came to their purported commitment to the original understanding of the Constitution—a criticism Farber repeats throughout his book.

In defense of Judge Bork, however, at the time that he testified before the Senate *no one* knew much about the Ninth Amendment. As an originalist, Bork was committed to remaining agnostic about the meaning of a text until such time that sufficient historical evidence is uncovered to allow at least some tentative conclusions about its original meaning. Since Bork's testimony, however, a great deal of historical and theoretical work has taken place in regard to the Ninth. As a result, we are in a much better position today than Bork was to assess the most likely original understanding of the text.

#### THE EVOLVING DEBATE ON THE HISTORICAL NINTH

The first wave of scholarly commentary on Ninth focused on its text, not its history. This is not surprising given the as-



sumed lack of any such history and, besides, there seemed little reason to investigate the amendment's original understanding given the seemingly facial declaration of the Ninth that there were other individual rights beyond those listed in the text. The insistence by some scholars that the Ninth merely restated principles declared by the Tenth seemed implausible, given the Tenth's focus on *state powers* and the Ninth's focus on the *people's rights*. The Supreme Court, however, proved unwilling to develop a specific Ninth Amendment jurisprudence. For years, then, a stalemate existed between liberal scholars who insisted that the Ninth had meaning (but weren't exactly sure what it was) and conservatives who supported judicial non-enforcement (perhaps hoping the issue would just go away). As a result, historical analysis of the Ninth Amendment remained moribund and the Supreme Court turned to other constitutional provisions in support of substantive due process rights.

It was not until the last decade of the twentieth century that serious discussion of the historical Ninth Amendment reappeared. In a series of essays and, later, a full book, libertarian scholar Randy Barnett solved the problem of liberal application of the Ninth by reversing the burden of proof. Rather than requiring a party to prove a retained right exists, Barnett read the Ninth as requiring the government to prove power exists in situations impinging upon a broad class of individual liberties. Combining the Ninth and Fourteenth Amendment produced what Barnett calls "a presumption of liberty" against both federal and state regulation.<sup>28</sup>

Barnett's work not only provided an escape from the Ninth Amendment's black box of "other rights," he supported his reading of the Ninth with a close investigation of the historical record surrounding the drafting and adoption of the Amendment. Taking advantage of theoretical advances in originalist theory, Barnett embraced "original meaning" originalism and claimed that the Amendment would have been broadly understood as a rule calling for narrow construction of federal power. In a critical contribution to historical scholarship on the Ninth Amendment, Barnett focused on James Madison's speech against the Bank of the United States, in which Madison expressly declared that the Ninth was meant to operate as rule

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28. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003).

prohibiting any undue “latitude of interpretation” in regard to federal authority.<sup>29</sup>

Barnett’s work advanced the understanding of the historical Ninth Amendment in a number of ways. First, Barnett established that the Ninth Amendment was understood by at least some Founders as an active constraint on the interpretation of federal power. Some scholars had claimed that the Ninth was no more than a kind of restatement of the Tenth—with neither amendment representing anything more than a passive statement that all non-delegated powers remained to the states. By highlighting Madison’s speech, Barnett was able to persuasively argue that Founders like James Madison saw the Ninth as an enforceable rule of construction which actively constrained the interpretation of Congress’ enumerated powers.

In one significant regard, however, Barnett agreed with prior commentary on the Ninth that the Amendment had gone unnoticed in any significant manner prior to the Supreme Court’s 1965 decision in *Griswold*. Even as late as 2003, every published work on the Ninth continued to insist that the Amendment had languished in obscurity from 1791 to 1965. The problem was, every serious Ninth Amendment scholar knew this was not entirely true. Legal historians had long noted a curious body of case law, primarily from the nineteenth century, which cited the Ninth Amendment as working alongside the Tenth to prevent federal encroachment upon matters believed best left to state control. This is not a small group of judicial outliers—there are literally hundreds of such cases extending from the earliest decades of the Constitution to the time of the New Deal. By insisting that the Ninth had languished in obscurity, most scholars simply dismissed these early cases as “mistakes.” Everyone knows, they insisted, that the *Tenth* Amendment guards state rights and the *Ninth* protects the rights of the people. Thus, an entire body of case law linking the Ninth and Tenth Amendments was dismissed, leaving the Ninth to seem as if it appeared “out of nowhere” in 1965.

