

## EVERYTHING IS ENUMERATED: THE DEVELOPMENTAL PAST AND FUTURE OF AN INTERPRETIVE PROBLEM

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When asked to reflect upon the problem of unenumerated rights, most constitutional theorists are likely to understand the invitation as raising questions about the legitimacy of a court exercising its ostensibly “countermajoritarian” judicial review powers while invoking a right not specifically named in the text of the Constitution.<sup>1</sup> In this article, I will take the invitation somewhat differently, instead as raising questions about both the necessity and propriety of rights enumerations. This point of entry does not preclude an acknowledgment of the question of legitimacy in the exercise of the power of judicial review pursuant to an unenumerated right, but it takes that question as part of a more capacious and comprehensive whole. Looking at the whole will allow us, first, to take into account problems of enumeration—that is, of lists—that arise in the practice of

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<sup>1</sup> For the classic discussion of judicial review as a “countermajoritarian” problem, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). In recent years, some prominent political scientists have argued that the description of judicial review as countermajoritarian is inapt. See, e.g., GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 3 (2003) (arguing that legislators at times deliberately give judges the opportunity to make policy); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 37 (1993) (arguing that the judiciary steps in to make policy when there is a “legislative stalemate or invitation”). As with many of these debates, it seems to me that the truth lies somewhat in the middle or, rather, depends on the particular incident under study. It is true that in some cases the legislature explicitly invites judicial review, thus mitigating the countermajoritarian character of that review. However, there is certainly no shortage of (very prominent) instances in which the Court, by voiding a statute, has opposed the clearly stated will of the legislature, which had absolutely no intention of fobbing off that particular question to the Court. See *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act). For a different defense of judicial review as (partially) majoritarian, anchored in a theory of political regimes, see JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW COURTS SERVE AMERICA* (2006) and Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 117 (Ronald Kahn & Ken I. Kersch eds., 2006).

“popular constitutionalism” taking place outside the courts, in both institutional and non-institutional settings. Second, it will allow us to relate problems of enumeration, whether they arise as problems facing institutionally authoritative interpreters of texts (like judges) or textual drafters, to broader political regimes or orders.<sup>2</sup> In this way, the problem of unenumerated rights can be considered less as a problem of the appropriate assertion of judicial power than as a part of the broad tapestry of American constitutional culture and constitutional politics, both inside the courts and out. I have no intention of availing myself here of the traditional freedom law journals provide to attempt to publish what amounts to a book on this topic. Rather than delving too much into details, I pass relatively quickly over a few historical markers. My modest goal is to suggest new, and potentially stimulating, ways to think about a familiar area of longstanding jurisprudential debate.

If we consider unenumerated rights not purely judicially, but more universally as appeals made both inside and outside of the courtroom on behalf of rights not specifically listed in the Constitution, and in some cases appeals made to textually-listed rights as mere illustrations of rights having their origins in broader non-textual sources, it becomes clear that appeals to unenumerated rights have been a constant in the American political tradition since the nation’s very inception. There is no reason to believe that this will change any time soon. That said, though, if we track the path of constitutional development long-term, there are clearly periods in American political and constitutional history when the polity, key sectors of the polity, or politically significant institutions such as courts, or constitutional drafting conventions, focus more intently on the question of enumeration as a pressing political and theoretical problem. If we study these episodes of heightened consciousness of enumeration as problems across time, we will find that they reveal the way in which rights enumerations, objections to them, and arguments about their purposes and comprehensiveness, serve distinctive purposes within the developmental lives and histories of political and legal institutions, and the life-cycles of governing political regimes.

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<sup>2</sup> For recent efforts in this regard, see Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT*, *supra* note 1, at 138, explaining changes in judicial understandings of the Constitution with reference to policy agendas of national governing coalitions; Ken I. Kersch, *The New Deal Triumph as the End of History? The Judicial Negotiation of Labor Rights and Civil Rights*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT*, *supra* note 1, at 169 (discussing changes in judicial understanding of the constitutionality of labor law in light of New Deal legislation); Tushnet, *supra* note 1 (describing how judicial review contributes to the construction of political order).

## I. PRELIMINARIES: UNENUMERATED RIGHTS AND WHAT THEY MEAN NOW

As a theoretical matter, and at the most general level—that is, considered separately from questions of institutional placement concerning enforcement, within distinctive institutional and political contexts—it is not clear, first, what we mean by an “unenumerated right” and, second, why a right’s prior non-enumeration is of political or intellectual significance. This is not to say, in the contemporary context, that a significant number of people do not seem to be thinking of the same thing when they think about unenumerated rights and reflect upon their existence as a problem. In that context, the paradigmatic unenumerated rights case arises when a court uses the phrase “right to x” (e.g., “the right to privacy,” “the right to treatment,” “the right to die with dignity,” “the right of a parent to direct the upbringing of his child,” etc.) as its chief justification for voiding a law or action as unconstitutional. The implication (and often, the charge) is that, in doing so, the court has “created” or “invented” a new right with no basis in the constitutional text. When a court acts in this way, it is argued that it is, in effect, writing a constitution, rather than interpreting one. This raises serious questions of the legitimacy of the Court’s exercise of its judicial review powers, since those powers are premised on its presumably passive role in applying the fundamental law of the constitutional text to the ordinary law under consideration.<sup>3</sup>

It is notable, however, that in the most paradigmatic of these “right to x” cases, such as *Griswold v. Connecticut*, the Court (as other contributors to this symposium have noted) almost never completely leaves the constitutional text behind. In *Griswold*, Justice Douglas famously referred to the “penumbras, formed by emanations from” the First, Third, Fourth, Fifth, and Ninth Amendments, which, he ar-

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<sup>3</sup> For the classic defenses of judicial review on these grounds, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also *United States v. Butler*, 297 U.S. 1, 62 (1936) (stating that the duty of the judge in assessing the constitutionality of a statute is “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”). On this point, I fully agree with Frank Michelman’s contribution to this symposium, which argues that the unenumerated rights issue (today, for law professors) is largely a question of judicial review and, moreover, that the criticism lodged against unenumerated rights today is essentially that the court which invoked such a right in voiding a law strayed “too far” from a reasonable interpretation of the text in finding such a right and, in doing so, departed from an interpretive technique grounded in what Michelman calls “standard legal method.” Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. (forthcoming Oct. 2006). See also Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. (forthcoming Oct. 2006) (subscribing to a similar view that the Court strayed too far from a reasonable interpretation when creating unenumerated rights).

gued, implied the existence of a “right to privacy.”<sup>4</sup> Justice Goldberg’s concurrence in *Griswold* recurred to the Ninth Amendment’s provision that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>5</sup> For this reason, it is wrong to say that the interpreter charged with having “invented” a new unenumerated right ignored the text. What the interpreter actually did is read the text in an expansive way, to the point of teasing out a new category that can then be applied by judges independently of its initial textual wellsprings.<sup>6</sup>

It is not at all clear that this newly generated category—the announcement of a fundamental, unenumerated “right to privacy”—was a *sine qua non* of reaching the result in either the first case in an identifiable line, or any of the subsequent decisions in that same jurisprudential line. Justices Douglas and Goldberg, for example, might have reached the same result in *Griswold* by the alternative means of finding the right to purchase and use contraceptives protected as a form of the “freedom of speech.” After all, the Court has repeatedly held that the First Amendment’s free speech protections apply to expressive conduct.<sup>7</sup> The Court has also indicated that sexual conduct falls within the category of expressive conduct protected under that Amendment, and under the Fourteenth Amendment as well.<sup>8</sup> Moreover, it is far from clear that Justice Douglas needed to extrapolate the existence of a “right to privacy” from the various amendments he cited in his *Griswold* opinion (that he chose to do so may have been characteristic of his particular, and peculiar, temperament). As it is not clear that there needs to be one, and only one, justification, it is similarly not clear that a married couple’s right

<sup>4</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>5</sup> *Id.* at 488 (Goldberg, J., concurring); see also *id.* at 500 (going beyond the Ninth Amendment argument, which depends on adhering to the incorporation thesis, to hold that Fourteenth Amendment due process and liberty “stands . . . on its own bottom”) (Harlan, J., concurring).

