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I. INTRODUCTION

Legal argument over the existence of unenumerated rights appears as insoluble as ever. You either believe in ghosts, or you do not.[1] This type of quandary is nothing new in constitutional law, where vague provisions beckon for opposing interpreters to step into the ring and do battle. But interpretive vagaries are not the only source of tension. Indeed it is sometimes hard to believe that either side of the public debate is dedicated to the Constitution rather than to a personal moral

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1. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 39 (1980).

or political goal. And that is what makes the subject so intensely exciting. It is *not* just a question of legalistic interpretation. It is a battle over the relationship between government and the individual — more specifically, over the federal government's authority to check the traditional power of states and localities to shape their communities.[2]

Professional lawyers, however, must stick to legal materials, and any claim that federal rights preclude state power implicates two sources: the Founding and Reconstruction. This article takes the position that the latter event has been given too little attention in the debate, and attempts to sketch out the possible results of according Reconstruction a more prominent place.[3] The answer to whether there

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2. The act of "community-shaping" is used here to describe the function of laws that typically are subjected to an unenumerated rights attack. *Cf.* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 247 (Quintin Hoare & Geoffrey N. Smith trans., 1971) ("Law is the repressive and negative aspect of the entire positive, civilising activity undertaken by the State."); Earl M. Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & PUB. POL'Y 163, 184 (1989) ("State autonomy allows people who hold values not generally favored nationally to effectuate their preferences by joining with other like-minded individuals to form communities governed by those values.").

3. Most judges and writers have proceeded from apparently well-settled assumptions regarding the stateside effect of unenumerated rights. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (no holding on incorporation issue). Opinions on incorporation of the Ninth Amendment are especially illustrative. *Compare* Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 23-24 (1980) ("To transform [the Ninth Amendment] into an instrument of control over state government by recourse to the fourteenth amendment blatantly perverts the meaning of the framers, both in 1789 and in 1866.") *and* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 261-62 (1983) (arguing that incorporation has no place because the Ninth Amendment was intended to protect states' own rights guarantees) *with* Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* THE RIGHTS RETAINED BY THE PEOPLE 47-48 (Randy E. Barnett ed., 1989) (describing limitation of the Ninth Amendment to federal government as "archaic") *and* Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962). Redlich states:

> Those Justices who consider the Fourteenth Amendment as having embodied either or all [sic] the major portions of the Bill of Rights could appropriately consider the Ninth and Tenth Amendments as "incorporated". . . . [T]hose Justices who have viewed the Fourteenth Amendment as limited only to "fundamental" rights unrelated to the specific provisions of the Bill of Rights should have no difficulty in adopting a Constitutional provision which appears to have been almost custom-made for this approach.

Id. at 808. Even the basic issue of enumerated rights incorporation continues to engender spirited disagreement. *See* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989); MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

Certain exceptions can be found, like Professor Earl Maltz, who argues that judicial-legislative tensions have unjustifiably overshadowed federal-state tensions in the evaluation of unenumer-

is a constitutional basis for binding states by unenumerated rights turns on the best interpretation of how Reconstruction altered the states' power to shape communities.[4]

The prevailing doctrine of substantive due process obviates the issue because the Due Process Clause by its terms applies to the states.[5] But endless hostility to substantive due process[6] increases the importance of other sources of unenumerated rights like the Ninth Amendment or "penumbra" theory — sources that do not enjoy the inherent stateside applicability of the Due Process Clause. Supreme Court Justices who have advanced Ninth Amendment and penumbra rationales have failed to squarely address the incorporation question. Yet, the fault may lie not just in the judicial stars, but in our history; we may simply have reached a question that has no clear answer in past political choices. Illuminating the choices now open to judicial decisionmakers is the goal of this article.

The article contains four main sections. Section one reviews how the doctrines used to incorporate federal rights against the states have developed over the years. Section two developes a menu of possible interpretations of the Due Process and Privileges or Immunities

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ated rights claims. Maltz, *supra* note 2. Professor Maltz nevertheless stops short of analyzing the potential bases for accepting or rejecting the application of federal unenumerated rights to the states. That is what this article will attempt to do.