But just as the troubling existence of retrograde motion eventually forced a rethinking of the Ptolemaic universe, so it was inevitable that scholars would eventually be forced to revisit this seemingly anomalous body of case law and, perhaps, rethink the conventional wisdom regarding the Ninth Amendment. The

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29. See BARNETT, *supra* note 28, at 163. See also, James Madison, *Speech Opposing the Bank of the United States* (1791), in WRITINGS, *supra* note 19, at 480.

latest wave of Ninth Amendment scholarship takes a second look at the historical association of the Ninth and Tenth Amendments and argues that courts were not wrong to pair the amendments for more than one hundred years. Plumbing the depths of this new debate about the Ninth is beyond the scope of this particular review. Some of the more recent entries can be found in a recent volume of the *Stanford Law Review* where Randy Barnett and I debate the relative merits of the libertarian and federalist readings of the historical Ninth Amendment.<sup>30</sup> For the purposes of this review, I will only highlight where the current evidence undermines a number of Farber's (and most modern scholars') assumptions about the Ninth. More time will be spent on one of Farber's distinctive claims regarding the Ninth Amendment and international law.

#### NINTH AMENDMENT MYTHOLOGY AND THE HISTORICAL RECORD

Here, in a nutshell, are Farber's claims about the historical Ninth Amendment: (1) Unlike the rest of the Bill of Rights which reflected Anti-Federalist concerns about limiting federal power, the Ninth Amendment reflected *Federalist* concerns about protecting individual rights. (2) Language which was deleted from Madison's original draft of the Ninth proves that the Founders intended the Amendment to protect individual rights, as opposed to the Tenth Amendment which the Founders intended to limit federal power to interfere with matters left to the states. (3) The Ninth Amendment languished in obscurity prior to *Griswold v. Connecticut*. None of these assertions are particularly unique. Indeed, they reflect what until very recently has been the consensus view among legal scholars. Nevertheless, the complete historical record calls into question every one of these commonly accepted propositions.

#### THE NINTH AND THE CONCERNS OF THE STATE CONVENTIONS

One of Farber's goals is to establish a clear distinction between the Ninth and Tenth Amendments in terms of their underlying principles and goals. The Ninth is about individual

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30. See Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008); Kurt T. Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 STAN. L. REV. 969 (2008) See also, LASH, THE LOST HISTORY OF THE NINTH AMENDMENT, *supra* note 19.

*rights*, while the Tenth is about limiting federal *power*. Distinguishing the Ninth from the states' rights oriented Tenth is important in light of Farber's ultimate conclusion that the Ninth represents principles that can be applied against the states. Farber makes two basic arguments in his attempt to drive a wedge between the two amendments. First, he claims that the Ninth emerged out of Federalist concerns about individual rights (p. 37), not Anti-Federalist concerns about limiting federal power. Second, Farber argues that Madison's original intent to place the clauses in different sections of the Constitution illustrates how the Amendments had different purposes and goals.

Farber's first claim is that "the Ninth Amendment was the product of Madison's mind" (p. 209). Other scholars have made similar claims. Leonard Levy, for example, asserts that unlike the rest of the Bill of Rights which are rooted in proposals made by the state ratifying conventions, the language of the Ninth Amendment was the unique idea of James Madison alone.<sup>31</sup> While this is true of the final language of the Ninth, Madison's original proposal echoed language suggested by a number of state conventions. Virginia's proposed amendments in particular (which Madison helped draft).<sup>32</sup> Madison's original draft of the Ninth and Tenth Amendment also both addressed the same general subject: The need to limit federal power. Here are Madison's original drafts of both Amendments:

The exceptions, here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>33</sup>

The powers not delegated by this Constitution, nor prohibited by it to the states, are reserved to the states respectively.<sup>34</sup>

Madison's Tenth has the effect of limiting the federal government to delegated powers (unlike the general police powers of the states). The Ninth forbids undue "enlargement" of those de-

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31. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 247 (1999) (Madison "improvised [the Ninth Amendment]. No precise precedent for it existed.").

32. Scholars have long noticed the link between Madison's original draft and proposals from Virginia and New York. For a discussion of these proposals, see Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 *IOWA L. REV.* 801(2008).

33. Madison, *supra* note 19, at 443.

34. *Id.* at 444.

legated powers. The original draft of the Amendments thus addressed the same general goal, limiting national power. This not only links the original purposes of the Ninth and Tenth Amendments, it also ties them to the concerns of the state conventions. Limiting federal power, of course, was *more* of a concern to the doubters in the state conventions than the Federalist proponents of the Constitution.