<sup>6</sup> On this point about interpreting to generate new categories, see Michelman, *supra* note 3, and Tushnet, *supra* note 3.

<sup>7</sup> See *United States v. Eichman*, 496 U.S. 310 (1990) (holding that flag desecration is protected by the First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that flag desecration is expressive conduct and protected by the First Amendment); *Clark v. Cmty. for Creative Non-Violence*, 486 U.S. 288 (1984) (stating that sleeping overnight in a public park could be expressive conduct protected by the First Amendment); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (holding that wearing black armbands as a form of protest in a public school is protected by the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concluding that refusing to pledge allegiance to the flag in a public school is protected by the First Amendment); *Stromberg v. California*, 283 U.S. 359 (1931) (concluding that displaying a flag is expressive conduct protected by the Constitution).

<sup>8</sup> See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (O’Connor, J., writing on her own behalf in Part III) (stating that nude dancing is expressive conduct); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Rehnquist, C.J., writing on his own behalf) (stating that nude dancing is expressive conduct).

to use birth control must, of necessity, derive from a single provision of the Bill of Rights. The Court might have cited all the amendments as essentially on par as applied to the facts of the case. Or it might have cited the First Amendment as *prima inter pares*, and the other amendments as secondary, but supportive. Arguably, none of these alternatives to the announcement of a “new” constitutional right to privacy would have been any less venturesome than the declaration of a new, unenumerated right itself.<sup>9</sup>

Considered in the context of the problem the Court’s liberal justices understood themselves to be facing at the time, the *Griswold* opinion is, relatively speaking, quite grounded textually. After all, the decision by Justices Douglas and Goldberg to ground the ruling in a constellation of specific Bill of Rights provisions followed a series of late nineteenth- and early twentieth-century appeals to the Due Process Clauses of the Fifth and Fourteenth Amendments alone as independent sources of constitutional rights.<sup>10</sup> These appeals had long since been anathematized by modern progressive liberals as a form of illegitimate judicial legislation. Both Justices Douglas and Goldberg were quintessential liberals deeply steeped in that heritage. In the earlier line of “substantive due process” cases, there was a textual touchstone too: the word “liberty.” But the conclusion by these earlier “conservative” courts that there exists a judicially-enforceable substantive constitutional right to “liberty” was taken by liberals as presumptuous enough to subsume the entire constitutional (and political) system into a single word, and then turn the guardianship over that word, and the principle it entailed, entirely over to judges upon whom no discernable limits seemed to have been placed in interpreting it. For understandable reasons, this was taken to be a serious problem. But it is not at all clear that the problem was the absence of a textual touchstone for the ruling. Rather, it was that the touchstone used (“liberty”) seemed infinitely malleable.

The feint that Justices Douglas and Goldberg used was to anchor their ruling not in the due process clauses, but rather in the Bill of Rights. This move, however, does not remedy the problem. After all, what if one is perfectly willing to interpret these ostensibly more concrete textual provisions—such as the free speech or Establishment

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<sup>9</sup> See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1917 n.84 (2004) (stating that *Griswold*’s treatment of fundamental rights signaled the start of the Court’s expanded use of the term “liberty”).

<sup>10</sup> See *Adkins v. Children’s Hosp.*, 261 U.S. 525, 545 (1923) (providing the right to contract as part of the liberty protected by the Due Process Clause); see also *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (“The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.”); *id.* at 502 (White, J., concurring) (stating that the right to liberty protected by the Fourteenth Amendment encompasses the right to marry and raise children).

clauses of the First Amendment, or the Equal Protection Clause of the Fourteenth—in ways that also appear to many to be almost infinitely malleable? If this is the case, as indeed it has by now long since been, it is not at all clear that the announcement of a new category of rights is, in any independent sense, a significant problem rather than a marker for a certain type of judicial temperament, or, in the idiom of Professors Tushnet and Michelman in their papers for this symposium, respectively, a willingness to go “too far” in their interpretations, or to depart too radically in their interpretations from the application of the widely-accepted “standard legal method.” What seems to have happened in *Griswold* is that the Justices sought to legitimize the result in the case in a way that comported with their best reading of the ideological environment extant at the time of their ruling, which favored expansive readings of the Bill of Rights over expansive readings of the Due Process Clause.

In the 1960s and 1970s, a “right to privacy” seems to have been the Court’s preferred grounds for rulings expanding the scope of individual sexual and reproductive autonomy. But we can already see at the turn of the twenty-first century, in the aftermath of a generation of critiques of the “right to privacy” as not distinguishable in any useful way from a *Lochner*-like substantive due process liberty ruling, how simple it can be for the Court to drop the right to privacy language, switch over to appeals to “liberty” and, in effect, continue to develop the line of precedent along precisely the same substantive lines.<sup>11</sup> Indeed, the switch to a language of liberty rather than privacy seems to have provided a new common ground for a new coalition of Democratic and (more libertarian) Republican appointees. The enforcement of an unenumerated right continues. But it is no longer clear whether that right has any consistent name.

## II. WHO’S AFRAID OF UNENUMERATED RIGHTS?

If we consider the question of rights enumerations not simply juridically, but universally, it is clear that neither the public generally, nor political conservatives, are hostile to the idea of unenumerated rights. It is thus not at all clear that unenumerated rights, as such,

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<sup>11</sup> See *Lawrence v. Texas*, 539 U.S. 558, 564–67 (2003) (concluding that liberty protected by the Constitution forbids the proscription of same-sex sodomy); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (O’Connor, J., plurality opinion) (reaffirming that the right to an abortion is a liberty protected under the Constitution); see also RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* (2004) (emphasizing the liberty, rather than privacy, aspects of these rulings); Seth Kreimer, *Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. (forthcoming Nov. 2006) (focusing on the rights at issue in these cases as rights of bodily integrity or autonomy).

have any principled and consistent opponents—a fact that bodes well for their future within American law and politics.