4. *But see* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 150-58 (1991). Professor Ackerman views the interpretive project as a matter of synthesizing the Founding and the "constitutional" transformation during the New Deal. Reconstruction is conspicuously absent from that interpretive approach. This article takes the less inventive position that the proper objects of constitutional synthesis in an unenumerated rights case are the Founding and Reconstruction.

5. Even this simple proposition may not always hold true, given the Rehnquist Court's common law-style use of federalism. *E.g.*, Coleman v. Thompson, 111 S. Ct. 2546, *reh'g denied*, 112 S. Ct. 27 (1991).

6. The opinion of the Court's "new center" — Justices O'Connor, Kennedy, and Souter — in the *Casey* abortion decision was admittedly a resounding reaffirmation of substantive due process. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804-06 (1992). But it would be naive to overlook the brooding presence of four dissenters in determined opposition to the rationale of the majority. There may or may not be limits to the conservative reaction against substantive due process. *Compare* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6, *reh'g denied*, 492 U.S. 937 (1989) (Scalia, J.) (success or failure of due process liberty interests should turn on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified") *with* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 240 (1990) (entirely rejecting substantive due process). *See generally* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987) (examining the effect of the Bowers v. Hardwick, 478 U.S. 186 (1986), on the doctrinal integrity of substantive due process).

Clauses of the Fourteenth Amendment, and examines the implications of each interpretation with respect to the Ninth Amendment and penumbra theories of unenumerated rights. Section three explores how the common law aspects of unenumerated rights lead to an impermanence of the individual-community relationship, resulting in an ongoing regulation of state autonomy, even under present due process doctrine. While Ninth Amendment and penumbra advocates fail to address incorporation issues, advocates of the still-prevalent substantive due process doctrine bury their respect for state autonomy in common law methods of adjudication, despite the inapplicability of incorporation doctrine to substantive due process issues. Finally, section four clarifies the issues that will unavoidably persist in this area, and defines the choices that are available. The greatest appearance of legitimacy for unenumerated rights would be achieved by using the Privileges or Immunities Clause as a basis for incorporation and a Ninth Amendment or penumbra approach as a source of substantive rights, because the rights of individuals and the responsibility of states to respect those rights would be more plainly linked to the constitutional text. But we are then still left with a choice between a narrow reading of privileges or immunities that constrains judicial discretion on the issue of incorporation and a broad reading — consistent with the Supreme Court's reading of the Privileges and Immunities Clause of Article IV, section 2 — that preserves the coherence of the Constitution.

II. THE DOCTRINE OF INCORPORATION

As enacted, the Bill of Rights applied only to the exercise of power by the federal government.[7] The Civil War and Reconstruction laid the groundwork for extending the reach of the Bill of Rights to the states. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were ratified after the Civil War; the latter two were produced during the radical Republican Reconstruction. These three amendments primarily consist of concessions regarding the power and nature of state governments, but do not explicitly state that the Bill of Rights applies to the states. The Fourteenth Amendment, however,

7. *E.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833); *see also* Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833) (holding that the Fifth Amendment was intended solely as a limitation on the exercise of power by the federal government and is not applicable to state legislation).

is drawn in broad terms,[8] and judicial interpretation has carried out what was not explicitly commanded by the text.

Two basic arguments favoring application of the Bill of Rights against the states are generated by the language of the Fourteenth Amendment. One argument is that the rights secured by the Bill of Rights are among the "privileges or immunities of citizens of the United States"[9] which no state may abridge. The other argument holds that government action that would violate the Bill of Rights if done by the federal government would constitute a deprivation of life, liberty, or property "without due process of law"[10] if done by a state.[11]

A. *Privileges or Immunities*

The Privileges or Immunities Clause would provide a simple and direct textual basis for application of the Bill of Rights to the states. Unfortunately, that approach was abandoned early in the process of judicial interpretation of the Fourteenth Amendment, and has never been employed by a majority of the Supreme Court.[12] It has been

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8. Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

9. *Id.*

10. *Id.*

11. For a more detailed discussion of incorporation doctrine than that which follows in the text, see RICHARD C. CORTNER, THE SUPREME COURT AND THE SECOND BILL OF RIGHTS (1981).

