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## Reflections on Unenumerated Rights

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## REFLECTIONS ON UNENUMERATED RIGHTS

*Laurence H. Tribe\**

The Papers in this Symposium serve up a savory blend of inquiries into the epistemology, the politics, and what might be called the “genealogy” of “unenumerated rights” discourse in constitutional thought and history. Its stimulating offerings present an enticing smorgasbord, prepared with impressive skill. Only a boorish guest would quibble over this chef’s choice of recipe or that chef’s choice of presentation. Of greater interest to me than the particulars of the cuisine on display are the seemingly shared premises and broad conclusions of its creators. They seem, by and large, to agree that they are engaged in a quest for substances as elusive as manna, and they appear, on the whole, to have decided that the objects of their assigned search have an awkward attribute in common: they don’t really *exist*.

Speaking as a student of the United States Constitution, I must confess to a certain discomfort with any academic meal the first course of which begins with either (1) the disarming proposition that *all* rights, if one reads with sufficient care, are somewhere “enumerated,” or (2) the equally unsettling proposition that *no* “rights,” if one is analytically rigorous about what to count as a right, can be “read” from any fixed enumeration.

We can, of course, think ourselves into either of these opposing corners, but talking in a language whose constitutive rules prominently include the directive that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”<sup>1</sup> precludes treating either category as empty or illusory. The boundary between enumerated and unenumerated rights may be artificial or wobbly, and I have no doubt that much may be learned by exploring the topic along that dimension, but for purposes of this Comment I’m content to put those considerations to one side.

Returning to the culinary image with which I began, I’m reminded of René Descartes’ imaginary reply to the waiter who asked

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<sup>1</sup> U.S. CONST. amend. IX.

him whether he wished to have another bowl of soup. The last words the great philosopher ever spoke, the apocryphal story has it, were barely audible as he slumped face down into his vichyssoise: “I think not.”

In that spirit, I set aside for the time being a question over which I’ve puzzled for some time: whether Gödel’s Theorem demonstrating the inevitable existence of true but unprovable mathematical propositions might somehow translate into a parallel theorem about the necessary existence of “unenumerated” rights—or whether the irreducibly normative character of “rights talk” condemns any such translation to category error.<sup>2</sup>

Because the existence of unenumerated rights is expressly posited by our Constitution’s text, I reserve for another time a discussion of whether their existence is necessary or contingent. So too, of the observation in a number of the symposium papers that, in our constitutional culture, calling a right “unenumerated” typically represents a way of disparaging that right: for present purposes, that observation is little more than a reminder that the Constitution’s commands are at times honored in the breach, given that the Ninth Amendment not only precludes inferring non-existence but also bars disparagement.

Bracketing as outside our frame inquiries into the possible non-existence of unenumerated rights or, conversely, into their possible ubiquity—as well as investigations of the reasons for routinely treating non-enumeration as a constitutional liability and the patterns of that supposed liability’s attribution over the range of potentially eligible candidates across time—what’s left to say about these perplexing entities?

My submission is that it will prove illuminating to lay bare the way in which unenumerated rights appear to be constructed (or deconstructed) from the available federal constitutional materials; to dissect the several distinct architectures of rights that appear to emerge from these processes; and to identify how relationships between the former and the latter might suggest *which* asserted federal constitutional rights are most comfortably described as “unenumerated” when that tag serves not to put down their constitutional legitimacy (or even to challenge their judicial enforceability) but simply to explore their anatomy and its morphology.

I speak here of “asserted federal constitutional rights” for two reasons: *first*, to exclude as uninteresting for present purposes “constitutional” rights that do not even *purport* to have supreme status under

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<sup>2</sup> David Hume might argue that such a translation would necessarily ignore the “is/ought” distinction. *But see* JANNA LEVIN, *A MADMAN DREAMS OF TURING MACHINES* (Alfred A. Knopf, New York 2006) (exploring the moral and spiritual significance of Gödel’s incompleteness theorems).

Article VI of the Constitution as originating in *federal* rather than *state* law; and *second*, to distinguish arguments to the effect that “r” is not included within the undisputed right “R” from arguments to the effect that an ostensible right “R” is not truly a “right” at all but rather a mere imposter.

As to the former exclusion, my intention is to reject out of hand as implausibly trivial any reading of the Ninth Amendment that treats its reference to “others retained by the people”<sup>3</sup> as a mere reminder of what the Tenth Amendment standing alone would in any event have made plain—namely, that nothing in our Constitution’s enumeration of certain *federal* rights may be taken to negate the reserved power of “the States respectively, or [of] the people”<sup>4</sup> to create, recognize, and protect rights under *state* law that are supreme vis-à-vis the ordinary lawmaking processes of the respective states.

As to the latter exclusion, my purpose is to set aside as an uninteresting distraction the recognition that disputes over the precise reach and coverage of an “enumerated” right such as the right to “freedom of speech”—witness, for instance, the Supreme Court’s close division over the constitutionality of flag desecration statutes<sup>5</sup> or over the inclusion of “obscenity,” variously defined, as “protected speech”<sup>6</sup>—may be every bit as persistent and troubling as disputes over the inclusion of an entire category of claims, such as claims to reproductive or bodily autonomy,<sup>7</sup> in the catalogue of federally protected “rights.” Both sorts of disputes may indeed be sources of unending difficulty, but maintaining a distinction between rights that are enumerated and those that are not entails treating the first sort of difficulty as different in kind from the difficulty posed by controversies over which

<sup>3</sup> U.S. CONST. amend. IX.