To be sure, in the post-*Griswold* era, many (though not all) conservatives have become vehement critics of unenumerated rights like the right to privacy. At the same time, however, these same conservatives are often simultaneously the most boisterous cheerleaders for the proposition that there is a “higher law” or “natural law” background inherent in the American political and constitutional tradition. Allusions to the opening words of the Declaration of Independence are standard, as are arguments tracing Jefferson’s words forward into Lincoln’s thought, and onwards into the Constitution itself.<sup>12</sup> In many respects, this reading of the American constitutional and political tradition is incontrovertible and should hardly be considered the insight of a “conservative” reading of the nation’s political past. The assumption that Americans are possessed of God-given political and constitutional rights—some of which are enumerated, and some not—pervades the thinking of the greats (Jefferson, Lincoln, and Locke before them), the people themselves, and (much less frequently, but nevertheless, longstandingly) the courts.<sup>13</sup> Indeed, much of the conservative animus against recent reiterations of a right to privacy by the Supreme Court is rooted in natural rights arguments alleging that, in announcing this “new” right to the use of birth control, abortion, and same-sex intimacy, the Court has arrayed itself against the reason inherent in the God-given natural order.<sup>14</sup> For these conservatives, the problem is less that the Court has shown itself to be a non-positivist believer in natural law and that it confers rights on the basis of that law, but rather, that its understanding of natural law (or right) is wrong, and, indeed, corrupt. Although some natural law proponents remain textualists and positivists when it comes to

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<sup>12</sup> GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992); see also HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 308–29* (1959) (discussing Lincoln’s views about the equality of men under the Declaration of Independence). See generally EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955) (portraying American constitutional law as a product of earlier legal regimes).

<sup>13</sup> For useful evidence of this, with an emphasis on the courts, see James W. Ely, Jr., “*To pursue any lawful trade or avocation*”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L., 917 (2006) and R.H. Helms, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. (forthcoming Oct. 2006).

<sup>14</sup> See generally HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (1986) (contemplating the interaction of man-made law with moral law); HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* (2002) (discussing how the controversial issues of privacy, abortion, and birth control implicate important questions of natural law).

questions of the judicial power to interpret legal texts,<sup>15</sup> many, one suspects, would be perfectly content if the Court's interpretations of ostensible natural rights coincided more completely with their own reading of the natural order. If the Court were to do this, after all, in their eyes, it would simply be affirming, and not inventing.

In short, if (as Justice Black famously insisted in *Griswold*),<sup>16</sup> unenumerated rights are simply appeals to natural law in a different form, then there is absolutely nothing new about unenumerated rights, and conservatives are, by and large, no more critical of them as a matter of principle than are liberals. They would derive those rights in different ways, and apply them in very different cases.

### III. UNENUMERATED RIGHTS AS A PROBLEM

While appeals to unenumerated rights in American culture, politics, and law are perpetual, enumeration problems are cyclical, though not necessarily in any regularized sense. They move to the fore and disappear as the polity moves through time, as they relate to broader questions of regime politics.<sup>17</sup>

As noted above, in the form we know it today, the enumeration problem is, first and foremost, a problem of judicial power. This was not always the case. If we approach the subject from a perspective that places cycles in the salience of the enumeration problem within a broader framework taking into account debates about rights lists both in the courts and outside them, we can identify at least four periods in American constitutional development when such lists appeared as serious intellectual and political "problems": first, in the debate between the Federalists and the Anti-federalists over the addition of the Bill of Rights to the Constitution; second, in the first stage of the debate, inaugurated by Justice John Marshall Harlan in his late-nineteenth-century Supreme Court dissents, over whether the Fourteenth Amendment "incorporated" the Bill of Rights as protections against the conduct of the states; third, in the mid-twentieth-century Black-Frankfurter debates over incorporation; and, fourth, in the

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<sup>15</sup> See, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 1 (1993) ("[T]here is nothing in principle unjust about the legal enforcement of morals or the punishment of those who commit morals offenses.").

<sup>16</sup> *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black J., dissenting).

<sup>17</sup> Some academics have focused on American political development as a distinctive vantage point for understanding political and legal change. See KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 26 (2004) ("The questions taken up by [American Political Development] research are seldom disembodied from the life of the polity itself; more often than not, they are keyed to its changing circumstances and integral to its lived experience."); PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004) (discussing a process oriented view of political development); *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006).



contemporary attack launched by textualists and originalists against unenumerated rights (particularly against the “right to privacy” announced by the Court in *Griswold*).

These four episodes in the history of the enumeration problem relate to regime politics in different ways, and present distinctive political and legal problems. They also vary along a number of dimensions, which include: 1) the felt imperative of compiling and publicly announcing a list of protected rights; 2) the presumption that the rights on the list are judicially enforceable; and, 3) the presumption that *only* the rights on the list are judicially enforceable (that is, the insistence that the list is comprehensive and complete).

As Mark Graber has outlined in his contribution to this symposium, these episodes, in many respects, can be understood as debates (whether between antagonistic parties, or within a governing coalition, or in the process of drafting a constitution, or modifying one) over the best strategy for protecting constitutional rights. One strategy (and a strategy especially familiar to us today in an age of powerful courts) is to specify the rights and interests to be protected in the language of a constitutional text. A second is to specify, through an enumeration, the powers that government officials may exercise (with the implicit assumption that any acts that extend beyond those powers are unauthorized, and hence, a presumed invasion of rights). The third is to structure government institutions in such a way that, in its normal operations—through the abrasion and collision of power against power—the system would work to preserve rights. Needless to say, over the course of American history each of these has played a part in rights-protection efforts under our Constitution. Different strategies have predominated in different eras. And within those eras, each had distinctive sets of advocates and detractors.

Graber’s approach is one useful way to consider the place of distinctive rights-protecting strategies within the trajectory of American political and constitutional development. My approach, which is not inconsistent with his, focuses in particular on salient episodes of debate about the propriety of enumeration, given the background assumption (which Graber explores, but I simply note) that a particular set of institutions is likely to be the polity’s chief instrument of rights protection.

#### IV. A HISTORICAL TAXONOMY OF THE ENUMERATION PROBLEM

Earlier enumeration problems were presented in three distinct episodes: first, the Founding; second, the late nineteenth century debate about the scope of judicial power to enforce individual liberties pursuant to the newly adopted Fourteenth Amendment; and, third, the mid-twentieth century Black-Frankfurter debate over the incorporation of the Bill of Rights against the states. While all shared

a preoccupation with the necessity and propriety of drawing up publicly promulgated lists of protected rights, which entailed a debate about what rights should be added to the list, and what was properly left off, as well as about whether the list was intended to be comprehensive, each of these episodes raised very different legal, political, and institutional problems. Only by undertaking a comparative assessment of these diverse confrontations with the enumeration problem can we properly situate our own enumeration problem. This is a prerequisite to assessing the prospects for unenumerated rights in the American political future.

At the time of the Founding, the problem of enumeration was a problem of the sort characteristic of any constitutional founding: what to put in and what to leave out, or, put otherwise, what to list and what not to list. A founding problem is a regime problem in its most elemental sense. While there is much dispute, imprecision, and inconsistency in discussions of just how we identify political and legal regimes, few would disagree that a polity's decision to create an entirely new slate of governing institutions—institutions that then, in turn, subsist and develop through time—represents the inauguration of a new political and constitutional regime.

Of the several enumeration episodes I explore here, the Founding episode tracks to the greatest extent the sorts of questions Graber raises. Here, the debate really is, at its core, about the best strategies of protecting rights. How important are (enumerated) "bills of rights" for rights protection? How important, relatively speaking, are questions concerning the enumeration, not of rights, but instead of governmental powers?<sup>18</sup> How important are structural features of the constitutional architecture, such as the "double security" of the separation of powers (where ambition counteracts ambition) and federalism's "compound republic," relative to rights enumerations?<sup>19</sup> Within this debate, of course, there were those such as the Anti-federalists who identified rights enumerations as crucial, and others who accorded them (at least at the national level) considerably less significance.<sup>20</sup>

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<sup>18</sup> See THE FEDERALIST NO. 27 (Alexander Hamilton), *supra* note 3, at 177 ("[T]he laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath.") (emphasis in original); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 3, at 515 ("[T]he Constitution is itself . . . and to every useful purpose, A BILL OF RIGHTS.") (emphasis in original).