12. *See* The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). *Slaughter House* ascribed a minor scope to the "privileges or immunities" of national citizenship. The Court at first narrowly identified privileges or immunities as "those rights which are *fundamental*," but then more broadly characterized them as "ow[ing] their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* at 76, 79. The right to peaceably assemble and to petition the government for a redress of grievances were the only interests in the Bill of Rights that the Court suggested as among the privileges or immunities of national citizenship. *Id.* at 79-80. Apart from the constitutional right to the writ of habeas corpus, the remaining privileges or immunities cited were essentially a set of extra-constitutional interests that the Court thought logically connected to citizenship under the federal government. *See id.*

The four Justices who dissented in *Slaughter House* saw that the list of examples given by the majority augured a dim future for the provision: "The construction adopted by the majority of my brethren is, in my judgment, much too narrow. . . . [I]t turns, as it were, what was meant for bread into a stone." *Id.* at 129 (Swayne, J., dissenting).

advanced in fits and starts by litigants,[13] commentators,[14] and occasionally even Supreme Court Justices,[15] but has not yet recovered from its initial foundering.

This article nevertheless will contend that the Privileges or Immunities Clause would be a more appropriate avenue for applying unenumerated rights to the states than the currently used Due Process Clause.[16] But that conclusion begs the broader question of how to measure the effect, if any, of the Privileges or Immunities Clause on government power to shape communities. Five different approaches

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For an argument that even the majority in *Slaughter House* supported an expansive interpretation of the clause, see ELY, *supra* note 1, at 27 n.59. Based on the majority's premise that privileges or immunities include fundamental guarantees, Ely believes all nine Justices in *Slaughter House* favored application of the Bill of Rights against the states, and differed only with respect to the specific issue in the case, i.e., whether privileges or immunities encompassed the claimed unenumerated right to carry on a trade without government interference. *Id.* Ely's analysis is important because it could provide a basis for current decisionmakers to escape the shackles of the more common reading of *Slaughter House*. Later decisions, however, did reaffirm the more limited reading of *Slaughter House*. *See* Twining v. New Jersey, 211 U.S. 78, 93-99 (1908); Maxwell v. Dow, 176 U.S. 581, 587-95 (1900).

13. In his argument for Clarence Gideon before the Supreme Court, Abe Fortas stated he was not arguing that the Fourteenth Amendment incorporated the Sixth Amendment right to a fair trial. When Justice Black asked why, Fortas replied: "I like that argument that you have made so eloquently. But I cannot as an advocate make that argument because this Court has rejected it so many times. I hope you never cease making it." ANTHONY LEWIS, GIDEON'S TRUMPET 174 (1964). Regarding Justice Black's position on incorporation, see *infra* notes 17-20 and accompanying text.

14. *See* Roger J. Miner, *Justice Harlan and the Bill of Rights: A Dichotomy in Constitutional Analysis*, 36 N.Y.L. SCH. L. REV. 75 (1991). Judge Miner states with regard to the jurisprudence of Supreme Court Justice John Marshall Harlan that

> Harlan's expansive view of the Bill of Rights as applied to the federal government is manifested in a number of his decisions. . . . These cases stand in sharp contrast to Harlan's view of the Bill of Rights as applied (or really as not applied) to the states. The problem of the Harlan dichotomy, as I see it, lies in its failure to account for another Fourteenth Amendment provision that is just as important as the due process requirement: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Id. at 79; *see also* CURTIS, *supra* note 3; WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 58 (1898); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT *passim* (1984); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71 (1989).

15. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 166 (Black, J., concurring), *reh'g denied*, 392 U.S. 947 (1968); Maxwell v. Dow, 176 U.S. 581, 606 (1900) (Harlan, J., dissenting); O'Neil v. Vermont, 144 U.S. 323, 361 (1892) (Field, J., dissenting).