<sup>4</sup> *Id.* amend. X.

<sup>5</sup> *See, e.g.*, *United States v. Eichman*, 496 U.S. 310, 312 (1990) (holding in a 5-4 decision that the Flag Protection Act of 1989 was unconstitutional as applied to the appellees); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding in a 5-4 decision that the Texas statute banning flag desecration was unconstitutional as applied to Johnson’s expressive act of flag burning).

<sup>6</sup> *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (striking down provisions of the Child Pornography Protection Act of 1996 because of overbreadth in restricting access to protected expression); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (establishing First Amendment standards for state laws proscribing the distribution of obscene materials).

<sup>7</sup> *See, e.g.*, *Lawrence v. Texas*, 539 US 558, 567 (2003) (“The liberty protected by the Constitution allows homosexual persons the right to make this choice [to enter into physically intimate personal relationships].”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990) (“It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.”); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[The] right to privacy, [whether founded in the Ninth Amendment or the Fourteenth], is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”); *Grissold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (holding that a Connecticut law forbidding the distribution of contraception to married couples infringed upon the marital relationship protected by the zone of privacy guaranteed by the Bill of Rights).

claims of right, albeit not grounded in any constitutional enumeration, are legitimate and which are bogus.

To make headway within the domain that remains once those exclusions are noted, I propose to describe four principal ways in which rights may be extracted from, or defined with reference to, the conventional materials of constitutional text, structure and history, and the surrounding, arguably subordinate, interpretive sources represented by moral, political, social, and cultural philosophy and theory. I call the four *geometric*, *geodesic*, *geological*, and *monster-barring* or *slippery-slope avoiding*.

*GEOMETRIC*. To envision the first model of rights-derivation, imagine a process of arranging in sensible patterns the seemingly distinct dots or points that represent the loci of "enumerated" rights and of the spheres of decision and choice that the exercise of those rights involves; of forming lines and planes that describe the relationships among, and the connections between, those individual points; of focusing on the interconnecting vectors thus formed, with attention to the directions and orientations of the resulting shapes; and then of articulating the normative significance of the edges and faces of the geometric forms that constitute the emergent array.

The famous "rational continuum" described in the first Justice Harlan's *Poe v. Ullman* dissent should come to mind,<sup>8</sup> as should the inductive inference from lists of validated and invalidated government measures, or the deductive extraction from theories of the meaning of particular enumerated rights, of directions along which, inputs on the basis of which, or ends toward which, government is presumptively forbidden to move. Among the consequences of this thought experiment's attention to forbidden directions of government movement may be a subtle shift from the practice of identifying rights principally as *types of protected private acts* to the practice of visualizing rights as the *mirror images of particular kinds of action forbidden to the states or to the federal government*. Especially instructive in this regard are decisions like *R.A.V. v. City of St. Paul*,<sup>9</sup> the case in which Justice Scalia insisted for a Court majority that, in identifying various categories of speech or conduct (e.g., "fighting words" or "threats") as "unprotected," we must take care not to obscure the continuing relevance of the First Amendment's proscriptions to government actions that target instances within those "unprotected" categories for sup-

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<sup>8</sup> 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . .").

<sup>9</sup> 505 U.S. 377 (1992).

pression along lines that discriminate in favor of some viewpoints and against others.<sup>10</sup>

Another embodiment of geometrically-derived unenumerated rights—one perhaps camouflaged by its familiarity—is the practice of enforcing against the states those individual rights that are deemed “implicit in the concept of ordered liberty.”<sup>11</sup> Common legal parlance often refers to this exercise as the “incorporation” of parts of the Bill of Rights against the states, but that is surely a misnomer. It would be misleading, for instance, to think of this process as one that merely transcribes a series of discrete points from one domain (that of rights against the federal government) to another (that of rights against the several state governments). Rather, the process is one that extrapolates to state action the lines or vectors that represent inferred limits against types of government restriction, where those lines in turn connect discrete instances of conduct enumerated as impermissible for the federal government. Although Justice Black famously urged that the Bill of Rights in its entirety be construed as applicable to state action,<sup>12</sup> the Court’s actual practice was one of gradual linear extrapolation, not an act of one-time boundary-crossing exportation. As Justice Harlan emphasized in *Duncan v. Louisiana*, “[t]he logically critical thing [in all instances of incorporation] was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental.”<sup>13</sup>

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<sup>10</sup> *Id.* at 383–84 (“[Certain] categories of expression are ‘not within the area of constitutionally protected speech,’ . . . . [T]hese areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. We recently acknowledged this distinction . . . in upholding New York’s child pornography law, [where] we expressly recognized that there was no ‘question here of censoring a particular literary theme. . . .’”).