<sup>19</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 320 (arguing that "the interior structure of the government [must be designed so] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places").

<sup>20</sup> See generally THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 3, at 510–20 (arguing that the Bill of Rights is unnecessary due to the broad power vested in the people).

When it came to central enumeration problems of this era as I conceive them—whether the U.S. Constitution should include a list of textually enumerated rights—the problem during this episode sounded chiefly in federalism. It entailed a controversy and debate about the best way to protect the people and their states (with which they more deeply identified at the time, both culturally and politically) from the potential predations of a distant central government radically more powerful than the one known during the predecessor Articles of Confederation. In that way and others, the debate and controversy was quite distinct from the contemporary enumeration problem, which is preoccupied with uncabined judicial power. To the minor extent that the Founding Era enumeration problem was understood as a judicial power problem, it was seen as a problem of the power of federal judges as instruments of central state policy<sup>21</sup> and not necessarily as potential usurpers of the power of a democratically elected Congress (of which the Anti-federalists were equally, perhaps even more, suspicious).<sup>22</sup> Many, and perhaps most, took the enumeration problem at this time as raising questions likely to be resolved not by courts, but through public debate, within and outside the elected institutions of government. At that time, and unlike today, few understood the proposed enumeration to be either exhaustive or exclusive. At the time of this initial enumeration, there were considerable doubts in some quarters about the propriety and necessity of a national-level enumeration that arose, not out of any doubt about the substantive content of the rights to be enumerated, but because some feared that any enumeration made would naturally be presumed to be exhaustive and, hence, actually a helpmeet to the aggrandizement of national power. Ultimately, to allay any fears of the former presumption, the Ninth Amendment<sup>23</sup> was added to the Bill of Rights.<sup>24</sup>

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<sup>21</sup> See generally KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* (2004) [hereinafter KERSCH, *CONSTRUCTING CIVIL LIBERTIES*] (suggesting an alignment of interests between the central state and landmark judicial decisions); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (describing a similar judiciary-legislature relationship in England, Imperial China, and the courts of Islam).

<sup>22</sup> See, e.g., Essays of “Brutus” to the Citizens of the State of New York, reprinted in *THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 306 (Michael Kammen ed., 1986) (insisting that the federal judiciary will act consistently to advance the claims of the national government, restricting the prerogatives of the states).

<sup>23</sup> U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

<sup>24</sup> See *THE FEDERALIST* NO. 84, (Alexander Hamilton), *supra* note 3, at 513–14 (arguing for the proposition that the enumeration of rights in the Constitution might lead some to conclude that unenumerated rights were excluded from constitutional protection); see also Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (“[T]he founding generation did not intend their new Constitution to be the sole source of paramount or

Once it was decided that a Bill of Rights would be added to the Constitution by the First Congress, there was, of necessity, some discussion and debate about what particular rights to include in the list and which ones to leave off, and about the particular verbal formulation with which to express those rights. But, unlike today, when law professors actively compete with each other to formulate endlessly creative proposals for “new” fundamental rights, at that time the rights to be included were drawn for the most part from a template slate of rights enumerated in the English Bill of Rights, and, in some cases, the pre-existing state constitutions. They occasioned relatively little controversy. This was because at the time the Bill of Rights was adopted, the degree to which the textually enumerated rights were to be judicially enforceable was unclear, both as a theoretical and practical matter. In the Founding Era, the judicial review powers of the federal courts, while conceivable, had yet to be definitively claimed. The status of the Bill of Rights as legal commands—as opposed to political touchstones—was unsettled.<sup>25</sup> The institutional architecture of the federal judiciary was unbuilt. And the institutional prestige of the federal courts was weak and politically suspect. At the time, who knew what the implications, as a judicial matter, of a nationally-enumerated Bill of Rights would be?

When it next appeared, the enumeration problem assumed a very different guise. In the Founding Era, the necessity of having a national rights enumeration was championed as part of a broader Anti-federalist, and, subsequently, Jeffersonian rights-protection strategy that also championed a strict construction of the enumerated limits of the federal powers, a suspicion of federal judges and federal courts, and an aggressive defense of robust understandings of the structural protections provided by constitutional federalism and the separation of powers. In the next episode in which enumeration assumed the status of a problem, the questions of national enforcement power—of institutional capacity of national institutions—were highly prominent. Some of the rights at issue in this subsequent episode

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higher law, but instead envisioned multiple sources of fundamental law.”). I would note that these fears actually belatedly came to pass under the twentieth-century regime of general powers and preferred freedoms, with the former envisaging islands of powers in a sea of rights, and the latter the opposite. See Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 624 (1994) (“[J]udges in the nineteenth and early-twentieth centuries were interested in constructing general protections for liberty broadly defined . . . rather than special protections for a handful of particularly important liberties.”).

<sup>25</sup> See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (discussing the view amongst some in the Founding generation that a Bill of Rights would be monitory rather than [legally] mandatory).

were new.<sup>26</sup> But some—and I will focus on these here—were the very same Bill of Rights provisions that had been enumerated in the first enumeration episode. The question this time was whether the Civil War and the amendments to the Constitution that were adopted in its wake had altered the terms of the original political settlement concerning the applicability of the Bill of Rights to the states.<sup>27</sup> This time, in a radically altered policy environment, the Bill of Rights enumeration was offered not as a protection of the independence and power of the states and a restriction on the powers of the national government, but rather as a means for the national government to control the behavior of the states as they sought to act upon the persons residing or moving within them. In this second enumeration episode, questions of jurisdiction of the supervisory and enforcement powers of national political institutions—both of Congress and the federal courts—were crucial.

The central figure in this next encounter—which involved a debate over whether the Fourteenth Amendment required the Bill of Rights to be “absorbed” or “incorporated” as protections against the states—was (the first) Justice John Marshall Harlan. While, as Felix Frankfurter noted, Harlan’s views on this were considered an “eccentric exception” at the time, they helped inform mainstream understandings of the applicability of the Bill of Rights in the mid-twentieth century.<sup>28</sup> The Founding Era enumeration debate was fought primarily in the realm of constitutional ratification and electoral politics. The second was taken up in the realm of jurisprudence; that is, as an interpretive question coming before federal judges. Although Justice Harlan is taken to be a progenitor of the next enumeration controversy—the Black-Frankfurter debate of the 1940s—Justice Harlan’s assumptions and concerns were in many respects quite different from the later debates they adumbrated. Justice Harlan was not particu-

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<sup>26</sup> Amongst those that were new were the Fourteenth Amendment’s equal protection guarantee, the Fifteenth Amendment’s protection of voting rights, and the statutory rights set out in the Civil Rights Act of 1866.

<sup>27</sup> See, e.g., *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding that the Constitution of Louisiana could not be reviewed by federal courts for non-compliance with the First Amendment’s religion clauses); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding the Fifth Amendment’s Takings Clause inapplicable to actions taken by the states).

