

WAYS TO THINK ABOUT UNENUMERATED RIGHTS

*Michael W. McConnell**

Akil Amar's new book discusses many different components of the "unwritten" constitution. This Article looks specifically at the most common use of that term—the practice of striking down state and federal laws on the grounds that they violate "fundamental rights" not directly mentioned in the Constitution. Although the Court's favored approach to finding unenumerated rights—so-called "substantive due process"—is neither historically supportable nor jurisprudentially coherent, other sources of unenumerated rights are more promising. The Ninth Amendment would support a jurisprudence of natural rights based on equitable interpretation, and the Privileges or Immunities Clause might support a jurisprudence of broadly accepted traditional rights.

Akhil Amar's new book uses the idea of an "unwritten" constitution to mean many different things, from interpretive principles, to structural arguments, to implicit references, to other bodies of law, to time-sanctified practices. But the most common use of that term in constitutional conversation is to describe the Supreme Court's sporadic practice of declaring state or federal laws "unconstitutional" on the ground that they violate so-called "fundamental rights," usually the right to "privacy," that they exceed the police powers of the state, or that they are not supported by reasons weighty enough to overcome the burden they impose on liberty.¹ The Court engages in this practice, notwithstanding the fact that the aforementioned "fundamental rights" are not mentioned in the Constitution or even its penumbras or emanations, that the United States Constitution does not purport to limit state legislative authority to any catalog of police powers, and one would think the reasonableness of legislation is a matter for elected legislatures to decide.

Discussion of this practice is surprisingly thin and unidimensional. The Court itself has said almost nothing true and useful about its authority to strike down laws on the basis of this unwritten constitution. Most

* Richard and Frances Mallery Professor and director of the Constitutional Law Center at Stanford Law School.

1. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

commentators praise the practice, either on the basis of libertarian or other philosophical grounds or on the basis of extrapolation from vague and open-ended constitutional language, or condemn the practice for its lack of textual and historical foundation and its aristocratic assumption that judges are likely to exercise moral judgments superior to those of elected legislators. I have engaged in some of the latter rhetoric myself.² Both critics and advocates tend to treat all exercises of judicial power to invalidate laws on the basis of unenumerated rights as essentially the same phenomenon: the judiciary's moral judgments trumping the moral judgments of legislatures.

I suggest that the text of the Constitution paints a more complicated and variegated picture of unenumerated rights jurisprudence. The Court's chosen vehicle for the practice, "substantive" due process, is indeed empty. But the other prominent textual hooks—the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment—offer distinct variants of the practice, each with its own history and theory. Attention to these different conceptions of unenumerated rights might help us to make more sense out of the practice and might even justify some (though certainly not all) of what the Court has done.

My purpose here is not to argue for the legitimacy (or illegitimacy) of any of these views on textualist, originalist, or any other grounds. I simply wish to entertain, for sake of argument, the possibility that one or more of these parts of the Constitution might support some version of unenumerated rights jurisprudence and explore what the implications would be. Possibly it is not all or nothing.

I. SUBSTANTIVE DUE PROCESS

The Supreme Court has adopted the least plausible of all possible grounds for enforcing unenumerated rights: the Due Process Clauses of the Fifth and Fourteenth Amendments. These Clauses forbid the government from depriving any person of "liberty," but only when this is done without "due process of law."³ As Amar points out in his book,⁴ in every one of the Court's substantive due process cases, the asserted liberty was infringed by a properly enacted law, executed in accordance with all proper procedural protections. The Due Process Clauses ask no more. In recent work, Nathan Chapman and I have traced the history of due process from Magna Carta to Reconstruction and shown that its historical meaning bears no resemblance to modern substantive due pro-

2. See Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 YALE L.J. 1501, 1535–38 (1989).

3. U.S. CONST. amend. V, cl. 4; U.S. CONST. amend. XIV, § 1, cl. 3.

4. AKHIL AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 118–19 (2012).

cess.⁵ As applied to legislative acts, the purpose of due process was to confine the legislature to the exercise of powers of a legislative nature and not to take upon itself executive or judicial functions.⁶ It had nothing to do with declaring certain liberties fundamental or beyond the reach of legislation. I will not repeat that evidence here.