<sup>11</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>12</sup> *See, e.g., Adamson v. California*, 332 U.S. 46, 69, 71–72 (1947) (Black, J., dissenting) (objecting to the Court’s assertion of the power to “expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice,’” and asserting that “one of the chief objects that the provisions of the [Fourteenth] Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states”).

<sup>13</sup> 391 U.S. 145, 179 (1968) (Harlan, J., dissenting); *see also Adamson*, 322 U.S. at 62 (Frankfurter, J., concurring) (“Of all [the judges to consider the Fourteenth Amendment since its passage], only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States.”). If this proposition requires further support, one need only notice that the set of rights protected under the Due Process Clause of the Fourteenth Amendment is not coterminous with the protections of the Bill of

Of course, the Court's extrapolations have not always withstood the test of history, a point amply demonstrated by a now extinct, but far from forgotten, progenitor of incorporation: freedom of contract as the core of "liberty." Nonetheless, the Court's assertion that the police power of the state failed to reach a zone of individual economic ordering—first forged in pre-*Erie* diversity cases applying general common law,<sup>14</sup> and later applied as a federal constitutional principle in the *Lochner* era<sup>15</sup>—was similarly grounded on the assessment that such a limitation "grow[s] out of the essential nature of all free governments."<sup>16</sup>

More recently, the Court held in *Lawrence v. Texas* that a state's ban on oral-genital and anal-genital contact between individuals of the same sex denied "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."<sup>17</sup> As I have elaborated elsewhere:

*Lawrence's* focus on the role of self-regulating relationships in American liberty suggests that the "Trivial Pursuit" version of the due process "name that liberty" game arguably validated by *Glucksberg* has finally given way to a focus on the underlying pattern of self-government (rather than of state micromanagement) defined by the rights enumerated or implicit in the Constitution or recognized by the landmark decisions construing it.<sup>18</sup>

*Lawrence* did not repeat *Lochner's* reliance on the arbitrary assumption that the background common law regimes of the several states—regimes that undeniably reinforced substantial inequalities in power—furnished a constitutionally neutral baseline for unencumbered economic ordering.<sup>19</sup> Nonetheless, while *Lawrence* avoided that

Rights. Compare *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (declining to apply the Seventh Amendment's guarantee of a civil jury trial to the states), with *In re Winship*, 397 U.S. 358, 364 (1970) (holding that, independent of the Bill of Rights, the Fourteenth Amendment Due Process Clause protects defendants against conviction except upon proof beyond a reasonable doubt).

<sup>14</sup> See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-1, at 1340-42 (3d ed. 2000) (demonstrating that the willingness of federal courts to enforce contractual liberty against the states prior to 1897 was limited to diversity cases).

<sup>15</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897))); *Allgeyer*, 165 U.S. at 591 ("To deprive the citizen of such a right [to contract] without due process of law is illegal.").

<sup>16</sup> *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1874).

<sup>17</sup> 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>18</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936 (2004) (referencing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

<sup>19</sup> See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923) ("The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the

particularly unsavory ingredient of the *Lochner* soufflé, the recipes reflected by the two decisions had more in common than many of *Lochner*'s detractors who applaud *Lawrence* are inclined to concede. Both decisions located in the ban on state deprivations of "liberty" without "due process of law" a substantive limit on laws prohibiting certain consensual relationships between adults that the individuals immediately involved, and those most directly affected, deem to be in their mutual interest; neither decision could point to any textual or historic referent more determinate than the open-ended word "liberty" as its constitutional compass; and both decisions rested on quite specific, and manifestly controversial, normative theories about the sorts of limits on freedom that will, in the long run, advance human liberty and dignity and the sorts that will instead prove oppressive.

But there is at least this crucial difference between the two decisions: *Lawrence* rested on descriptive premises both sides in the dispute would have been hard-pressed to reject with respect to the most profound expressions of the self in relation to others in our civilization and perhaps in all imaginable human societies, whereas *Lochner* presupposed a sharply contested set of assumptions about the ostensibly pre-political character of contractual and property arrangements already widely believed, as of the time of the decision, to rest on deliberately constructed social and political structures and institutions barely imaginable as essential features of the human condition.

*GEODESIC.* Think now of Buckminster Fuller's marvelous geodesic domes—superstructures capable of enveloping and sheltering individuals and their relationships and indeed entire organizations and living communities. Even if it is the rigidity of the triangular form of each face of the polyhedron defining any such dome that gives these shapes their stability and strength, the feature on which I rely in treating the domes as suitable metaphors for a distinctive mode of rights construction is the protective convex covering that the domes provide to the plane on which they rest. This image should bring to mind the notion of "penumbral" or peripheral rights to which Justice Douglas's opinion for the Court in *Griswold v. Connecticut*<sup>20</sup> referred—rights recognized (or, in truth, boldly posited)—to prevent the "specific rights"

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purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." (quoting *Adair v. United States*, 208 U.S. 161, 174–75 (1908)).

<sup>20</sup> 381 U.S. 479, 484–85 (1965) ("[Certain] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." (citing *Poe v. Ullman*, 376 U.S. 497, 516–22 (1961) (Harlan, J., dissenting))).



expressly identified and enumerated in constitutional texts from becoming “less secure.”