Farber's second claim involves Madison's original intended placement of the two amendments. Madison had originally proposed placing the Ninth Amendment with the other amendments addressing individual rights, while placing the Tenth in Article VI. Farber believes that Madison's intended separation of the two amendments indicates the clauses originally had different purposes: The Tenth was about federalism while the Ninth "was about individual rights" (p. 44).<sup>35</sup>

Here Farber makes an assumption about Madison's intent based on his original planned placement of the amendments. But there is no need in this case to try and guess Madison's views about the relationship between the Ninth and Tenth Amendments." The man is on record as declaring, in both private letters and public speeches, that the Ninth and Tenth Amendments worked together to protect the reserved powers and rights of the states.<sup>36</sup> Farber does not mention Madison's explanations, both delivered while ratification of the Bill of Rights remained pending in the states. It is possible that Farber follows some historians in distinguishing between the "early" and "later" views of Madison, with the former taking a more nationalist view of federal power and rights and the latter taking more of a (post hoc) states rights approach in response to the nationalist policies of Alexander Hamilton and John Adams.<sup>37</sup> This bifurcated view of Madison generally attempts to distinguish the Madison who fathered the Constitution with the Madison who later advocated a rule of strict construction of federal power. Modern biographers of Madison, however, stress the remarkable consistency in Madi-

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35. The Founders do not seem to have shared Farber's clean distinction between limiting federal power (federalism) and protecting individual rights. For example, James Madison claimed that the Sedition Act violated both individual rights and the rights of states. See generally, Kurt T. Lash, *James Madison's Celebrated report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 181 (2006).

36. See Madison, *supra* note 29.

37. There are places in Farber's book where he appears to take this "early v. late" view of Madison's work. (e.g., p. 46: "In their reaction against Hamilton and the Federalist Part's platform, Southerners like Jefferson and Madison developed a constitutional theory that stressed states' rights and strict construction of federal power.").

son's thinking from the end of the Philadelphia Convention through his 1790s battles with the nationalist policies of men like Alexander Hamilton.<sup>38</sup> Indeed, Madison adopted a mixed view of the Constitution (both federal and national) throughout his life, for he fought as hard against ultranationalists like Hamilton as he did against ultra-states' rights theorists like Spencer Roane and John C. Calhoun.<sup>39</sup>

But even accepting the theory of the "two Madison's," one still cannot dismiss his declarations regarding the Ninth and Tenth Amendments. Madison's Virginia Resolutions were indeed a response to the aggressive nationalist policies of the Federalist Party, and they were written a decade after the adoption of the Constitution. But Madison's declarations regarding the Ninth and Tenth Amendment were written in 1791, even before the adoption of the Bill of Rights. In short, not only do we *know* Madison's views of the Ninth and Tenth Amendments, he declared those views, more than once, before the ink on the original Constitution was dry.

Putting aside for the moment the issue of Madison's personal intentions, by stressing the original proposed placement of the two amendments, Farber relies on an outmoded form of originalism. At most, Madison's placement proposal might tell us something of Madison's original private intentions regarding the two provisions. Contemporary originalists, however, do not seek the private intentions of the Framers. Instead, the effort is to recover the original public meaning of the text as it was understood by the ratifiers, the body with the sovereign authority to establish fundamental law. This shift in methodology reflects a shift in the normative justification for using original meaning as an interpretive method. Although presented in the past as a tool for constraining judicial activism, today the practitioners of originalism most often justify their efforts on the normative theory of popular sovereignty—the sovereign right of the people to establish fundamental law in a written and enforceable Constitution.<sup>40</sup> The relevant group in this endeavor is not the individual framers (and their private intentions), but the members of the ratifying assemblies who debated and adopted the text. *This*

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38. See, e.g., RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 323 (1990).

39. Farber himself has discussed the "mixed" position of Madison regarding state and national power in other works. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 39 (2003) [hereinafter FARBER, *LINCOLN'S CONSTITUTION*].

40. For the sophisticated (and complete) analysis of popular sovereignty based originalism, see WHITTINGTON, *supra* note 24.

*group* would not have known about Madison's original placement of the two amendments. Instead, they were presented with a single "Bill," with the Ninth and Tenth Amendments placed side by side.

