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Natural Rights and Positive Law: A Comment on Professor McAffee's Paper

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NATURAL RIGHTS AND POSITIVE LAW: A COMMENT ON PROFESSOR MCAFFEE'S PAPER

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Were the rights retained by the people defined by positive law?[1] This is the issue explored by Professor McAffee and various other scholars who dispute the history of the Ninth Amendment.[2] Surveying the work of these other historians, Professor McAffee distinguishes between those who argue that the framers and ratifiers were "positivists" and those who attribute to the framers and ratifiers a so-called "natural-law" or "natural-rights" perspective—the latter being the view that the rights retained by the people included rights not delineated by the United States Constitution. McAffee rejects this latter point of view in favor of the positivist interpretation of the Ninth Amendment, and he thereby has done much to uphold the traditional history of the Bill of Rights.

Although I agree with Professor McAffee's general conclusion that the framers and ratifiers had a "positivist" understanding of the Ninth Amendment, I must dissent from his arguments about natural rights. Professor McAffee assumes that the framers and ratifiers could not have taken both a positivist and a natural-rights approach to the Ninth Amendment. On this basis, he defends a positivist reading of the Ninth Amendment by arguing that the framers and ratifiers did not understand the rights retained to include

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1. For purposes of this paper, I am following Professor McAffee's non-Austinian usage and am assuming that written constitutional limitations on government can be called "positive law." Incidentally, eighteenth century Americans occasionally employed the phrase "positive law" or "positive act" to describe the United States Constitution. More generally, if we are to address the debate about whether the framers and ratifiers defined the rights retained in terms of "positive law," some use of the label is unavoidable.

2. The historical literature is discussed in Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990). For a selection of historical and other commentaries, *see* THE RIGHTS RETAINED BY THE PEOPLE (Randy E. Barnett ed., 1989).

natural rights.[3] In fact, however, the framers and ratifiers frequently said that natural rights were among the rights retained. Moreover, even when they were saying that their retained rights included natural rights, they typically assumed that the extent of their retained rights was determined by positive law. For the framers and ratifiers, as for most late eighteenth century Americans, an analysis based on natural rights was not incompatible with a form of positivism.

How did Americans reconcile natural rights and positive law? Americans regularly theorized that individuals in the state of nature were equally free—that they had no common superior and so were free from subjugation to one another. This undifferentiated freedom was an individual's "natural liberty," any portion of which was a "natural right." Put more crudely, a natural right was part of the freedom an individual had in the absence of government. Such freedom, however, was precarious, for it was subject to the depredations of others. To preserve their natural liberty, therefore, individuals gave up as much of their natural liberty as was necessary to establish government. Americans rarely seemed to tire of telling each other that individuals preserved their natural freedom by submitting some of it to government and civil laws; they iterated this political truth so often that it became "a hackneyed and well-known principle."[4] Of course, when forming government to protect their natural liberty, the people also had to protect themselves from the government they were creating. For this purpose, they had to settle in their "contract of government," "fundamental law" or "constitution" precisely what natural liberty was sacrificed to government and what was retained. Thus, according to the natural-rights theory, the people stipulated in their constitutions the natural rights they gave up to government and the natural rights they would keep.[5] The natural-rights theory justified and explained what we would consider a "positivist" conception of constitutions.[6]

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3. Speaking of the phrase "retained rights" as used in the context of the natural-rights theory, Professor McAffee says that "there is no such term of art associated with the reference to rights retained by the people." Thomas B. McAffee, The Bill of Rights, Social Contract Theory And Rights "Retained By The People" 18-19 (September 13, 1991) (unpublished manuscript on file with *Southern Illinois University Law Journal*).

4. LETTER FROM WILLIAM PIERCE TO ST. GEORGE TUCKER (March 20, 1788), *reprinted in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 443 (John P. Kaminski & Gaspare J. Saladino eds., 1986). Pierce said that individuals "give up a part of their natural rights to secure the rest."

5. Constitutions also stipulated various acquired rights—that is, rights not existing in the state of nature.

6. For more on this *see* Walter Berns, *Judicial Review and the Rights and Laws of*

This natural-rights analysis can be observed in both Federalist and Anti-Federalist arguments about a federal bill of rights. Anti-Federalists insisted upon enumeration of the natural rights to be retained. As one Anti-Federalist said, "[t]o define what portion of his natural liberty, the subject shall at all times be entitled to retain, is one great end of a bill of rights."[7] Federalists, however, preferred to identify the retained rights largely by means of an enumeration of powers. One Federalist explained:

> It is well known that several of the states on the continent have never made any formal declaration of their rights. Well aware of the impossibility of enumerating all those blessings to which by nature they were entitled, and highly sensible of the danger there was intrusting to their recollection of them (knowing that when once they attempted to set to them legal bounds, what ever should by chance be left out, was of course given up) some of the states more prudently thought fit to enumerate on the other hand what should be the powers of their government, when of course what ever was omitted on that side, remained as their natural and inviolable rights on the other. And but few states in the world have deemed it safe to do otherside.[8]

A constitution that enumerated powers rather than rights, said Federalists, would leave to the people, not merely the natural rights listed, but innumerable natural rights.