“Rights” so conceived would appear to describe claims of a less intrinsic or foundational and more purely instrumental character than seems the case with respect to rights geometrically extrapolated; ordinarily, at least, the rights lying atop any protective scaffolding or shield present themselves as contingent in character, provisional as well as prophylactic, recognized not as intrinsically valuable in the way that core, or primary, rights tend to be but as essentially instrumental and ancillary, and thus presumptively subject to legislative replacement with differently designed protective structures, provided only that those alternative structures be equally effective, by some suitably administered measure, in securing the underlying rights at stake. One need only recall Chief Justice Warren’s construction of the prophylactic *Miranda* warnings the Court required the government to follow unless and until something as effective (by the Court’s own lights) in preventing coercive custodial interrogation were to be legislatively enacted, in order to make real the theoretical right set out in the Fifth Amendment’s privilege against compelled self-incrimination.<sup>21</sup>

In one recent case, however—*Dickerson v. United States*<sup>22</sup>—a lopsided majority of the Court, in an opinion by Chief Justice Rehnquist, treated the *Miranda* rules—despite their avowedly prophylactic purpose and the express recognition that Congress remained free to replace them with equally effective alternatives—as “constitutional” in character.<sup>23</sup> The Court derived that characterization not from a renewed examination and reaffirmation of the legitimacy of the *Miranda* Court’s imposition of the required warnings upon state as well as federal law enforcement and adjudication but from a hermeneutical exegesis of how the Court, both in *Miranda* itself and in succeeding cases, had *described* the rules and applied them in a manner that the Supreme Court’s purely supervisory power over the federal judicial system could not have justified.<sup>24</sup>

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<sup>21</sup> *Miranda v. Arizona*, 384 U.S. 436, 490 (1966) (“[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”).

<sup>22</sup> 530 U.S. 428 (2000).

<sup>23</sup> *See id.* at 432 (“*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.”).

<sup>24</sup> *See id.* at 437–41 (noting that the Court’s practice of applying *Miranda* protections to state court prosecutions could be legitimated solely as a means of enforcing the Federal Constitution).

Having concluded that *Miranda*'s rules had therefore been pronounced, rightly or wrongly, in the Constitution's name and in the Court's constitutional voice, the *Dickerson* Court treated as automatically unconstitutional a congressional measure purporting simply to repeal *Miranda* and to replace its rules, not with an alternative prophylactic regime, but with a return to case-by-case assessment of each confession's voluntariness, in effect viewing Congress's effrontery in daring to disagree with the Court's conclusion as to the necessity of its geodesic constitutional construct as sufficient to condemn Congress's action as unconstitutional even before addressing the continuing validity of the *Miranda* precedent as a matter of constitutional law.<sup>25</sup> Turning to that issue, the Court quickly concluded that considerations of *stare decisis* carried the day and accordingly declined to revisit *Miranda*'s constitutional validity.<sup>26</sup>

In dissent, Justice Scalia expressed understandable outrage at what he deemed worse than "a milestone of judicial overreaching," calling the Court's approach the apex of "judicial arrogance."<sup>27</sup> More relevant here, Justice Scalia categorically denied the legitimacy of any purportedly "constitutional" rules that are purely prophylactic and provisional in character.<sup>28</sup> He therefore dismissed examples drawn from judicially-derived procedural free speech protection (such as the rules constraining the substantive and evidentiary criteria surrounding defamation suits, or the rules constraining the allocation of burdens of proof in matters affecting anti-government speech) and similar areas as readily distinguishable on the ground that the Court had in those instances found the particular rules in question to be logically necessary parts of the underlying constitutional rights and not merely discretionary rules for implementing those rights in a comparatively efficacious manner.<sup>29</sup>

As Justice Scalia saw the matter, the role of crafting implementing or instrumental rules of that sort—rules ancillary to specific constitutional rights but not conceptualized as intrinsic to those rights—was

<sup>25</sup> See *id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

<sup>26</sup> See *id.* at 443 ("Whether or not we agree with *Miranda*'s reasoning and its resulting rule . . . the principles of *stare decisis* weigh heavily against overruling it now.").

<sup>27</sup> *Id.* at 465 (Scalia, J., dissenting).

<sup>28</sup> See *id.* at 454 ("[W]hat makes a decision 'constitutional' in the only sense relevant here . . . is the determination that the Constitution *requires* the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.").

<sup>29</sup> See, e.g., *id.* at 459–60 ("In these cases, and others involving the First Amendment, the Court has acknowledged that in order to guarantee that protected speech is not 'chilled' and thus forgone, it is in some instances necessary to incorporate in our substantive rules 'a measure of strategic protection.'").

quintessentially legislative rather than judicial in character.<sup>30</sup> He emphasized that Article III contains no analogue to the enforcement clauses of the Fourteenth and several other Amendments empowering the judicial branch to sculpt what I have here called geodesic superstructures to surround and effectuate the underlying rights.<sup>31</sup> And he argued that, to the degree the enforcement powers entrusted to Congress by these Amendments are properly understood to include authority to create purely prophylactic prohibitions—something he questioned in a later dissent<sup>32</sup>—those powers, in recognition of their extraordinary nature, have been judicially cabined by requirements of congruence and proportionality of a sort that neither the *Miranda* Court nor the *Dickerson* Court saw fit to impose on itself.<sup>33</sup>

It seems fair to say that Justice Scalia, in contrast to the Justices joining the Rehnquist majority in *Dickerson*, regarded the process of layering implementing rules like those of *Miranda* over the core constitutional requirements that those rules are meant to enforce—there, the requirement that criminally incriminating statements not be involuntarily extracted for trial use against an accused—as constitutionally legitimate, if at all, only as a properly constrained exercise of sub-constitutional lawmaking power, and never as a matter of inference directly from the Constitution itself.