#### THE ALTERED LANGUAGE

Two critical changes occurred between the time Madison presented his proposed amendments and when Congress presented the Bill of Rights to the states. First, as discussed above, the Amendments were consolidated into a single Bill to be added at the end of the original Constitution. Secondly, Madison's original language regarding the Ninth was trimmed. The final draft of the Ninth omitted the original language regarding federal power and focused solely on the issue of the retained rights of the people. Farber claims that this alteration *proves* that the final draft addressed only individual rights and had nothing to do with limiting federal power.<sup>41</sup> This is a common claim among those who read the amendment as *only* protecting individual rights. From a modern perspective, this assertion seems reasonable enough—language referring to the rights of the people seems unrelated to limiting the construction of federal power. But, as the writings of James Madison make clear, such was not the case at the Founding. In a letter discussing the Ninth Amendment that Farber does not address, Madison explained that protecting rights and limiting the construction of power amount to the same thing.

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.<sup>42</sup>

To Madison, limiting powers and protecting retained rights were two sides of the same coin: accomplishing one goal, by definition, accomplished the other. Madison's letter was written in re-

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41. According to Farber:

[N]otice the deleted language saying that enumerated rights do not indirectly expand other federal powers. The deletion of this language is significant because it disproves one misreading of the Ninth Amendment, which tries to twist it into an effort to restrict federal powers rather than to recognize unenumerated rights. If the idea was to restrict federal power, that language was there as part of Madison's draft. The fact that this specific language was deleted shows that the remaining language had a different purpose (p. 42).

42. *Letter from James Madison to George Washington* (Dec. 5, 1789), in 5 THE DEBATE, *supra* note 19, at 221–22.

sponse to objections raised in the Virginia Assembly that the final draft of the Ninth did not containing language clearly limiting the construction of federal power. According to Madison, the objection was “fanciful” for language guarding retained rights had the same effect as language limiting the construction of federal power—only the language used the more powerful concept of *rights*. Advocates of a libertarian reading of the Ninth have struggled to explain (or discredit or ignore) this letter by Madison.<sup>43</sup> Recently, however, new evidence has come to light regarding the *subject* of Madison’s letter, objections in the Virginia assembly regarding the final draft. This new evidence makes clear (if the letter was not itself clear enough) that Madison believed the final version of the Ninth Amendment addressed the Virginia Assembly’s concerns about the need to limit federal power. Hardin Burnley, a member of the assembly charged with debating and ratifying the Bill, shared the same view.

Farber insists that it is a mistake to read the Ninth as limiting federal power. But not only does he ignore Madison’s (and Burnley’s) letter on the subject, he also ignores Madison’s 1791 speech against the Bank of the United States, in which Madison publicly declares that the Ninth Amendment guards against a “latitude of interpretation” in matters involving federal intrusion upon the autonomy of the states. This speech is particularly important as signaled to the Virginia ratifying assembly the meaning of the Ninth Amendment according to Virginia’s congressional delegate and *drafter of the clause*.

#### THE MYTH OF THE HISTORICAL OBSCURITY OF THE NINTH AMENDMENT

One of the most common assertions about the Ninth Amendment is that it disappeared from view following its adoption until resurrected by Justices Douglas and Goldberg in *Griswold v. Connecticut*. According to Farber, following its enactment, the Ninth Amendment “faded from view” (p. 46). Although one of the most common assertions about the Ninth, it is also one of most easily, and conclusively, disproved. Elsewhere, I have compiled a fairly exhaustive list of post-adoption cases and commentary on the Ninth Amendment.<sup>44</sup> Without

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43. See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 54 (2006).

44. See Lash, *supra* note 19; Kurt T. Lash, *The Lost Jurisprudence of the Ninth*



going into detail here, suffice to say that courts and commentators repeatedly referred to the Ninth Amendment throughout the first century and a half of the Constitution. Highlights include Madison's letters and speeches, the first constitutional treatise, St. George Tucker's *View of the Constitution*,<sup>45</sup> Justice Story's Supreme Court opinion in *Houston v. Moore*,<sup>46</sup> and literally hundreds of state and federal judicial opinions.<sup>47</sup> The myth of the "forgotten Ninth Amendment" is so easily disproven that its continued reference in the literature raises an issue of its own. What can account for this myth's durability?