The Supreme Court's stated rationale for substantive due process is woefully inadequate. The most extended discussion may be found in the plurality opinion in *Planned Parenthood v. Casey*.⁷ The opinion begins by acknowledging that the "literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty."⁸ This is a considerable understatement. The Court points to no linguistic ambiguities and offers no alternative readings, even nonliteral, under which the Clause "might suggest" anything else. It is what the Clause unambiguously says. And the opinion makes no attempt to show that the history of the Clause, prior to its adoption against the federal government in 1791 or the states in 1868, supports any other reading.

Turning to the jurisprudential problem, the *Casey* plurality notes that it is "tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution."⁹ Note the word, "tempting." "It is also tempting, for the same reason," the plurality opinion goes on, "to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."¹⁰ The Court does not, however, give way to these temptations. Other than to label the impulse toward judicial self-restraint a "temptation," the Court offers no reason to eschew that path.

Why judicial self-restraint would be labeled a temptation, and assuming greater authority than provided by the constitutional text somehow treated as resistance to temptation, is a mystery. The passage thus provides no answer to the jurisprudential question: Why is it a good thing in a democratic republic governed by a written constitution for judges to be able to overturn popularly enacted laws on the basis of controversial

5. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672 (2012).

6. *Id.* at 1677-79.

7. 505 U.S. 833 (1992).

8. *Id.* at 846.

9. *Id.* at 847. Note that the Court's formulation is imprecise. The problem with substantive due process is not that it recognized too broad a definition of liberty but that it fails to recognize that liberty is subject to limitation by means of the due process of law.

10. *Id.*

moral judgments? The paragraph indicates the Court is aware of the problem, but it provides no answer.

If the Court were merely enforcing unwritten moral consensus—the settled judgment of the community—it might have some basis in the common law method. But the Court openly acknowledges that “reasonable people disagree” about many of the matters at issue in substantive due process cases.¹¹ Why one side of a reasonable dispute, rather than the other, is entitled to prevail as a constitutional matter is left unexplained.

In the end, the *Casey* opinion relies not on text, history, or jurisprudential argument, but on the supposed force of its own earlier cases. “[F]or at least 105 years, since *Mugler v. Kansas*, . . . the Clause has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”¹² Since *Mugler v. Kansas*! *Mugler* was the first in a line of economic substantive due process cases, culminating in *Lochner v. New York*,¹³ that have repeatedly been repudiated by subsequent decisions and are widely regarded as among the biggest mistakes the Court ever made.¹⁴ As the Court said in *Ferguson v. Skrupa*:

The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.¹⁵

Indeed, later in the *Casey* opinion, in the section about stare decisis, the plurality reiterates its repudiation of this line of cases, interestingly without mentioning *Mugler* by name.¹⁶ It is misleading for the court to invoke 105 years of precedent since *Mugler* without noting that *Mugler’s* reading of due process was repudiated in 1937¹⁷ and is repudiated still.

As Akhil Amar has pointed out, the *Casey* plurality could have found a precedent even older than *Mugler*, stretching the longevity of

11. *Id.* at 851.

12. *Id.* at 846 (citing *Mugler v. Kansas*, 123 U.S. 623, 660–61 (1887) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Court in *Mugler* upheld the challenged state law but, in so doing for the first time, embraced the theory of economic substantive due process. See Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 947 (1927).

13. 198 U.S. 45 (1905).

14. *Lochner’s* leading modern defender, David Bernstein, does not defend substantive due process but confines himself to showing that the Court’s motives in the *Lochner* decision were not the plutocratic antiworker motives often attributed to the *Lochner* Justices. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

15. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

16. *Casey*, 505 U.S. at 861–62.

17. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

substantive due process to 135 years.¹⁸ That case is *Dred Scott v. Sandford*.¹⁹ It is obvious to all why the Court did not care to remind us of that decision. The *Mugler-Lochner* period was nowhere near as bad as *Dred Scott*, but few would regard it as the Court's finest hour.

Putting aside three cases better understood as arising under the First Amendment or the Equal Protection Clause,²⁰ the Court's next case involving unenumerated rights, *Griswold v. Connecticut*,²¹ came nearly thirty years after 1937. During the intervening three decades, substantive due process dropped out of the Court's constitutional toolbox, and was mentioned only disapprovingly.²² Was *Griswold* a return to the former practice? Although understood today as a substantive due process case, the majority in *Griswold* did not invoke the Due Process Clause, instead turning somersaults in an unpersuasive attempt to ground the right of married couples to use contraceptives in the First, Third, Fourth, or another part of the Fifth, Amendments.²³ The obvious reason for these jurisprudential acrobatics was to avoid the odor of substantive due process. The next such case, *Eisenstadt v. Baird*, relied on Equal Protection.²⁴ And the next—and by far the most important and controversial—*Roe v. Wade*, listed a string of constitutional provisions, demonstrating little or no interest in which one to rely on for its decision.²⁵ Only more recently has substantive due process become the explicit and acknowledged basis for judicial review of legislation said to violate important but unenumerated rights.²⁶ One can count to 105 years only by ignoring long periods of repudiations and disuse.

Even aside from textual, historical, or precedential legitimacy, the Court's forays into substantive due process have not been impressive examples of judicial or moral reasoning. Confining ourselves to the Court's modern cases, many of them reaching popular and maybe even desirable results, the logical thread has been confused and contradictory. Although the Court likes to describe its line of decisions as based on “a rational process,” and not “one where judges have felt free to roam where

18. AMAR, *supra* note 4, at 119; *see also* *Washington v. Glucksberg*, 521 U.S. 702, 763 (1997) (Souter, J., concurring) (claiming a 200 year paternity for substantive due process on the basis of *Dred Scott*).

19. 60 (19 How.) U.S. 393 (1857).

20. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), held that it is unconstitutional for a state to outlaw private schools, and *Meyer v. Nebraska*, 262 U.S. 390 (1923), protected the right to speak and teach in German. *Loving v. Virginia*, 388 U.S. 1 (1967), involved a racially discriminatory law.

21. 381 U.S. 479 (1965).

22. *Id.* at 514–18 (Black, J., dissenting).

23. *Id.* at 484–85.

24. 405 U.S. 438, 443 (1972).

25. *Roe v. Wade*, 410 U.S. 113, 152–54 (1973).

26. *Id.* at 153, 165; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 755–773 (1997) (Souter, J., concurring).

unguided speculation might take them,”²⁷ the record is hard to square with that description.

The *Griswold* majority opinion is a paean to the unique importance and inviolability of marriage, leading to the conclusion that forbidding married couples to use contraceptives is an intolerable intrusion into the marital relation. The next case, *Eisenstadt*, takes the opposite view. It holds that the married status of couples wishing to use contraceptives is completely immaterial to any right they may have to use them—so much so that it is “irrational” for the state to distinguish between married and unmarried persons in this context.²⁸

The most celebrated opinion in *Griswold*, Justice Harlan’s concurrence, rests on the overwhelming consensus of states that contraception is permissible—indeed, Connecticut was the only state in the union to forbid the use of contraceptives by married couples.²⁹ In *Roe* and *Doe v. Bolton*,³⁰ the Court effectively struck down the laws of at least 45 and maybe 49 or 50 of the states, without even commenting on the difference from *Griswold*.³¹

The plurality opinion in *Casey* expatiated at length on the importance of complying with stare decisis, even when the current Justices do not agree with the prior decision and would come out differently if the case were one of first impression.³² *Lawrence v. Texas*,³³ a few years later, overruled a clearly applicable precedent,³⁴ completely unperturbed by stare decisis.