16. *See infra* section V.

to the clause will be identified and tested for incorporative effect. First is a literalist interpretation that can be associated with Justice Hugo Black, who championed the total incorporation position that would have applied the Bill of Rights *in toto* to the states.[17] Justice Black primarily relied on a collection of statements by the congressional drafters and sponsors of the Fourteenth Amendment, Representative Bingham and Senator Howard.[18] These aspects of the legislative history are indeed impressive. For example, Bingham vociferously criticized Supreme Court decisions finding the Bill of Rights inapplicable to the states, and stated that the Privileges or Immunities Clause would correct those decisions.[19] This intent was equally clear in Howard's remarks introducing the amendment to the Senate.[20]

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17. *See* Adamson v. California, 332 U.S. 46, 71-75, 89 (1947) (Black, J., dissenting). An important adjunct to Justice Black's position that enumerated rights were incorporated was his adamant belief that unenumerated rights neither existed nor could be incorporated. He believed that the due process approach of *Twining*, 211 U.S. 78, *see infra* text accompanying notes 41-44, had amounted to an illegitimate appropriation of discretion by the judiciary, with little or no guide for decision other than the Justices' personal predilections and notions of right and wrong. *Adamson*, 332 U.S. at 82-84 (Black, J., dissenting). Justice Black's exceedingly self-effacing judicial temperament is not necessary to his approach to the Privileges or Immunities Clause, which was really rooted in legislative intent. It is the legislative intent aspect of his analysis that is of present interest.

18. *Adamson*, 332 U.S. at 92-123 (Black, J., dissenting).

19. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866) (criticizing, and referring "the House and the country" to, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), and Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833)); *see also* CURTIS, *supra* note 3, at 110, 124-25 (arguing that Bingham advocated protecting from state encroachment the privileges and immunities guaranteed by "the Bill of Rights"). For a skeptical view of even Bingham's intentions, see BERGER, *supra* note 3, at 131 (referring to "Bingham's repeated recognition that control of internal matters was left to the states.").

20. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866). Howard first noted that privileges or immunities included those things recognized by judicial interpretation as within the Privileges and Immunities Clause of Article IV, section 2 of the original Constitution. *Id.* at 2765. Then,

> [t]o these privileges and immunities, whatever they may be — for they are not and cannot be fully defined in their entire extent and precise nature — to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

A second interpretation is offered by Charles Fairman in his influential argument against Justice Black's views.[21] Fairman's conclusion was that only fundamental rights fitting Justice Cardozo's "ordered liberty" idea should be held against the states.[22] To reach this conclusion, Fairman detailed the legislative history of the Fourteenth Amendment, examining state ratification proceedings and even public sentiment as reflected in newspapers.[23] Fairman thought Justice Black was guilty of a selective reading of history and had left out significant parts of the debates that did not support incorporation.[24] Fairman also highlighted the existence of state practices contrary to the Bill of Rights at the time of ratification, and the absence of any notable controversy in those states over the effect of the proposed amendment.[25]

Having set out an exhaustive exegesis of the adoption of the Fourteenth Amendment, Professor Fairman was nevertheless unable to reach an incisive conclusion on the incorporative effect of the Privileges or Immunities Clause. The true meaning of the clause remained elusive, though he was confident about his refutation of Justice Black's total incorporation position.[26] Fairman could only suggest that "Justice Cardozo's gloss on the due process clause [of the Fourteenth Amendment] — what is 'implicit in the concept of ordered liberty' — comes as close as one can to catching the vague aspirations that were hung upon the privileges and immunities clause."[27] Thus, Fairman's argu-

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> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation.
> . . .
> . . . The great object of the first section of this amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental guarantees.

Id. at 2765-66.

21. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

22. *Id.* at 139.

23. *Id.* at 68-132.

24. *Id.* at 135-36.

25. *See id.* at 81-132.