The primary reason, I believe, is the fact that almost all of these numerous historical references to the Ninth occur in conjunction with discussions of the Tenth Amendment and the need to limit federal power. Beginning with Bennett Patterson's 1955 "The Forgotten Ninth Amendment,"<sup>48</sup> modern Ninth Amendment scholars (including Farber) simply dismiss as "mistaken" any historical reference that links the Ninth and Tenth Amendments.<sup>49</sup> Given the sheer number of reference accordingly dismissed from consideration, this is a rather bold assumption. Nevertheless, if one first assumes that the Ninth and Tenth have nothing to do with one another, then it simply follows that any historical evidence to the contrary must be in error. The problem is with the assumption.

Again, this is not the place to fully investigate the full historical record of the Ninth Amendment. My purpose is only to alert readers to the existence of a number of historical documents that call into question Farber's reliance on Ninth Amendment mythology. Farber could have addressed this record and no doubt advanced our understanding of a developing historical record, as indeed he has done in prior works.<sup>50</sup> Unfortunately Farber simply avoids the current debate. Although readers are promised a more developed historical discussion in the book's "Appendix" (p. 201), this final section of the book

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*Amendment*. 83 TEX. L. REV. 597 (2005) [hereinafter Lash, *Lost Jurisprudence*].

45. St. George Tucker, *Note D: View of the Constitution of the United States*, in 1 WILLIAM BLACKSTONE, COMMENTARIES 140 (Dennis & Co., Inc. 1965) (1803).

46. 18 U.S. (5 Wheat.) 1 (1820).

47. See Lash, *Lost Jurisprudence*, *supra* note 44.

48. BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY (1955).

49. P. 46: "When it was mentioned at all, the ninth was often erroneously lumped together with the tenth amendment (which preserves the 'powers retained by the states').".

50. See FARBER, LINCOLN'S CONSTITUTION, *supra* note 39.

provides only a cursory sketch and dismissal of various alternative interpretations of the Ninth Amendment.

THE LAW OF NATIONS, POPULAR SOVEREIGNTY, AND THE  
NINTH AMENDMENT

In some ways, Farber is absolutely right to insist we consider the Founders' view of the law of nations in determining the original meaning of the Ninth Amendment.<sup>51</sup> In particular, Farber correctly identifies the work of the eighteenth century internationalist Emmerich de Vattel as influencing the Founding generations' understanding of the retained rights of the people. The earliest constitutional treatise, St. George Tucker's 1803 *View of the Constitution*, cites Vattel's *Le Droit des Gens* ("The Law of Nations") throughout, especially in regard to the Ninth and Tenth Amendments.<sup>52</sup> But where Farber is concerned about retained individual rights, Vattel was most concerned with the retained rights of the *sovereign*. The distinction is critical in understanding how international law informed the meaning of the Ninth Amendment.

Although most Ninth Amendment scholarship focuses on the issue of individual natural rights, the text of the Ninth Amendment is not so limited. It speaks of "other rights," not just other individual rights, much less individual natural rights. At the time of the Founding, rights came in many different shapes and sizes: individual and collective, natural and positive. Nothing in the text of the Ninth Amendment excludes *any* category of right. For example, the people could retain the right to free expression (an individual natural right) or the collective right to determine municipal law (such as local piloting regulations) on a local level. It takes but a moment's thought to realize that "the people" (whether conceived of a single national people or the people in the several states, or both) would have wanted to retain under local control all those rights, whether individual and collective, which were not delegated into the hands of the national government. Madison was clear about this: In his speech against the Bank of the United States, Madison claimed that because chartering a bank was not within the delegated powers of Congress, passing the Bank Bill would violate the Ninth and Tenth Amendments. The Bill would not violate indi-

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51. Justices who "look[] beyond our national borders to seek the parameters of liberty ... honor the framers' intent" (p. 10).

52. See, e.g., Tucker, *supra* note 45, at 151.

vidual natural rights (there was no right of people in the states to prevent state chartered banks—indeed, most states had them). Instead, the Bill would violate what Madison saw as a retained right of the collective people in the several states.