<sup>28</sup> As I will note below, Harlan’s views were not the same as the views later adopted (in part through appeals to his authority) in the mid-twentieth century. See KERSCH, *CONSTRUCTING CIVIL LIBERTIES*, *supra* note 21, at 86–87 (describing the legacy of Harlan’s lone dissents in a series of criminal cases as “early, principled commitments to a rights-protective theory of incorporation”). By focusing on this episode as an interpretive problem for the courts, I do not mean to ignore the fact that the question was first discussed in Congress at the time of the drafting of the Fourteenth Amendment. As it turns out, however, those debates became significant chiefly as aides to judges charged with discerning the “true” meaning of the Fourteenth Amendment, as it was invoked to decide concrete legal cases.

larly troubled (or at least concerned in any sustained way) with what later generations took to be the “profound” problem of untethered judicial power. Justice Harlan understood the enumeration of rights in the Bill of Rights to be but one source of judicially enforceable federal rights. In his opinions (often dissents) regarding the applicability of those rights to the states, he did not especially trouble himself over settling on a single grounding for the rights. For Justice Harlan, history, tradition, natural law, or textual enumeration would do, and each would do just as well as the other. He commonly cited many of these touchstones simultaneously.<sup>29</sup> Although Frankfurter would later charge Justice Hugo Black with following in Harlan’s footsteps in setting out his theory of “total incorporation,” Harlan’s rather open-ended approach, in its original form, would hardly have answered the concerns about rampant judicial discretion that Black’s theory of total incorporation was designed to address. It was fashioned not to keep judges from drawing from ostensibly inappropriate non-textual sources of law, but to arrive at the answer to the question “which rights are so fundamental as to be appropriately considered national?” This was a different concern, and a different constitutional problem.<sup>30</sup>

The Harlan Era Court bequeathed to its twentieth-century successors a world in which the Supreme Court came to understand itself, and was understood by others, as a crucial defender of the protection of rights and liberties at the national level—a distinctively modern model of rights protection that is only one of many imaginable models concerning the best way of advancing the same ends.<sup>31</sup> In this way, the ostensibly conservative Harlan Court, despite its rejection of the theory that the Bill of Rights was enforceable against the conduct of the states,<sup>32</sup> beget our modern Supreme Court, and set the stage for a policy environment in which concerns about “judicial activism,” “judicial restraint,” and “judicial supremacy” moved to the front and

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<sup>29</sup> The decision to do so seems to be quite common in the American political and legal tradition, perhaps even more the rule than the exception. At about the same time, in his fight against the labor injunction, American Federation of Labor leader, Samuel Gompers—at the time an aggressive critic of judicial power—referred simultaneously to the First Amendment, the Magna Carta, God’s law, and universal human rights in making his “constitutional” appeals. Ken I. Kersch, *The Gompers v. Buck’s Stove Saga: A Constitutional Case Study in Dialogue, Resistance, and the Freedom of Speech*, 31 J. SUP. CT. HIST. 28 (2006).

<sup>30</sup> I do not mean to deny that this was also a question in the Black-Frankfurter debate. But, in that later episode, it was considered alongside the highly-charged concern with run-away judicial power. I canvass Justice Harlan’s approach to incorporation at some length in my book. See KERSCH, *CONSTRUCTING CIVIL LIBERTIES*, *supra* note 21, at 86–87.

<sup>31</sup> See Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights*, 9 U. PA. J. CONST. L. (forthcoming Nov. 2006).

<sup>32</sup> *But see* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (concluding that the Takings Clause is applicable to the states).

center. The liberal justices of the modern Court were staunch critics of the earlier Court. But, nevertheless, they ultimately welcomed the responsibilities it had created and assumed. In the third enumeration episode, both Black and Frankfurter took the problem of uncabined, anti-majoritarian, judicial power as their overriding concern. The central question in the famous debate between Hugo Black and Felix Frankfurter was whether a commitment by judges to hold the textually enumerated provisions of the Bill of Rights to be applicable to the states—all of the provisions, *and only those provisions*—imposes the sort of discipline on the exercise of judicial discretion that would confine judges to a constitutionally appropriate role, thus preserving the prerogatives of a representative, democratic government. Justice Black's faith was that it would. Justice Frankfurter contended that any such faith would be misplaced, and that Black's focus on the enforcement of enumerated rights, and enumerated rights only, was likely to prove a false hope. Character and a self-restraining temperament—and not text—Frankfurter believed, was the only real hope.<sup>33</sup>

Subsequent developments—developments which have set the stage for the enumeration problem we face today—proved Black and Frankfurter both to be correct in their fears, and overly sanguine in their remedies. Black had insisted that judicial power could be appropriately constrained only by judges committed to grounding all of their rulings in explicit provisions of the constitutional text. But during the Court's Warren (1953–1969) and Burger (1969–1986) years, there was no particular correlation between the Court's decision to cite a particular textual provision and the modesty of the Court's ambitions.<sup>34</sup> Those Courts certainly proved venturesome in their application of the unenumerated right to privacy. But they were equally venturesome in their interpretations of the Equal Protection and Establishment Clauses, and the Constitution's other plainly enumerated provisions. While the former forays, of course, spurred one set of criticisms (that the Court was not interpreting the text), and the sec-

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<sup>33</sup> See MARK SILVERSTEIN, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING* 131 (1984) (comparing Frankfurter's and Black's views on judicial decision making, judicial restraint, and the applicability of the Bill of Rights to the states).

<sup>34</sup> See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE* (1998) (examining the impact of the Warren Court's expansion of civil rights and liberties); RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953–1993* (1994) (analyzing the similarities and differences in constitutional jurisprudence between the Warren Court and the Burger Court); EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986* (2000) (examining the extent to which judicial restraint and a commitment to the constitutional text drove decision making of the Burger Court); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) (discussing and analyzing the major decisions of the Warren Court in terms of their immediate effect on society).

ond a slightly different set (that the Court was interpreting the texts willfully and, in some cases, whimsically), both were criticisms of the core problem: willful judging and unrestrained judicial power.<sup>55</sup>

Justice Frankfurter had been convinced from the outset that this would be the case and that efforts to constrain judicial power through what he took to be a naïve faith in textualism were doomed to failure. On this he was proved correct. He argued in turn that the only way judicial power could be confined to its appropriate scope was if judges were steeped in an understanding of the nature of their role within the larger political system—through a thoroughgoing process of professionalization in which they learned to appreciate that they were judges, and not legislators. What Justice Frankfurter did not anticipate, but did witness, was the almost complete collapse of this tradition within the political coalition of which he was a part (post-New Deal Democratic Party liberalism), and the substitution of a new transformational model of the appropriate role for a judge that had been forged in the crucible of the civil rights movement, and subsequent “liberal” social movements (on the behalf of women, the poor, the mentally ill, gays and lesbians, and others). This model saw the judge as an active reformer and a moral leader. By watching the Warren Court and, subsequently, by sitting at the feet of professors who worshipped it, a new generation of lawyers and judges learned that a significant part of the Supreme Court’s role was to exercise a leadership role in transforming the nation into a more just society. In this context, the intellectual support structure for the sort of craftsmanlike professionalism of limited ambitions had all but collapsed. The liberal Justice Frankfurter, who stuck to his guns in insisting on judicial restraint, when both textual and non-textual rights were concerned, became, in this new context, widely identified as a conservative.