26. *Id.* at 139. Fairman's article concludes that "[i]n [Black's] contention that Section I [of the Fourteenth Amendment] was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against him." *Id.*

27. *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

ment actually supports incorporation as carried out by the twentieth century Supreme Court.[28]

A third approach would take Fairman's route without bringing the baggage of his conclusion; whether a right should be incorporated would depend on an empirical evaluation of practices contemporaneous to ratification of the Fourteenth Amendment. Although this analysis has not developed an independent vitality as a theory of incorporation, it has occasionally found expression in judicial opinions, especially those opposing the recognition of an unenumerated right.[29]

The fourth view looks with broader scope at the history surrounding ratification, and asks whether a given right fits the Civil War and Reconstruction setting. In concentrating on the legislative intent revealed by recorded debates, both Justice Black and Professor Fairman may have failed to give adequate consideration to the Reconstruction environment in which the Fourteenth Amendment was proposed and ratified.[30] Fairman's article itself contains evidence that the Fourteenth Amendment was designed to prevent the kinds of abuses that Northerners had suffered in southern states both before and during the Civil War.[31] Privileges or immunities might therefore be inter-

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28. Those who like Fairman's factual presentation but dislike his conclusion must disagree with him over the content of the Privileges or Immunities Clause. Raoul Berger thus pleads that he "may be permitted to differ with Fairman in this particular. To my mind the framers were quite clear as to the contents of the 'privileges or immunities' clause; to them the clause did not represent 'vague aspirations.'" BERGER, *supra* note 3, at 16 n.49.

29. *See infra* note 76.

30. Thus it has been contended that:

> The difficulty with Charles Fairman's article, despite its superb scholarship and exacting standards of proof, is that its compass is limited to the immediate background of the Fourteenth Amendment. . . . He therefore missed the history that was behind [the words used] and that suffused them with a content that can be appreciated only by understanding them and the language of the amendment as expressions of the constitutional ideology of the abolitionists.

Leonard W. Levy, *Introduction* to CHARLES FAIRMAN & STANLEY MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY at xiv (1970).

31. Fairman cites Representative Bingham's remark that

> [M]any instances of state injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

Fairman, *supra* note 21, at 51 (quoting Rep. Bingham, CONG. GLOBE, 39th Cong., 1st Sess. 2459, 2542 (1866)).

preted in the context of Northerners engaged in activities in a rebellious South and subjected to the exercise of hostile state power. The product of this approach would depend on the historical specificity with which a court implemented the provision. A judge could look to problems actually suffered by persons in the South before the Civil War.[32] Or a higher level of generality could be employed so that political or religious activity and fair criminal procedures would be protected.

The fifth and final view has been developed recently by Professor Akhil Amar, who argues that the Bill of Rights was originally protective of the collective body politic, and was transformed by Reconstruction in a very specific way: it was made into a set of individual and perhaps group protections rather than a set of popular protections. Incorporation is then appropriate only to the extent that the Bill of Rights can be recast as individual or perhaps civil rights, rather than as rights of states or of the public at large.[33]

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32. As one historian has noted, "[s]ome portions of the Bill of Rights were of little moment in 1866 . . . [b]ut it is abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect . . . key provisions . . . [that were] being systematically violated in the South in 1866." ERIC FONER, RECONSTRUCTION: 1863-1877, at 258-59 (1990). The problems were indeed rife. "Southern States passed laws making criticism of slavery criminal. The South became a closed society. . . . Republicans could not campaign in the South. Southern whites were prosecuted for circulating a book Northern Republicans used as a campaign document." Michael K. Curtis, *Privileges or Immunities, Individual Rights, and Federalism*, 12 HARV. J.L. & PUB. POL'Y 53, 54 (1989). Efforts by southern states to prevent abolitionist activities took both official and unofficial forms:

> The abolitionist movement was strongly resisted, especially in the South. In part this took the form of state legislation. Thus a statute passed in Georgia in 1829 prohibited, subject to the death penalty, "aiding or assisting in the circulation or bringing into this state . . . any . . . pamphlet, paper, or circular, for the purposes of inciting to insurrection, conspiracy, or resistance among the slaves, negroes, or free persons of color . . . ." Geo. Acts, 1829, pp. 170-71. A similar statute in Louisiana provided that anyone who wrote, printed, published or distributed "any thing having a tendency to produce discontent among the slaves therein, shall on conviction thereof . . . be sentenced to imprisonment at hard labor for life, or suffer death, at the discretion of the court." La. Acts, 1830, p. 96. . . .
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> Throughout this period suppression of abolitionist views was undertaken by extra-legal sanctions enforced by private individuals and groups. Mob action in both North and South became common.