In this way, the Ninth and Tenth Amendments preserved the Founding vision of popular sovereignty. A concept rooted in the English Bill of Rights, but which evolved significantly in Revolutionary America, popular sovereignty maintains that sovereign power resides in the collective people and *not* in their government. Locating sovereignty in extra-governmental conventions of the people was a key development along the road to the American embrace of written and enforceable constitutions. Prior to the adoption of the federal Constitution, of course, the people existed in separate sovereign states (the “free and independent states” of the Declaration of Independence). One of the major issues which arose during the ratification debates involved whether the people in the states would continue in their independent sovereign capacity, or whether they would be consolidated into a single national “people.” In order to secure ratification, the Federalists assured the conventions that no such consolidation would occur. As Madison assured the ratifiers in the *Federalist Papers*, the Constitution was neither wholly national nor wholly federal—each would have its independent and respective powers, jurisdictions, and rights following ratification.

The problem for those still on the fence regarding the proposed Constitution, however, was the possibility that delegated federal power would be so broadly construed as to render the independent sovereignty of the people in the states no more than a paper declaration. Once again, Federalists such as James Madison, Alexander Hamilton and James Wilson insisted that the federal government would have only expressly delegated powers, and that these powers would be strictly construed. As Hamilton pointed out, strict construction of delegated sovereign power was the established “law of nations.”

According to Vattel, the acknowledged expert on international law, sovereigns (be they Kings or a sovereign people) were assumed to never delegate away any more of their sovereign powers than was necessary to accomplish a particular purpose. Accordingly, delegated sovereign authority was read to include only those powers expressly enumerated or “clearly”

incident to the express delegation.<sup>53</sup> In the first constitutional treatise, St. George Tucker applied Vattel's law of nations to the specific issue of delegated federal power. A passionate defender of popular sovereignty, Tucker insisted that because the sovereign people in the several states had previously delegated broad powers to their state governments, establishing a new federal government required the people to recall some of these powers and delegate them into the hands of the national government. Citing Vattel, Tucker insisted that all such newly delegated power must be strictly construed, and that this principle of the law of nations had been constitutionally enshrined through the adoption of the Ninth and Tenth Amendments. John Overton, a member of the second North Carolina Ratifying Convention that ratified the Ninth Amendment, similarly viewed the Ninth as working alongside the Tenth to preserve the retained state right of "self-preservation." Writing as a judge on the Tennessee bench, Overton declared:

[N]ations as well as individuals are tenacious of the rights of self-preservation, of which, as applied to sovereign States, the right of soil or eminent domain is one. Constitutions, treaties, or laws, in derogation of these rights are to be construed strictly. *Vattel is of this opinion*, and, what is more satisfactory, the *Federalist*, and the American author of the Notes to Blackstone's Commentaries, two of the most eminent writers on jurisprudence, are of the same opinion [Here Judge Overton cites Vattel, Tucker's discussion of the Ninth and Tenth Amendments, as well as the amendments themselves].<sup>54</sup>

James Madison shared the same view—the people in the states had been promised strict construction of federal power—a promise made express in the final two amendments in the Bill of Rights. The above does not mean that Farber (and others) are wrong to insist the Ninth protects individual natural rights. To the contrary, it is clear that the state conventions (and Founders like Madison) were very much concerned about protecting such rights. The issue involves *how* such rights were to be protected, as well as *other* rights which also were considered among the retained rights of the people. For example, the Free Speech Clause

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53. In other works. Farber seems aware of this aspect of Vattel's writing. See FARBER, LINCOLN'S CONSTITUTION, *supra* note 39, at 33.

54. Glasgow's Lessee v. Smith, 1 Tenn. (1 Overt.) 144, 166 (1799) (Overton, J.) (citing "vat. B. 2 c. 17, §§ 305, 308; Amendment to Con. U. S. arts 11, 12; 1 T. Bl. app. to part 1, 307, 308; Ib. 412; Vat. B. 1, c., § 10; 2 Dall. 384; 1 T. Bl. app. to part 1, 269; 4 Johns. 163").

of the first amendment protected what Madison referred to as an individual natural right. This right was protected, however, by leaving regulation of speech to the people in the individual states. Thus, when the national government passed the Sedition Law, Madison objected that the law violated both the First *and* Tenth Amendments.<sup>55</sup> The same was true of the retained rights of the Ninth Amendment: these rights, be they individual or collective, were retained under the control of the people in the several states who could then leave the matter under the control of their state government, or retain the right from their state government as well by placing the matter in their state declaration of rights. The Ninth and Tenth Amendment ensured these retained rights of local self-government by limiting the federal government to delegated power (the Tenth Amendment) and requiring the strict construction of those powers which were delegated.