Thus, when late eighteenth century Americans—Federalist or Anti-Federalist—said that they "retained" various natural rights, they were indicating that they had a government of limited authority—that the absence of government power left the people in other respects free. They were assuming, moreover, that the Constitution defined what liberty was retained. Consequently, the rights retained by the people consisted of the absence of federal authority; these rights

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Nature, 3 SUP. CT. REV. 49 (1982). Obviously, in some senses, late eighteenth century Americans were not positivists. For example, they frequently condemned constitutions that failed adequately to protect natural liberty, including "inalienable" natural rights. Yet they typically assumed that they could remedy such failures only by amending the Constitution or, more generally, adopting a new one—if necessary, by means of revolution. *See id.* & Helen Michaels, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*" 69 N.C. L. REV. 421 (1991). The natural rights unprotected by a constitution or other civil law were mere "imperfect" rights.

For another perspective, see the other comments on Professor McAffee's paper. As this paper is not a comment on those comments, I will simply indicate my disagreement.

7. AN OLD WHIG IV (Oct. 27, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 497, 501 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

8. STATE SOLDIER II (Feb. 6, 1788), *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 352 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

consisted not only of the rights specified in the Constitution but also of the undifferentiated liberty defined by the specified federal powers. In this sense, the rights retained by the people were innumerable and judicially enforceable.

The assumption that the rights retained by the people were defined not merely by the list of rights but also by the list of powers can be illustrated by the restrictions on federal power with respect to the press. Although, during the ratification debates, Federalists frequently assured Americans that the federal government would have no power to regulate the press, Anti-Federalists pointed out that Congress would be able to restrain the press under the tax provision and the necessary-and-proper clause.[9] For this reason, among others, Anti-Federalists demanded enumeration of the freedom of the press; enumeration of the right, they said, would forbid the federal government from doing some things it was permitted to do by the enumeration of powers.[10] Yet the First Amendment did not render the absence of a press power unimportant. On the contrary, the absence of an enumerated federal power to regulate the press precluded the federal government from taking some actions against the press that were allowed by a free-press clause. For example, Federalists assumed that Article One, far from merely prohibiting Congress from abridging the "freedom of the press," more generally did not even authorize Congress to regulate the press.[11]

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9. They also sometimes mentioned the language about general welfare.

10. LETTERS FROM A FEDERAL FARMER (Oct. 12, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 250 (Herbert J. Storing ed., 1981); TIMOLEON (Nov. 1, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 535 (John P. Kaminski & Gaspare J. Saladino eds., 1981).

11. James Wilson said: "If . . . a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation." JAMES WILSON, SPEECH IN STATE HOUSE YARD (Oct. 6, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (Merrill Jensen ed., 1976). In other words, in the course of arguing that it was unnecessary to stipulate the right of freedom of the press, Wilson pointed out that the absence of an enumerated power regarding the press had a broader effect. Obviously, there was truth on both sides: The enumerated right and the absence of an enumerated power each protected the press from the federal government in ways the other did not.

Wilson also said that "the proposed system possesses no influence whatever upon the press, and it would have been merely nugatory to have introduced a formal declaration upon the subject—nay, that very declaration might have been construed to imply that some degree of power was given, since we undertook to define its extent." *Id.* Hence, the need for the Ninth Amendment.

Later, when George Hay, Tunis Wortman, and other Americans responded to the Alien and Sedition Acts with broad claims on behalf of the press, they argued not only on the basis of the First Amendment but also—indeed, sometimes with greater emphasis—on the ground that the federal government was a government of enumerated powers.[12] The enumeration of powers was essential to the definition of retained rights, including retained press rights.[13]

Of course, the rights retained were understood in the context of a federal system. Just because the United States Constitution left many natural rights unimpaired by federal power did not mean that state constitutions left the same natural rights untouched by state power.[14] Indeed, it was one of the fundamental assumptions of the framers and ratifiers that states in the exercise of their police power would restrain natural rights differently and, in many respects, more extensively than the federal government. For example, the United States Constitution, as jut seen, greatly limited the federal government's ability to restrict the press, but it did not thereby preclude state restraints on the press. The framers and ratifiers of the United States Constitution and Bill of Rights assumed the existence of state constitutions and laws, which placed their own restraints on natural liberty.

This point may be illustrated by a document of the Committee of Detail in 1787. In sketching a draft of the United States Constitution, the document argued against a preamble that would "designat[e] the ends of government and human polities":

> This display of theory, howsoever proper in the first formation of state governments, is unfit here; since we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and interwoven with what we call the rights of states.[15]

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12. HORTENTIUS [i.e., George Hay], AN ESSAY ON THE LIBERTY OF THE PRESS 5-32 (1799)); TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS 207-32 (1800). *See also* KENTUCKY RESOLUTION (Nov. 10, 1798), *reprinted in* 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 160 (Melvin I. Urofsky ed., 1989).

13. Obviously, this suggests interesting issues relating to the Fourteenth Amendment's "incorporation" of the Bill of Rights.

14. For an important examination of this theme, *see* Arthur E. Wilmarth, *The Original Purposes of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261 (1989).

15. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (J.H. Hutson ed., 1987) (in the handwriting of Randolph and Rutlege).

In other words, natural rights had to be analyzed in the context of the federal system. Although the people, by adopting the United States Constitution, gave up some of their natural rights to the federal government, they had already, in their state constitutions, made various concessions of natural rights to state governments.

In sum, natural rights were portions of the freedom individuals had in the state of nature, and, by adopting a constitution, the people gave up some of these rights to government. As a result, late eighteenth century Americans were not abandoning a "positivist" understanding of the rights retained when they said that those rights included natural rights. The rights the people retained under a constitution, including the natural rights they retained, were the rights they reserved to themselves by means of the constitution.