THOMAS I. EMERSON & DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 280 (2d ed. 1958); *see also* CURTIS, *supra* note 3, at 26-34.

33. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

B. *Due Process*

As litigants were warded off by *Slaughter House* from using the Privileges or Immunities Clause as a tool for challenging state governments, attention turned to the Due Process Clause. The Supreme Court was at first as disinclined to extend application of the Bill of Rights to the states through this medium as it had been with the Privileges or Immunities Clause. But the rejection of due process as an avenue for applying federal rights to the states was incrementally enervated until the current condition of penultimate selective incorporation came into being.

The Supreme Court held in *Hurtado v. California*[34] that the Due Process Clause did not require the State of California to obtain an indictment by grand jury for an accused murderer, because such a requirement "would . . . deny every quality of the law but its age" by binding the states to past practices.[35] In the Court's opinion, that a process of law had a history of settled usage would demonstrate that it qualified as due process, but a lack of settled usage would not demonstrate a lack of due process.[36] The *Hurtado* Court also developed the doctrine of non-superfluousness, based on the perceived equivalence of the Due Process Clauses of the Fifth and Fourteenth Amendments.[37] In a simple syllogism, the Court decided first that due process meant the same thing in both amendments.[38] Due process within the Fifth Amendment was then found not to include those additional guarantees which appear in the Bill of Rights, because if it did, the enumeration of those guarantees would be superfluous.[39] Due process under the Fourteenth Amendment therefore could not include those Bill of Rights guarantees either.

Opposition to incorporation faltered when the Takings Clause of the Fifth Amendment was held applicable against state action in 1897.[40] Was that just a symptom of the Court's contemporaneous solicitude for property rights? Perhaps; but whatever the motivation, the decision ushered in the twentieth century and federal rights against state and local government.

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34. 110 U.S. 516 (1884).

35. *Id.* at 529.

36. *Id.* at 528.

37. *Id.* at 534-35. The Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

38. 110 U.S. at 535.

39. *Id.* at 534-35.

40. Chicago, B. & Q. Ry. v. Chicago, 166 U.S. 226 (1897).

The Court soon departed from the nonsuperfluousness doctrine, stating in *Twining v. New Jersey*[41] that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against State action, because a denial of them would be a denial of due process of law."[42] This was not necessarily due to any theory of incorporation of the Bill of Rights per se, but because some of the rights might be "of such a nature that they are included in the conception of due process of law."[43] The metes and bounds of due process were to be determined by asking whether the claimed right was

> a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government[.] If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law.[44]

The next change of direction occurred in the 1920s. Despite the fact that in 1922 the Court had reiterated the stance that freedom of speech did not have to be honored by the states,[45] three years later it shifted course in *Gitlow v. New York*.[46] Clearly, the Court would now entertain arguments that substantive portions of the Bill of Rights were incorporated by the Due Process Clause. Rather than explain this monumental change in constitutional law, the Court only noted that

> [f]or present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, that the Fourteenth Amendment imposes no restrictions on the states concerning freedom of speech, as determinative of this question.[47]

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41. 211 U.S. 78 (1908).
42. *Id.* at 99.
43. *Id.*
44. *Id.* at 106.
45. *See* Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).
46. 268 U.S. 652 (1925).
47. *Id.* at 666 (citation omitted).

The assumption in *Gitlow* was by 1931 "no longer open to doubt."[48] Moreover, these decisions established the practice of applying rights to the states to the same extent that they applied to the federal government.