When Farber sees Founding-era references to retained rights and the law of nations, he reads these phrases through the lens of modern libertarian human rights law. For Vattel and those Founders who applied his work to the new Constitution, the emphasis was on the law of *nations*—how sovereignties relate to one another and the proper construction of delegated power. In fact, because Vattel's work powerfully supported strict construction of the Constitution, later nationalists like Joseph Story went out of their way to denounce reliance on "Europeans" like Vattel. Ironically, it was nationalists like Story and John Marshall who supplied the vision of national power that would ultimately be used to justify the New Deal Court's expansion of federal authority—a result that Farber appears to applaud. But these same nineteenth century nationalists *rejected* reliance on international law precisely because the law of nations called for a narrow construction of federal power. One can embrace broad theories of federal power, or one can embrace Vattel's contributions to the American theory of the people's retained rights. One cannot, however, embrace them both. Thus, when Farber argues in favor of both New Deal regulatory power *and* enforcement of international human rights law against the states,<sup>56</sup> he has doubly departed from the original vision of the Ninth Amendment.

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55. See James Madison, *Virginia Resolutions Against the Alien and Sedition Acts* (1798), in *WRITINGS*, *supra* note 19, at 590–91.

56. See p. 209 (criticizing the libertarian view as unduly encroaching on federal power), and pp. 96–97 (arguing against economic rights as fundamental rights).

Farber's history of the Ninth Amendment, of course, is only half of his book. The second half is devoted to exploring how courts can go about identifying and enforcing the fundamental individual rights Farber believes are protected under the Ninth and Fourteenth Amendments. Here Farber eschews any particular "global theory" of constitutional rights and instead advocates the kind of pragmatic form of judicial review that he has presented in previous works. Embracing an approach that seems at once descriptive (this is what courts have always done) and hesitantly normative (we are wise to follow the general views of the Founders), Farber presents a series of factors that he believes can both guide and constrain judicial enforcement of fundamental rights. But Farber never clearly provides a normative reason for embracing his pragmatic approach, and those who follow the tenets of originalism have good reason to *reject* his internationalist reading of the Ninth.

### CONCLUSION

Much has happened since the Founding. The Thirteenth, Fourteenth and Fifteenth Amendments introduced new libertarian rights, significantly altering the original balance of federal and state power, while at the same time establishing a new vision of American freedom. An originalist committed to the normative theory of popular sovereignty must reconcile these (and other) exercises of the people's sovereign will. If the retained rights of the people under the Ninth Amendment involved only fundamental individual rights, then it would be possible that the Fourteenth Amendment applied this same set of rights against the states. However, we know that the retained rights of the Ninth Amendment included all matters not left to federal control. Unless one interprets the Fourteenth as having nationalized *every aspect* of local municipal law and state responsibilities, there remain aspects of the original Ninth Amendment which are left to the control of people in the several states as a matter of right. Originalists are therefore left with the task of determining the *extent* to which the Fourteenth Amendment nationalized certain freedoms which, prior to 1868, had remained under local control as a matter of right.<sup>57</sup>

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57. A common move by libertarian Ninth Amendment scholars has been to posit a broad set of libertarian rights protected by the Ninth and then claim that the seemingly similar text of the Privileges or Immunities Clause of the Fourteenth Amendment protects the same set of rights. This move allows one to skip over what remain exceedingly

Nor are the results of such an inquiry necessarily “conservative” or “liberal.” We may find that although the First Amendment was considered a “privilege or immunity,” the non-establishment of religion was not. Perhaps parental rights were considered fundamental, perhaps also property and contract rights. Perhaps not. The point is that a commitment to originalism is a commitment to following the trail of evidence wherever it leads. In this regard, Daniel Farber is surely right to upbraid any proponent of original understanding who refuses to apply the theory when it appears to lead in an uncomfortable direction. But Farber’s book also stands as a warning to those who would use originalism as a form of political jujitsu. The move may work well enough for the moment, but there remains the on-going possibility that new historical discoveries will reveal that one’s opponents were more right than they knew.

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difficult questions about the original meaning and ratification of the Fourteenth Amendment. In the end, however, this is like using frog DNA to fill in missing portions of dinosaur DNA. In both situations, the project has good intentions but the outcomes are less than ideal. See MICHAEL CRICHTON, *JURASSIC PARK* (1991). If one’s reading of the original Ninth is in error, so too will be one’s reading of the Fourteenth.