In each of these pairs of cases, the very consideration that justified the first is absent from the second—but turns out not to matter after all. Marriage mattered in *Griswold*, but it was irrational to consider it in *Eisenstadt*; national consensus provided the justification for exercise of judicial power in *Griswold*, but in *Roe* the Court overturned the law of almost every state; precedent was sacrosanct in *Casey* but dispensable in *Lawrence*. The only consistency in reasoning is that the Justices always decide cases the way they want them to come out.

Substantive due process doctrine provides no guidance and has no content beyond the feelings and beliefs of the Justices who make up a majority at any given time. The only possible reason to endorse substan-

27. *Casey*, 505 U.S. at 850 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

28. *Eisenstadt*, 405 U.S. at 447.

29. See *Griswold*, 381 U.S. 479, 500 (Harlan, J., concurring) *Poe*, 367 U.S. at 554–55 (Harlan, J., dissenting) (incorporating his prior dissenting opinion in *Poe*).

30. 410 U.S. 179, 181–82 (1973).

31. See Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. DET. MERCY L. REV. 157, 158–61 (1990) (detailing five categories of pre-*Roe* abortion statutes).

32. See *Casey*, 505 U.S. at 854–61 (discussing the precedential force of *Roe*).

33. 539 U.S. 558 (2003).

34. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

tive due process would be if we thought that judges, especially Supreme Court Justices, are better moral decision makers than the representatives of the people. Even if there were reason to believe this—count me skeptical—there is no reason to think the people have ever consented to a form of government based on that premise.

II. NINTH AMENDMENT

The Supreme Court has never—or almost never—relied on the Ninth Amendment to invalidate legislation based on unenumerated rights. Many scholars have argued, however, that this is the clause most directly addressed to the question: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁵ This strongly implies that there *are* rights, not elsewhere enumerated, that the people retain. As Kurt Lash has noted, the people might retain these rights in a collective capacity, meaning that they are subject to regulation or control by their state governments, or they might retain them individually as personal private rights.³⁶

To my mind, there are two principal features of the language of the Ninth Amendment that set it apart from the other potential bases for an unenumerated rights jurisprudence. First, the rights to which the amendment refers are “retained,” not created by the Constitution. In Madison’s great speech to the First Congress proposing the Bill of Rights, he distinguished between “rights which are retained when particular powers are given up to be exercised by the Legislature,” and “positive rights,” like trial by jury, which “cannot be considered as a natural right, but a right resulting from a social compact.”³⁷ The Ninth Amendment’s language of “retained rights” refers only to the former. The Amendment may thus be seen as an embodiment of Lockean natural rights theory, under which human beings enjoy broad freedom in the state of nature—“a State of perfect freedom to order [our] actions, and dispose of [our] possessions and persons, as [we] think fit,” subject only to the “law of nature,” which guarantees the same right to everyone else.³⁸ Under Lockean natural rights theory, the social compact—the adoption of a constitution—consists of trading many of these natural rights for more effectual protection of those that are retained.³⁹ Natural rights, unlike modern “human rights,” are not inviolable; on the contrary, the people decide which of these rights to relinquish in exchange for the

35. U.S. CONST. amend IX.

36. Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 343–47 (2004).

37. 1 ANNALS OF CONG. 454 (1789) (Joseph Gales ed., 1834).

38. John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT § 4 (Peter Laslett ed., 1988) (1690).

39. *See id.* at §§ 122–31.

protections and benefits of civil society. And natural rights, unlike modern “human rights,” do not include any of the positive rights that are created by civil society. In the latter respect, Lockean natural rights theory roughly tracks Isaiah Berlin’s distinction between negative and positive rights.⁴⁰

That the Framers of our Constitution saw themselves as engaged in the Lockean enterprise of relinquishing some natural rights in exchange for protection for those retained is evident from the letter sent by the Constitutional Convention to the Congress, conveying the draft of the new constitution. This letter, which is mostly ignored by constitutional scholars, states that “Individuals entering into society, must give up a share of liberty to preserve the rest.”⁴¹ Significantly, as in Locke’s theory, this decision regarding which rights to relinquish and which to retain is a profoundly political and constitutional decision. It is not a matter of logic, philosophical deduction, or revelation. Different peoples will draw the line in different places. As the Convention’s Letter to Congress states: “The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained.”⁴² That is why constitutional drafting mattered. There was no expectation that a wise and beneficent judiciary would intervene at a later date to protect rights that should have been retained but were not. The only standard by which to judge the line between retained and relinquished rights was the social compact itself, the Constitution.