## V. THE PRESENT ENUMERATION PROBLEM

The enumeration problem we confront today is both a function of today’s distinctive policy environment and a sequential developmental product of this history of earlier enumeration problems. The past remains present in today’s enumeration problem for a number of

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<sup>55</sup> In the effort to correct these failings, the next step, which supplements the criticism of unenumerated rights, was to insist that a textual provision be interpreted in light of its original meaning. Justice Black, with his attentiveness to questions of history and original meaning, was a major influence on this step. See JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 68–73 (2005) (discussing Black’s views on the relevance of original intent of the Fourteenth Amendment to judicial interpretation). Discovering whether an originalist posture was itself ultimately constraining, either as a practical matter or in theory, was the next step in this debate.



reasons. One is that, given the nature of the American constitutional tradition, the normative debate concerning the best means of protecting rights has never been settled. Another is that the provisional settlements in those ongoing normative debates have institutional embodiments (such as a powerful, right-enforcing Supreme Court) that, while never final, are difficult to dislodge by those inclined to oppose them. That said, though, contexts and policy environments do change. But those changes are undertaken, inevitably, as part of an ongoing dialogue with the past.

As contemporaries who have witnessed the post-history of the Black-Frankfurter debate over the importance (or false hope) of textual enumeration, we now know that both of those Justices' proposed remedies for the ostensible problem of runaway judicial power failed, less as a matter of logic than as a matter of institutional sociology. Their diagnosis proposed remedies that presupposed that lawyers and judges would be molded through a certain sort of professional socialization, and imbued with a certain set of attitudes toward legal texts and the judicial role, all of which came under sustained assault in the mid-twentieth century. Changed understandings of the most appropriate role of judges, lawyers, and legal texts inspired the development of new interpretive theories better tailored to the new political context. At the extreme, but not the fringe, were "noninterpretivist" theories, which held that the constitutional text itself was largely irrelevant to judges ruling in constitutional cases. More moderate versions of the new approach held not that the text was irrelevant, but rather that to interpret a constitutional text was ultimately (and, indeed, inevitably) to engage in a creative exercise of moral philosophy, and that, as such, the lion's share of the effort in constitutional studies should be directed towards the study of philosophy and applied ethics, rather than traditional questions of interpretation and common-law-style reasoning. By the lights of this new family of interpretive theories, to insist on textualism was to be naïve about the constraining capacities of language.

Many made the mistake of assuming that because the chain of inquiry undertaken by scholars had been traced to its conclusion, history had reached its end, and henceforth only rubes would believe that judges were constrained by texts. But, of course, history did not stop here. These interpretive theories were deployed in defense of actual rulings and policies. Their fate was thus tied inevitably not only to their abstract logical or philosophical plausibility, but to the perceived successes and failures of the policies with which they were associated. These interpretive theories were at their high-water mark at a time when public confidence in liberal policy programs was at its peak. Their credence began to fall as those policy programs, and the constitutional and statutory decisions that served to support them, either failed or came under sustained political attack. Since the Su-

preme Court had been a key player in the rise of Great Society liberalism,<sup>36</sup> it was a key target for Great Society liberalism's opponents. Conservatives undertook a sustained attack both on a liberal activist Court, and the interpretive theories that enabled it. Along the way, these interpretive theories lost much of their political support outside of the increasingly closed academic circles in which they were discussed. Many came to see arguments that, in a stampede toward "fairness" and "social justice" (rightly understood), passed impatiently over the provisions of the Constitution itself as the willful assertions of an increasingly arrogant and condescending liberal law school elite. They increasingly dismissed non-interpretivism, along with pronouncements from the legal academy concerning questions of constitutionality, out of hand. A theoretical correction was long overdue. Arguments focusing on the constitutional text, and some form of original meaning, assumed a new prominence.

Today we are witnessing a textualist renaissance in American constitutional thought. This, of course, is evident in conservative thought, where the influence of Justice Scalia's textualism has been profound.<sup>37</sup> But it is also evident amongst liberals, where newly textualist approaches have risen to prominence because they are manifestly better attuned to a conservative political context. After the death of non-interpretivism and the more freewheeling, untethered versions of living constitutionalism, there seem to be three alternative versions of legal liberalism currently vying for preeminence: 1) multiple origins originalism; 2) welfare constitutionalism; and 3) transnational rights enumeration.<sup>38</sup> If liberals continue to exert a significant influence on the development of American constitutional law, one (or some combination) of these theories may very well provide the context for the future of (liberal) versions of unenumerated constitutional rights.

There have been several contenders for preeminence amongst liberal constitutional theories seeking to preserve and extend the liberal

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<sup>36</sup> See POWE, *supra* note 34 (discussing the relationship between political forces and decisions by the Warren Court); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 1, at 138 (analyzing the role of political agendas in explaining judicial interpretations of the Constitution).

<sup>37</sup> See RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 29 (2006) (analyzing Scalia's textualism and the impact of this view); cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997) (presenting Scalia's hallmark version of textualism and academic commentaries on this view).

<sup>38</sup> I will put to the side the question of conservative unenumerated rights. There is no reason to conclude that conservatives won't advance their own versions of unenumerated rights. My discussion of these versions of liberalism is drawn significantly from Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759 (2006) (exploring the different versions of liberalism as they relate to Justice Breyer's thought and jurisprudence).

constitutional regime generated during the Warren and Burger years that gave the country both *Griswold v. Connecticut* and *Roe v. Wade*.<sup>39</sup> The first, “multiple origins originalism,”<sup>40</sup> joins conservative originalism by venerating the Founders. It then goes on, however, as many conservative originalists do not, to take up the whole of American history sequentially, multiplying the number of “foundings” in the American constitutional tradition. Multiple origins originalists argue that the contemporary Supreme Court must interpret the Constitution in light of a synthesis of these multiple foundings, which, as democratic expressions of popular sovereignty, are every bit as constitutionally authoritative as the eighteenth-century Founding itself. Akhil Amar’s version of this approach forges a second line of commonality with conservatives by supplementing its originalism with a consistent textualism. In his first book-length iteration, Amar emphasized what were essentially two foundings: one in 1789 and one brought about by the Civil War Amendments.<sup>41</sup> As he has recently developed this, while still placing the lion’s share of the emphasis on these two foundings, he reinforced a theme of an ever-more-democratizing constitutional text by a focus on the subsequent addition of the Progressive Era and Kennedy-Johnson Era amendments.<sup>42</sup> Bruce Ackerman’s version of this approach emphasizes the same first two foundings as Amar, but adds a non-textual third Founding to the mix—Franklin Roosevelt’s New Deal.<sup>43</sup>

A second major category of arguments on behalf of sustaining (and, perhaps, expanding) New Deal and Warren Court liberalism in a conservative political and constitutional age are those grounded in so-called “welfare” or “positive rights” constitutionalism. Welfare constitutionalists, who are also (in their way) originalists, have argued on behalf of sweeping governmental powers (and, indeed, governmental duties and responsibilities) and against more “formalistic” arguments about textually stipulated powers and their limitations in the interest of advancing and enforcing the collective social good in the face of countervailing interests. Welfare constitutionalists typically emphasize the Constitution’s character as a charter of not only “negative” but also of “positive” rights, or affirmative constitutional duties. As

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<sup>39</sup> 410 U.S. 113 (1973).

<sup>40</sup> Kersch, *supra* note 38, at 810–11.

<sup>41</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION*, at xv (1998) (explaining how the Fourteenth Amendment transformed the original Bill of Rights).

<sup>42</sup> See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 403–47 (2005) (discussing the historical development of the Constitution and how the different amendments have affected its interpretation).