In some tension with his objection to the high-handed and hegemonic nature of the Court's claim to automatic supremacy over Congress in matters of constitutional construction, Justice Scalia seemed to be taking the position that a genuinely "constitutional" rule must invariably have a necessary rather than contingent, a permanent rather than provisional, character, and can never be adopted judicially as merely the best available means of avoiding core constitutional violations unless and until legislatively supplanted by something equally efficacious.

Consider what this construct would imply for the right of an interested listener or viewer to receive, without government inhibition based on content, the views and information that a willing (even if

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<sup>30</sup> "[W]hat today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States." *Id.* at 461.

<sup>31</sup> *Id.* at 460–61 ("Where the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so.") (citing U.S. CONST. amend. XIV, § 5).

<sup>32</sup> *Tennessee v. Lane*, 541 U.S. 509, 558–59 (2004) (Scalia, J., dissenting) (deeming prophylactic legislation "reinforcement rather than enforcement" and thus violative of the Fourteenth Amendment).

<sup>33</sup> *Dickerson*, 530 U.S. at 460–61 (Scalia, J., dissenting) ("The power with which the Court would endow itself under a 'prophylactic' justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text." (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997))).

constitutionally unprotected by virtue of extraterritoriality) speaker chooses to transmit. This “right to receive information” is a right that Justice Brennan, concurring in *Lamont v. Postmaster General*,<sup>34</sup> pointedly described in terms suggesting that he was at the time laying the groundwork for recognizing a “right to privacy” as among the “penumbral” unenumerated rights in the then-pending case of *Griswold v. Connecticut*. Such a “right” would seemingly count as sufficiently essential to any coherent version of the “freedom of speech” to escape condemnation under the strict test enunciated in Justice Scalia’s *Dickerson* dissent. If that is so, then what Justice Brennan, at least, seemed prepared to describe as an “unenumerated” right—the right to receive information from a willing speaker—would appear to survive the Scalia test. But it would survive that test only because, in the Scalia scheme of things, that right was not truly an instance of an “unenumerated” right at all but was instead merely a logical entailment of a solidly enumerated right to free speech.

In Justice Scalia’s tightly constricted universe, “geodesically” constructed rights, if they are rights at all, must therefore collapse into logical derivations from rights that are firmly enumerated—and in that sense must amount to relatively trivial instances of “geometrically” derived straight-line extrapolations located on the same plane as the rights from which they stem. Otherwise, such constructs would represent nothing more than improperly legislated pretenders to the status of “unenumerated” constitutional rights, lacking all legal legitimacy.

For all its rhetorical force, one must remember that Justice Scalia’s was, of course, but a proposed counter-universe. The legal world as understood by the *Dickerson* majority left room for geodesically constructed constitutional rights that could not be geometrically extrapolated as necessary entailments of rights properly described as textually “enumerated.” That such rights remain subject in theory to alternative enforcement regimes—although not, plainly, to a naked congressional decision to ditch them without substituting anything beyond what the Court had already found wanting—means that they are not directly derivable from rights of unquestioned textual pedigree. But if the relationship of these “unenumerated” rights to rights of such pedigree is a relationship of means to ends, at least it seems plain that the contours of that relationship were not viewed in *Dickerson* as too indeterminate to permit judicial determination of when the rights have been sufficiently if alternatively protected or of who bore an obligation to protect them.

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<sup>34</sup> 381 U.S. 301, 307 (1965) (finding the requirement that an addressee request in writing the delivery of certain literature to be an unacceptable burden on First Amendment rights).

Of quite a different character would be such material guarantees as those purportedly ensuring minimally adequate shelter, nutrition, health care, or occupational or educational opportunity. Enforcing such guarantees would no doubt facilitate, and would certainly render more meaningful, such enumerated rights as the right to speak one's mind or the right to practice one's religion, and such more readily extrapolated rights as the right to cast an equal vote. Thus these material guarantees would seem to fall within the theoretical reach of the geodesic method and hence to constitute potential candidates for recognition as unenumerated constitutional rights. Yet the irreducible indeterminacy of the inquiry into whose responsibility it is to fulfill these rights, and of the inquiry into when these rights are to be deemed fulfilled, makes quite implausible—in anything resembling today's American constitutional culture<sup>35</sup>—the proposition that such rights are constitutionally enshrined.