It is important to remember that to the Founders, perhaps unlike our post-New Deal thinking, the grant of powers to government is the flip side of the rights retained. To grant a power to government is to relinquish the corresponding natural right. Thus, in Madison’s Bill of Rights speech, he described retained rights as those which “are retained when particular powers are given up to be exercised by the Legislature.”⁴³ As Madison said in a letter to George Washington, “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.”⁴⁴ Rights can thus be relinquished in two ways: (1) by granting powers to government or (2) by limiting the rights of the people. The Ninth and Tenth Amendments are designed to ensure that neither of these modes of relinquishment is accomplished by mere implication. The

40. See ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

41. Letter from the President of the Convention to the President of Congress (Sept 17, 1787), in *1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 305, 305 (Merrill Jensen ed., 1976).

42. *Id.*

43. 1 *ANNALS*, *supra* note 37, at 453.

44. Letter from J. Madison Jr. to The President of the U. States (Dec. 5, 1789), in *5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870*, at 222 (Dep’t of State ed., 1905).

Ninth Amendment guards against the negative implication that would come from an incomplete enumeration of rights, and the Tenth Amendment protects against the expansion of powers by means of positive implication beyond those enumerated.

To the extent that a modern jurisprudence of unenumerated rights takes its bearings from the Ninth Amendment, then, it would focus judicial attention on natural rights, not positive rights, and would be attentive to the importance of the limits imposed by the enumeration of powers. Any attempt to discover rights to welfare, education, housing, marriage, nondiscrimination in the commercial sphere, or the like, will find no support in the natural rights foundation of the Ninth Amendment.

The second potentially significant feature of the Ninth Amendment is its reliance on a preconstitutional, equitable understanding of rights protection. Contrary to the arguments of some academics,⁴⁵ the language of the Amendment does not suggest that the retained rights to which it refers attain the status of constitutional rights on par with the enumerated rights of the Bill of Rights. To the contrary, the Amendment states only that those unenumerated rights are not to be “denied” or “disparaged.”⁴⁶ In other words, unenumerated rights are to enjoy the same status they enjoyed before the remainder of the Bill of Rights was added to the Constitution. The purpose of the Ninth Amendment was not to elevate an unstated set of rights to fundamental status but to ensure that no rights, fundamental or otherwise, are relinquished or given up by negative implication.

To know what legal protection the retained rights of the Ninth Amendment are entitled to receive, we must therefore determine how natural rights were protected prior to the Constitution. Our best evidence of that is found in Blackstone’s *Commentaries*. Blackstone is well known for his doctrine of parliamentary supremacy: “[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it”⁴⁷ Less well known is what immediately follows: “where some collateral matter arises out of the general words”—what we would call an as-applied challenge—judges acting in equity may “disregard” that application if they can “conclude that this consequence was not foreseen by the Parliament.”⁴⁸ Blackstone made clear that when the legislature couches its intent in “such evident and express words,” then

45. E.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 235–42 (2004); DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007).

46. U.S. CONST. amend. IX.

47. WILLIAM BLACKSTONE, *1 COMMENTARIES* *90.

48. *Id.* at 91.

“no court [] has the power to defeat the intent of the legislature.”⁴⁹ But a court is entitled to presume that the legislature did not intend to abrogate established rights of the people absent explicit and specific indications to the contrary. Natural rights prevail in court unless legislative abrogation is clear.