<sup>43</sup> See BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 48–50 (1991) (arguing that the New Deal altered constitutional decision making); BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* (1998) (same).

was the case with multiple origins originalism, welfare or positive rights constitutionalism comes in more- and less-textualist versions. The more-textualist welfare constitutionalists, like Sotirios Barber, derive their understandings from readings of the Constitution's broadly worded provisions, like the Preamble, and its assertion that the text was designed to "promote the general welfare" (along with similar statements from an array of Founders and subsequent touchstone figures acceptable to conservatives, such as Abraham Lincoln—but not Franklin Roosevelt). Barber argues that the particular provisions of the Constitution must be interpreted in light of the document's overarching objective, which is to promote "the general Welfare" or to advance the collective public good.<sup>44</sup>

Other welfare constitutionalists, like Cass Sunstein, appear less fully textualist in placing emphasis on the (non-textual) New Deal transformation. But to characterize this as a form of non-textualism may be misleading, for Sunstein's trick is to appeal to a whole new set of texts as potential grounds for the Court's protection of new rights. Just as many conservatives have argued that the Declaration of Independence is, for all intents and purposes, part of the Constitution's text, Sunstein appeals to Franklin Delano Roosevelt's "Four Freedoms" speech as, essentially (like the Declaration), a constitutional document.<sup>45</sup> But Sunstein's welfare constitutionalism is conjoined with the third version of legal liberalism concerning rights currently jockeying for preeminence: transnational rights enumeration. In his recent work on constitutional interpretation, Sunstein has made vigorous appeals to the post-World War II rights enumerations in international (and European) declarations, conventions, and treaties as relevant touchstones for domestic American constitutional under-

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<sup>44</sup> See SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* 1 (2003) (arguing that "fidelity to the American Constitution entails a concern for . . . 'the solid happiness of the people'"); see also CASS SUNSTEIN & STEPHEN HOLMES, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 15 (1999) ("Personal liberty, as Americans value and experience it, presupposes social cooperation managed by government officials.").

<sup>45</sup> See CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 5 (2004) (viewing FDR's Four Freedoms and Second Bill of Rights as reflected in the Court's late-twentieth-century jurisprudence). The *bête noire* of "positive rights" (or constitutional "duties") constitutionalists is less *Lochner v. New York*, 198 U.S. 45, 64 (1905)—which invalidated state regulations limiting the hours bakers could work in the state of New York—than the Rehnquist Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 191 (1989)—which held that a county was not liable to a boy repeatedly beaten by his father when county social service providers knew of the beatings but failed to respond, which is anathematized in this literature. See, e.g., Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. (forthcoming Oct. 2006); see also Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 256–57 (1999) (arguing that the articles of the Universal Declaration of Human Rights require that minimum levels of education, employment, and subsistence be offered to all people in the world).

standings. Sunstein's call for a new attentiveness to such touchstones resonates with a swelling body of work which understands that post-War international order as a new and distinctive political regime, a "constitutional" order in its own right.<sup>46</sup>

This international regime or "constitutional" order (sometimes referred to as the "new international law") had its genesis in humanity's own global enumeration problem or episode. At the end of the Second World War, efforts to prosecute Nazis (and others) for the violation of a set of basic international (or universal) human rights proved unexpectedly problematic, because the rights being appealed to had not been specifically enumerated in advance of the acts deemed to have violated them. This raised serious rule-of-law problems involving questions of notice and retroactive punishment. What followed was a cascade of rights enumerations—often drawn up by philosophers and groups of transnational activists acting either above or outside of the constraints (and responsibilities) of domestic politics—of varied (and, in most cases, ambiguous, though "evolving") legal status. Indeed, much of the post-War human rights order has appeared to have been driven by a passion for rights enumerations.<sup>47</sup> In this order, it might be said—with little exaggeration—that the goal is that every potential right be enumerated somewhere. Considered together, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social and Economic Rights, the Genocide Convention, the International Convention on the Rights of the Child, and the International Convention on the Rights of Women, not to mention the various European and regional declarations, set out extensive rights enumerations.

The legal status of these rights and the obligation of diverse institutions (like domestic courts) to either enforce them or accord them weight has, to date, been ambiguous. Nevertheless, much of the scholarship that characterizes the post-War world generally as having launched a new "constitutional" international order calls upon officials within domestic governments around the world to integrate themselves more fully into transnational "global governance" networks, where they will work across borders with fellow professionals in other countries and in international organizations to proffer solu-

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<sup>46</sup> *E.g.*, G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2001).

<sup>47</sup> *See, e.g.*, MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 77 (2001) (stating that one international group "concluded that it was possible to achieve agreement across cultures concerning certain rights that 'may be seen as implicit in man's nature as an individual and as a member of society and to follow from the fundamental right to live'").

tions to common sets of problems.<sup>48</sup> Many of these global governance networks take up highly technical questions of science and environmental policy, communications regulation, or antitrust, to name just a few areas, and envisage increasing interaction between career professionals with special technical expertise in administrative agencies. But many proponents of global governance understand rights questions in very much the same terms. They see judges and courts as essentially the equivalent of the expert administrators in the particular “policy” area concerning rights. In this vision, which is fast becoming a touchstone of liberal constitutional thought, judges around the world engage in an increasingly routine “court-to-court” dialogue to arrive at more sensible “expert” judgments about the instrumentalist, functionalist or purposive meaning of rights.<sup>49</sup> In many cases, domestic judges integrated into these networks will consult with each other transnationally to arrive at “improved” interpretations of the rights that are already enumerated in their domestic constitutions. In others, judges will appeal to new enumerations, as set out in international (and foreign) declarations, covenants, and treaties, as relevant sources for rulings on domestic constitutional questions.

The degree to which these new, post-War enumerations are considered legally binding varies by country and by the particular enumeration in question. Many, however, understand that patchwork status quo as temporary and as a prelude to an evolution of what will, in time, become a global legal order; while certain of these rights enumerations may not be legal at the moment, they are envisaged as becoming legally binding in the future. Many liberal American law professors are now working hard to work out the theoretical mechanisms through which these international and foreign enumerations might be currently considered binding, or, in time, made so.<sup>50</sup> Other

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<sup>48</sup> See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 195 (2004) (“[H]eads of state, prime ministers, regulators, judges, legislators, pundits, and scholars everywhere [should] embrace[] the concept of government networks as prescription rather than description and [seek] actively to create and use them as instruments of global governance.”); see also Ken I. Kersch, *Constitutions and What they Mean Today: The Brewing Battle Between Charter and Network Constitutionalism*, LAW & SOC. INQUIRY (forthcoming).

<sup>49</sup> See generally AHARAN BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005) (arguing for a purposive interpretation of rights driven by an increasingly international context); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (hinting at the notion of an international, jurisprudential conversation).

<sup>50</sup> See KERSCH, *CONSTRUCTING CIVIL LIBERTIES* *supra* note 21, at 341 (“In recent years, one of the most striking turns in elite intellectual life in the United States, particularly within political science and constitutional law, has been a rapidly burgeoning interest in the concept of ‘global’ or ‘world’ constitutionalism.”); Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4 (“The [Supreme] Court’s multilateral turn, however, is no accident. Behind these seemingly benign references to international agreements and foreign practice stands a vast and ongoing intellectual project . . .”); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346 (2005) [here-

more strategically cautious liberal law professors have set themselves to the task, not of advancing theories of how these enumerations might be made legally binding on American courts, but rather on how to convince American judges that they are under a professional obligation to be aware of these foreign and transnational rights enumerations, to consider them, or to give them due weight in their reasoning about the content of domestic constitutional provisions.