Considerably less attenuated in today's constitutional universe is the set of what might aptly be regarded as the "unenumerated" rights of state and local governments. Think, for instance, of Justice O'Connor's and Justice Kennedy's frequent exhortations about how our federalism "split the atom of sovereignty,"<sup>36</sup> in the latter's felicitous phrase, not as an end in itself but as a means of giving double security to individual citizens' rights against overbearing government. Given Chief Justice Rehnquist's evocative reference to the "tacit postulates" of the "constitutional plan"<sup>37</sup> in describing the precepts of federalism—and given the general recognition that nothing in the Constitution's text points to, much less "enumerates," many of the "states' rights" recognized by the Rehnquist Court and bound to be preserved or extended in the jurisprudence of the Roberts Court—should one not view the "rights" of the quasi-sovereign states—for instance, their rights not to be "commandeered" in the exercise of their lawmaking,<sup>38</sup> executive,<sup>39</sup> or adjudicatory functions<sup>40</sup>—as amenable to geodesic, even if not geometric, construction?

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<sup>35</sup> Cf. S. AFR. CONST. 1996, ch. II, §§ 24–29, *reprinted in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 15–18 (2004) (providing for economic and social rights including the right to a secure environment, adequate housing, health care, food, water, social security, and education); Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 586 (2004) (book review) (noting that the German Federal Constitutional Court has interpreted German Basic Law to provide social rights such as minimum subsistence as furthering "the necessary preconditions for the meaningful realization of liberties" (citing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 334–48 (Julian Rivers trans., Oxford Univ. Press 2002) (1986))).

<sup>36</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>37</sup> Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

<sup>38</sup> New York v. United States, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and en-

The opinions of the four Justices who have dissented from nearly all of the decisions establishing such rights—insisting that such rights need no judicial protection because the political process suffices to guarantee their survival,<sup>41</sup> need protection of a much thinner and more deferential variety in light of the empirical uncertainties surrounding how best to realize federalism's aspirations,<sup>42</sup> or no longer make sense at all as "rights" in light of contemporary realities<sup>43</sup>—seem to me thinly veiled denials that geodesically derived rights of this sort, once one concedes their contingent rather than inevitable character, ever deserve to be included in the "unenumerated rights" pantheon.<sup>44</sup>

force a federal regulatory program." (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

<sup>39</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997) ("Congress cannot circumvent th[e] prohibition [against compelling a state to enact or enforce a federal regulatory program] by conscripting the States' officers directly.").

<sup>40</sup> *Alden v. Maine*, 527 U.S. 706, 744 (1999) ("[The Court] ha[s] discovered no instance in which [an early Congress] purported to authorize suits against nonconsenting States in [state courts].").

<sup>41</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., joined by Stevens, Ginsburg, & Breyer, J.J., dissenting) (arguing that the Founders had concluded in their "considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy"); *id.* at 661 (Breyer, J., joined in this part by Stevens, J., dissenting) (noting that "Congress, when it enacted the statute, followed procedures that help to protect the federalism values at stake. It provided adequate notice to the States of its intent to legislate in an 'are[a] of traditional state regulation.'" (citing *id.* at 615 (majority opinion))); *Printz*, 521 U.S. at 957 (Stevens, J., joined by Souter, Ginsburg, & Breyer, J.J., dissenting) ("The majority points to nothing suggesting that the political safeguards of federalism identified in *Garcia* need be supplemented by a rule, grounded in neither constitutional history nor text, flatly prohibiting the National Government from enlisting state and local officials in the implementation of federal law."); *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (arguing that the Court's deference to congressional invocations of the Commerce Clause reflects its "appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices").

<sup>42</sup> See, e.g., *Printz*, 521 U.S. at 976–77 (Breyer, J., joined by Stevens, J., dissenting) (observing that "[a]t least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body. . . . They do so in part because they believe that such a system interferes less, nor more, with the independent authority of the 'state,' member nation, or other subsidiary government, and helps to safeguard individual liberty as well.").

<sup>43</sup> See generally Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (developing the thesis that fidelity to original constitutional meaning, purposefully understood, often requires translating the way an original text had been read so that the translated "reading" is more faithful to the original meaning of the provision or principle in question, given altered circumstances and contexts, than the original "reading" would have been).

<sup>44</sup> See, e.g., *Alden*, 527 U.S. at 763 (Souter, J., dissenting) (objecting to the Court's holding as "a conception necessarily implied by statehood itself. . . . [that] is . . . not one of common law so much as of natural law, a universally applicable proposition discoverable by reason").

As such, those dissents leave much to be desired—even when the majority opinions against which they are cast are conspicuously unresponsive to the dissenters' claims, and even when one might in the end find some of the majority's holdings unconvincing.<sup>45</sup>

Although I have discussed constitutionally unenumerated rights of state governments in terms of the geodesic model, it would be a mistake to regard that model as necessarily the most powerful in understanding the structure and derivation of those rights. On the contrary, such rights might well be understood best either in terms of what I would call the geological model or in terms of what I would describe as the monster-barring or slope-avoiding model.