Significantly, this doctrine was applied in the most prominent judicial decision in a state court after independence and before the Constitution: *Rutgers v. Waddington*.⁵⁰ In that case, argued by Alexander Hamilton and decided by his friend James Duane, who was then the Mayor of New York City and thus the chair of the prestigious Mayor’s Court, the court quoted Blackstone and applied the principle of Blackstonian equitable interpretation to New York’s Tory Confiscation statute, to the partial protection of the Tory defendant.⁵¹

If modern courts looked to the Ninth Amendment as the basis for unenumerated rights jurisprudence, they might be drawn to an approach almost the opposite of current practice. They would narrowly construe exercises of power that diminish natural rights, but accede to the authority of legislatures when they have acted explicitly and intentionally. The first half of this formula contradicts both the New Deal premise of *Caroleene Products*,⁵² which demands a generous rather than a narrow construction of federal powers, and the Regan-era *Chevron* doctrine,⁵³ which demands deference to governmental claims of legislative authorization. Blackstonian equitable interpretation demands that the legislature—not the executive—be explicit if it wishes to invade natural liberty. The second half of this formula contradicts the judicial supremacy of *Casey* and its scions. Unless and until they are enumerated and made part of constitutional law by the people, natural rights are not impervious to legislation. There is no institution that is vested with authority to control the legislature when it has acted explicitly, specifically, and intentionally, unless the Constitution has either denied the power to the legislature or granted a supervening right to the people. Where, as in *Casey*, a legislature has explicitly considered and deliberately abridged a natural right, the Court has no authority to persist in giving it legal protection.

Some might say that this reading of the Ninth Amendment renders it toothless—that legislatures can always pass specific laws abrogating natural rights, and the courts will be powerless to stop them. But in fact it is politically costly for legislators to abrogate rights. The consequence

49. *Id.*

50. The case is unreported, but the opinion has been reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 392, 392–419 (Julius Goebel, Jr. ed., 1964); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 457–59 (1998) (describing the *Rutgers* opinion).

51. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 50 at 415.

52. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148 (1938).

53. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

of Blackstonian equitable interpretation is that rights cannot be abrogated silently or through the aggressive enforcement of broad laws by the executive. Discussion of rights will have to be explicit. That would be no small thing.

III. PRIVILEGES OR IMMUNITIES CLAUSE

The historical record suggests that the Privileges or Immunities Clause was the heart and soul of the Fourteenth Amendment.⁵⁴ Like the Ninth Amendment, this Clause seems to refer to a body of rights enjoyed by the people that the states are forbidden to abridge: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”⁵⁵ If there are unenumerated rights, protected against state legislative or executive invasion, the Privileges or Immunities Clause would seem to be their natural textual home. In the 1872 *Slaughter-House Cases*, however, the Supreme Court rendered this provision essentially meaningless and redundant.⁵⁶

The obvious question is what content to give the term “privileges or immunities of citizens of the United States.” There are two leading plausible alternative ways of reading this language.

The first is as a shorthand reference to the enumerated rights of the Bill of Rights. This would be a natural use of the language. If most people were asked what the privileges or immunities, meaning rights, of U.S. citizens are, they would answer by quoting the Bill of Rights. As Akhil Amar and others have shown,⁵⁷ there is considerable historical support for this reading—not conclusive or uncontradicted, but considerable support. John Bingham appears to have believed that the principal flaw in antebellum constitutional jurisprudence was that the Bill of Rights could not be enforced against the states and that the Privileges or Immunities Clause would correct that flaw.⁵⁸ Chief Justice Taney seemed to believe that if free blacks were recognized as citizens, they would be entitled to exercise Bill of Rights rights, like freedom of speech and the right to bear arms, throughout the Union.⁵⁹ Leading advocates of the Fourteenth Amendment in the Thirty-Ninth Congress listed the freedoms of the Bill of Rights as examples of privileges or immunities of citizens.⁶⁰

54. U.S. CONST. amend. XIV, § 1, cl. 2.

55. *Id.*

56. 83 U.S. 36, 74–80 (1873).

57. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 167–76 (1998).

58. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 346–49 (2011).

59. *Dred Scott v. Sandford*, 60 U.S. 393, 416–17 (1856).

60. *See, e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 1034 (1866) (Rep. Bingham); *id.* at 1057 (Rep. Kelley); *id.* at 1262 (Rep. Broomall); *id.* at 1294 (Rep. Wilson).

If this is the meaning of the Privileges or Immunities Clause, though, it does not support any jurisprudence of unenumerated rights. The enumerated rights of the Bill of Rights now apply to state governments, but there is no reason to think that judges are entitled to conjure up any others.

There is, however, an alternative reading. Perhaps the privileges or immunities to which the Fourteenth Amendment refers are the same as the privileges and immunities protected by the Comity Clause of Article Four⁶¹—such as the right to have, acquire, sell, and use property; to make and enforce contracts; to sue and be sued, to be subject to the same criminal laws; and to employ the instrumentalities of civil justice. Under Article Four, a citizen of one state is entitled to this set of rights when traveling in another state. It is plausible to think that under the Fourteenth Amendment, all citizens, including former slaves, are entitled to this set of rights within even their own states. This is what the text of the Privileges or Immunities Clause says: that no state may abridge the “privileges or immunities” of any person who is a citizen of the United States. The Civil Rights Act of 1866⁶² appears to embody this understanding. It provides that “all persons born in the United States,” and not subject to a foreign power, are citizens of the United States and have the “same right . . . as is enjoyed by white citizens” to exercise essentially this same list of rights.⁶³ If the purpose of the Fourteenth Amendment was to constitutionalize the Civil Rights Act, this is a persuasive reading of the Privileges and Immunities Clause.

If this is so, there exists a narrow but important scope for unenumerated rights. The rights protected by the Comity Clause are not listed anywhere and are not fixed. Rather, according to the canonical interpretation in *Corfield v. Coryell*, they comprise those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”⁶⁴ The test, then, is whether the rights are long-established and broadly or universally recognized like the common law rights listed in the Civil Rights Act of 1866.

Taken in a broad spirit, this might be thought to authorize judges to identify those rights that are firmly embedded on our laws and traditions, both as a matter of longevity and as a matter of national consensus—as the Court held in *Washington v. Glucksberg*.⁶⁵ This interpretation draws strength from the overall thrust of the Fourteenth Amendment as a na-

61. U.S. CONST. art IV, § 2, cl. 1.

62. 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)).

63. *Id.*

64. 6 F.Cas. 546, 551 (E.D. Pa. 1823).

65. 521 U.S. 702 (1997) ([T]he [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”).

tionalization of the content of rights. In effect, when a particular right has been recognized by a large majority of states for a long period of time, judges are empowered to treat it as a “privilege or immunity” of national citizenship and enforce it against outlier states that may depart from that consensus. Rights become national by virtue of time, consensus, and experience. This could provide a stronger explanation for *Griswold*: because every other state recognized the right of married couples to use contraceptives, and had for many decades, the Court was within its authority to declare Connecticut’s law invalid.

Note, though, that this approach does not give courts authority to engage in contentious moral reasoning or to elevate one side in a reasonable disagreement to constitutional victor. It provides no support for *Roe v. Wade*, for example. Enforcing national consensus is not an exercise in moral philosophy but of determining the weight of national practice. It is a nationalistic and traditionalist inquiry, not a moralistic or progressive one.

IV. CONCLUSION

If we examine the specific sources of possible authority for judicial enforcement of unenumerated rights, we find that they do not point in the same direction. The Ninth Amendment contains a broad reference to retained natural rights, but is enforced through equitable interpretation, not as a matter of constitutional supremacy. The Privileges or Immunities Clause may embody judicially enforceable rights against states but only if they are firmly embedded in law and tradition. None of these sources supports the modern open-ended practice of substantive due process.

1998

UNIVERSITY OF ILLINOIS LAW REVIEW

[Vol. 2013