If a new international legal order is at hand, which is understood to be “constitutional,” then this new set of foreign and international enumerations (or some subset of them) may very well, in time, assume the status of additions to the Bill of Rights. If this is the case, it is not clear whether we would want to characterize this as an appeal to unenumerated rights, or instead, as an extension of the list of enumerations to which we hold ourselves legally bound. It is possible that these external enumerations might come to stand in American courts in the position that the Bill of Rights provisions named in Justice Douglas’s *Griswold* opinion did to the “right to privacy” announced by the Court. They could, that is, be referenced either singly or in multiples as supportive of either a particular reading of a textual constitutional right that comports with (for example) European practice, or alternatively, as providing support for a newly articulated unenumerated right, such as “the right to die with dignity,” “the right to treatment,” etc. If this comes to pass, the new set of post-War transnational enumerations would provide an entirely new means of legitimizing decisions by American courts to declare new, unenumerated rights.

So far as regimes are concerned, this can be looked at in two ways. It might be considered part of a strategic effort to extend the (domestic) liberal constitutional regime through moral exhortations involving foreign and international sources of law. Alternatively, it might be viewed as a broader, transnational effort to build what is essentially a new legal and institutional order. Liberals will assign domestic judges an important role in building and maintaining that order. The appeal of this turn to liberal Democrats has only been enhanced in recent years, as the party has argued on behalf of a revived multilateralism in the face of the ostensibly disastrous “unilateralism” of the much-despised Bush Administration.<sup>51</sup> This turn would

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inafter Kersch, *The New Legal Transnationalism*] (arguing that the decision of several Supreme Court Justices to look to the constitutional law of other countries in the course of interpreting American constitutional law “is part of an elite-driven, politically-motivated world-wide trend to judicial governance . . .”).

<sup>51</sup> See Ken I. Kersch, *Multilateralism Comes to the Courts*, *supra* note 50 (arguing that the Court’s use of multilateralism represents “a vast and ongoing intellectual project” to internationalize the Constitution).

be the constitutional and judicial adjunct of Democratic Party foreign policy multilateralism.

## VI. CONCLUSION

Although there is little doubt that the Supreme Court is (and has been) moving in a conservative direction in recent years, it would be foolish to write off a bright future for unenumerated rights. The tradition of appealing to such rights, both in courts and outside of them, is too deep. That tradition, moreover, has sustained itself no matter which direction the politics of the moment have gone. Over the long term, it tracks neither liberal nor conservative dimensions. Anyone taking a historical or developmental approach to the subject, and also an approach that is not exclusively jurisprudential, will conclude with confidence that unenumerated rights will remain a secure part of the American political tradition.

Unenumerated rights as a problem, by contrast, has always been an episodic affair. The history of rights enumeration episodes demonstrates that they have very different characters. This makes it very difficult to reach any general conclusions about them. But it does suggest that unenumerated rights are not really a problem on their own terms, or for any one reason, but only in light of other political problems and challenges facing historically-bounded political institutions and governing political regimes. Rights enumeration problems do not always appear in the same guise. Some raise questions of judicial power, whereas others do not; some are focused on the relationship between the central government and the states, while others are not; some contemplate enumerations as exhaustive lists, and some do not; some are taken up in periods where texts tend to be (relatively) strictly construed, and some do not (which thus raises the question of how distinctive, in practical terms, is an unenumerated right, as opposed to an expansively construed enumerated right).

For many, the problem of unenumerated rights today is less a question of those rights, *per se*, than of the future of the instantiations of those rights most familiar to us since the Warren Era—the future, that is, of judicially-protected rights to individual bodily autonomy that many people have come to understand as synonymous with “the right to privacy.” Anyone contemplating the future of these institutions would need to spend less time reflecting on considerations of legitimate judicial power and the constraints of constitutional texts than on cultural questions concerning religion, technology, and medicine—and their relation to normative judgments concerning the respective claims of an individual to bodily autonomy versus the counterclaims of the state on behalf of public health, safety, and morals. Obviously, this is a completely different question than the one I



have taken up here, and one about which I have no special expertise.<sup>52</sup>

Given the developmental history or rights enumeration episodes in the American constitutional tradition, what can we say about the likely future of unenumerated rights? I have argued as prognostication above that three features of the current context and policy environment may prove especially relevant. The first is the trend toward conservatism, on the Court and in American politics more generally. The second is a reaction against noninterpretivist methods in favor of a new textualism. The third is the belief by many in an emergent system of "global governance" or a new international "constitutional" order. Most liberals are hopeful (and, indeed, sometimes millennial) about the last. They have taken stock of the current context and assimilated the second. And they are miserable about the first. This suggests that *now* is the perfect time for them to be combing the world for a broader set of texts, which they hope American judges will either rely upon, or be influenced by, in interpreting the American Constitution in ways more conducive to their political objectives. To be sure, there are other routes to the same end (like multiple origins originalism and welfare, or positive rights, constitutionalism). But for many liberals, the appeal to foreign and international rights enumerations is likely to prove the most exciting or innovative in the coming years.<sup>53</sup>

At the time of the Black-Frankfurter debate, it was possible to believe that the position one took on enumerated versus unenumerated rights would provide a solution to the problem of uncabined judicial power. No one believes this any more. The problem is not amenable to logical solution. What counts, instead, is the judge's attitude concerning his role. Many liberals increasingly believe that, in reflecting on rights, it is the duty of American judges to take into account the nature of the broader international order. They also believe that it is a matter of professional good practice for a judge to socialize and

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<sup>52</sup> See Kreimer, *supra* note 11, for discussion of some of these issues.

<sup>53</sup> It is not really as original or innovative as they suppose. There was a similar burst of enthusiasm in the immediate aftermath of the Second World War. It would be well worth studying the parallels between that historical moment and our own, and of the theories of "world government" then and "global governance" now being crafted in the crucibles of those moments. I have suggested a parallel between these moments in several places, but only in preliminary form. See, e.g., KERSCH, *CONSTRUCTING CIVIL LIBERTIES*, *supra* note 21, at 103–12 (illustrating the parallelism of those two moments); Kersch, *The New Legal Transnationalism*, *supra* note 50, at 347–50 (arguing that "legal scholarship has swelled with discussions concerning the relationship between domestic legal decisions, foreign practices, and international law"). See generally W. WARREN WAGAR, *BUILDING THE CITY OF MAN: OUTLINES OF A WORLD CIVILIZATION* (1971) (providing a detailed study of the earlier moment in the Second World War); W. WARREN WAGAR, *THE CITY OF MAN: PROPHECIES OF A WORLD CIVILIZATION IN TWENTIETH-CENTURY THOUGHT* (1963) (same).

consult with judges of other countries who are called upon to serve similar domestic duties.<sup>54</sup> If judges internalize this attitude, we will find them in coming years increasingly willing to cite enumerations wherever they may find them. Whether they then use these to announce new rights or to interpret domestic rights in a particular way is neither here nor there. This phenomenon, if it comes to pass, may very well constitute our next enumeration problem. If it does, we will increasingly ask questions such as what within the emerging "global" regime is to be part of the new list? To what degree are domestic judges charged with enforcing that list (or considering it seriously)? How should a domestic judge position and understand himself as an actor committed to governance and/or government?

This episode has just begun to reveal itself. But there is a very good chance that it will structure the central enumeration problem of the future.

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<sup>54</sup> See Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. (manuscript at 20, on file with author) (forthcoming 2006) (illustrating the Supreme Court's new attention to the role of judges in constructing a peaceful, prosperous, and just international order).