*GEOLOGICAL:* The third form of rights construction—although in this instance perhaps a better term would be deconstruction—entails neither geometrically linking enumerated rights nor extrapolating from such rights, on the one hand, nor geodesically constructing shields for their protection, on the other. Instead, it involves digging beneath a recognized enumerated right or set of rights so as to unearth the logical or sociological presuppositions of those rights, the postulates they should be understood to reflect, or the underlying (typically more substantive) rights without which the rights enumerated (often more procedural or quasi-procedural in cast) would be rendered incoherent or largely purposeless. Recall Justice Harlan's suggestion, in his *Poe v. Ullman* dissent, that the Fourth Amendment's various search-and-seizure-related protections for "the right of the people to be secure in their . . . houses"<sup>46</sup> would make little or no sense but for an underlying "solicitude to protect the privacies of the life within."<sup>47</sup>

In much that spirit, in my oral argument representing Michael Hardwick, who had been arrested for engaging in consensual sex at home with another man in *Bowers v. Hardwick*, I suggested that the Third Amendment's protection against "quarter[ing] [regiments of soldiers] in any house, without the consent of the Owner,"<sup>48</sup> would make little sense if there were no substantive limit whatever on the

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<sup>45</sup> See Laurence H. Tribe, *Saenz Sans Prophecy: Does The Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 139–41 (1999) (noting that although Justice Stevens criticized the majority in *Printz v. United States* for selectively employing "unconstrained modes of structural inference," it is likely that "in the current era, claims of individual rights are most likely to have power and ultimately to prevail if they can be convincingly expressed through the language, and clearly understood through the logic, of such concretely architectural features of the Constitution as the separation of powers or, more to the point here, the federal system of separate, equal, and semi-autonomous states").

<sup>46</sup> U.S. CONST. amend. IV.

<sup>47</sup> *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

<sup>48</sup> U.S. CONST. amend. III.

authority enjoyed by the state to regiment every last detail of what the owner did behind closed doors in the privacy of that home.<sup>49</sup>

Rights that bear substantively on the allocation of decision-making authority with respect to particular realms or domains of life—if their assumed, but not textually articulated, existence is arguably necessary, in a given time and place, to render purposeful one or more of the rights that *are* articulated in the constitutional text—would seem to be prime candidates for the unenumerated rights “retained by the people” to which the Ninth Amendment refers. We might disagree that one or another specific allocation of decision-making roles—with respect to reproductive choice, to take a prominent instance, or with respect to end-of-life decisions, to posit another—is indeed necessary to render various enumerated rights meaningful, to prevent them from being mere hollow shells, but there should be wide agreement that the inquiry into such necessity represents the crucial step in a distinctly “geological” approach to identifying something as an unenumerated but constitutionally protected right.

Failure to make a convincing case for a given right’s necessity in these terms means, by definition, that the geological method fails to generate the right in question. It does not necessarily mean that the contested right cannot be otherwise generated. In particular, the fourth form of rights derivation—the method that focuses on “monster-barring” or slippery-slope avoidance—might yet furnish a persuasive basis for admitting a claimed right into the unenumerated rights universe. We turn, then, to:

**MONSTER-BARRING:** This form of rights construction employs a method for which I have borrowed a label from the mathematical logician, Imre Lakatos, whose 1976 book, *Proofs and Refutations: The Logic of Mathematical Discovery*, uses that label to describe (and to criticize) the mode of reasoning in which one approaches mathematical proof by pretending that counterexamples to supposed truths are not genuine counterexamples but “monsters” that can simply be ignored.<sup>50</sup> As I use the term here, “monster-barring” entails rejecting as unconstitutional any government action whose constitutional legitimacy we could accept only at the monstrous price of treating some established constitutional boundary or limitation as entirely empty or wholly ineffectual.

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<sup>49</sup> Transcript of Oral Argument at 21, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), reprinted in 164 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1985 TERM SUPPLEMENT 653 (Philip B. Kurland & Gerhard Casper eds., 1987).

<sup>50</sup> For further discussion of Lakatos’s monster-barring approach and its relationship to law, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 88–92 (1991).



Witness Chief Justice Rehnquist's assertion in *United States v. Lopez*<sup>51</sup> that giving one's constitutional blessing to the congressional ban on possession of firearms near schools would in principle commit one to accept the constitutional legitimacy, at least insofar as affirmative authority is concerned, of literally *any* assertion of congressional power over any aspect of life.<sup>52</sup> The Chief Justice's majority opinion in that case challenges the dissenters to propose a limiting principle that might provide some purchase along an otherwise limitlessly slippery slope. The majority treats the dissenters' failure to propose such a principle as proof that only a right to avoid congressional regulation of the type there involved could serve to forestall the monstrous outcome of essentially erasing the Tenth Amendment and repudiating the generally accepted axiom the Amendment expresses—to wit, that ours is a government of limited national powers.

Just so, it may well be that the strongest argument for treating certain intimate realms of personal choice as implicating unenumerated constitutional rights is the monster-barring argument that, if one were to cede to government the authority to intrude willy-nilly, and without any particularly compelling justification, into the realms in question, one would in essence have ceded to government powers so boundless as to efface the very idea of personal rights, leaving virtually nothing beyond the reach of government.

Nor need unenumerated rights so constructed be expressed as substantive spheres of conduct or forms of relationship that the logic of monster-barring puts presumptively beyond the reach of governmental power to forbid, to mandate, or to shape. Similar in structure would be an argument that permitting government to regulate some particular aspect of life along a specific axis, in a particular manner, in terms of a given variable, or in service of a particular value or end, would be tantamount to erasing a vital constraint on permissible government action that we have agreed the Constitution enumerates. In *Larkin v. Grendel's Den, Inc.*,<sup>53</sup> for example, I represented a restaurant in challenging a Massachusetts law that empowered churches to wield over businesses operating in their immediate vicinity a form of governmental authority—there, a veto over a commercial activity (serving liquor to customers)—that had been preferentially delegated to such churches (and to selected others but not to all institutions similarly situated). The Court was persuaded that sustaining the constitutional legitimacy of that preferential delegation of secular power to

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<sup>51</sup> 514 U.S. 549 (1995).

<sup>52</sup> *Id.* at 564 (“Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”).

<sup>53</sup> 459 U.S. 116 (1982).

religious institutions would for all practical purposes have eliminated the anti-establishment principle in its entirety from the array of constitutional constraints on government.<sup>54</sup>

The unenumerated rights that emerge from geometric, geodesic, geological, and monster-barring constructions may take many forms. They may be procedural or substantive, individual or structural, intensely controversial or widely accepted. Some of these rights may be cognizable not merely as the product of a single one of these techniques, but as the overlapping or converging result of multiple methods of rights construction. For example, the anti-commandeering holdings of *New York v. United States*<sup>55</sup> and *Printz v. United States*<sup>56</sup>—whose grounding in the history of the founding the dissenters in those cases fairly demolished—might rest more comfortably either on the geodesic notion that politically transparent separation between dual sovereigns guards other liberties protected in the Constitution, or on the monster-barring argument that upholding the federal directives at issue in those cases would have reduced state and local jurisdictions to little more than field offices of an all-powerful central government, a consequence difficult to square with the Constitution's "tacit postulates" regarding at least a modicum of state sovereignty.

My intention in this exploratory essay has not been to defend any particular mode of rights construction over any other, to extol the virtues of the entire enterprise over its well-known difficulties, or to champion the inclusion of one or another personal or governmental right in—or the exclusion of any particular right from—the "unenumerated" rights canon. Although my previous writings have frankly embraced organic and evolutionary over mechanistic and static conceptions of constitutional interpretation, this Essay is not intended as an attempt to claim constitutional status for any particular subset of the historic landmarks punctuating our political and moral development as a nation that find no explicit reflection in the text of the written Constitution.

Only a false equation between the Constitution's evolving contents and the ever-changing measure of how government ideally ought to behave and what it ought ideally to avoid doing could foster the fallacy that "unenumerated rights" or the "unwritten constitution" define whatever it might take to fill the sometimes yawning gap between what the constitutional text tells us and what counts as fundamental about our political and legal morality at each phase in our national evolution. In attempting to develop a taxonomy for the

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<sup>54</sup> *Id.* at 126 ("This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause . . .").

<sup>55</sup> 505 U.S. 144 (1992).

<sup>56</sup> 521 U.S. 898 (1997).

available methods of deriving and structuring the rights that the Constitution supports but does not enumerate, I have not sought to close that gap or to erase the fundamental distinction between what our polity accepts as just or condemns as indecent and what its Constitution mandates, permits or forbids.

On the contrary, it is precisely our Constitution's memorialization of such practices as slavery, and our tradition of never erasing whatever the Constitution might at one time have inscribed—however shameful its doing so may have been—that constitutes one of the greatest virtues of its written character and of its adherence to the poet's dictum that "The Moving Finger writes; and, having writ, Moves on."<sup>57</sup> That so much of our Constitution as is expressed in writing continues permanently to register even outdated and since repudiated traces of its compromises with expediency and with evil is an antidote against the temptations of collective forgetting. The Constitution's writtenness ensures that the darkest episodes of our past—insofar as they have found expression in the Constitution's text—cannot be airbrushed from our history. And it ensures as well that we never lose sight of the distinction between what the Constitution, written or unwritten, permits or demands and what common decency and wise statecraft might require. That is the meaning, in constitutional discourse, of the poet's reminder: "nor all your Piety nor Wit Shall lure it back to cancel half a Line, Nor all your Tears wash out a Word of it."<sup>58</sup>

Pathbreaking acts of Congress and other potentially more transitory expressions of our national struggle, however much they sometimes contribute to the growing recognition of one or another unenumerated right as grounded in the Constitution, however much they may count as vital stepping stones along the legal path of the nation's development, and however entrenched they might in practice become in our history and tradition, all remain subject, should they ever be repealed, to total erasure from the enacted annals of our legal past. Such federal statutes and other collective expressions of our national will thus remain worth distinguishing from the Constitution proper, both in its glacially changing written projections and in its more fluid and volatile unwritten premises. My aim in this brief Essay has been to dissect the ways in which those more fluid but still constitutionally grounded unwritten premises may be connected to, and may be understood as arising from, the written text itself.

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<sup>57</sup> THE RUBAIYAT OF OMAR KHAYYAM verse 71, at 106 (Christopher Decker ed., Edward Fitzgerald trans., Univ. Press of Va. 1997) (1879).

<sup>58</sup> *Id.*