The free speech decisions arguably followed *Twining*, because incorporation of the First Amendment was based upon the fundamental qualities of First Amendment rights in civil society.[49] But it remained necessary to determine which of the provisions of the Bill of Rights ought to be regarded as fundamental enough to be required as a matter of due process. The judicial standard for identifying such provisions was developed further in *Palko v. Connecticut*,[50] where Justice Cardozo described rights appropriate for incorporation as those which are "implicit in the concept of ordered liberty,"[51] the denial of which would conflict with "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[52] Justice Cardozo also confirmed that rights fitting this description had been "absorbed" by the Fourteenth Amendment.[53]

Under the aegis of *Palko*, the bulk of the Bill of Rights has since become applicable to the states, although certain provisions remain unincorporated.[54] The Court's reluctance to hold the full Bill of Rights against the states has led to its approach being termed "selective

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48. Near v. Minnesota, 283 U.S. 697, 707 (1931).

49. According to the *Near* decision, it was "impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property." *Id.* That makes it sound so easy, but incorporation of free speech really was a breakthrough because it finally resolved the tension between the 1897 incorporation of substantive property rights and *Twining*'s requirement of being "of a nature that pertains to process of law." Twining v. New Jersey, 211 U.S. 78, 106 (1908).

50. 302 U.S. 319 (1937).

51. *Id.* at 325.

52. *Id.* at 328.

53. Specifically, Cardozo stated that

> [W]e reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.

Id. at 326.

54. Amar, *supra* note 33, at 1263-64 ("[F]our rights in Amendments I-VIII have remained outside the selective fold: the right to keep and bear arms, the right against quartering soldiers, and the rights to grand and civil juries.").

incorporation,"[55] and the manner in which it continues to differentiate between the provisions which are incorporated, and those which are not, is a key to understanding the present doctrine. Although the Court has overruled the *Twining* decision,[56] it still must proceed with what essentially is a *Twining* analysis to determine whether a provision is fundamental enough to be incorporated. Once incorporated, however, *Palko* supports a right's application to the states in the same way the right applies to the federal government. *Palko* can therefore be understood as a point of rationalization between the present and the past. Rooted in the fundamental rights analysis of *Twining*, the *Palko* decision accommodated the cases holding the First Amendment fully applicable to the states, and in synthesizing the two approaches assured that both would remain important to the decisionmaking process. Current incorporation doctrine is indebted to *Palko* for preserving the *Twining* fundamental right component and adding to it the full effect against the states of those provisions that are incorporated.

III. INCORPORATION: THE WELL-TRAVELED AVENUE BETWEEN THE INDIVIDUAL AND THE COMMUNITY

The foregoing discussion shows that a number of different rationales can be used to determine incorporation issues. The remaining question is, if there are indeed unenumerated rights secured by the Constitution, do *those* rights necessarily apply to the states? This section will respond to that question by showing how each incorporation approach bears on the general issue of how the states are constrained in shaping their communities. The discussion also will demonstrate how the various incorporation approaches (due process and privileges or immunities) would apply to the likely alternatives to substantive due process derivation of unenumerated rights: the Ninth Amendment and penumbral rights theories.

Briefly stated, the general conclusions are as follows. Viewing incorporation as a matter of nationalized "ordered liberty" (under either

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55. *See, e.g.*, WILLIAM B. LOCKHART, et al., THE AMERICAN CONSTITUTION 300-06 (5th ed. 1981); Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982). Justices Murphy and Rutledge believed that due process under the Fourteenth Amendment had additional meaning independent of the Bill of Rights, at least "where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation." Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting). This became known as the "total incorporation plus" theory. In view of the fact that unenumerated rights have been applied to the states, the terminology of incorporation would be more consistent if current doctrine were referred to as "selective incorporation plus."

56. *See infra* note 66.

the Due Process Clause or the Privileges or Immunities Clause) easily supports incorporation, if only because the phrase itself is so oxymoronic, and therefore malleable. Varying degrees of community control could be preserved, however, by the other readings of the Privileges or Immunities Clause. Informing that clause with empirical evidence of state practices in 1868 can justify significant governmental incursions on private behavior. Similarly, interpreting the clause in the context of the Civil War might easily lead to incorporation of criminal, political, and religious guarantees, but would fail to support other interests like privacy. Treating privileges or immunities as individually oriented guarantees, however, would not have a limiting effect on incorporation of the personal autonomy claims that unenumerated rights usually involve.

A. *Due Process Incorporation*

"Ordered liberty"[57] — "fundamental principles of liberty and justice"[58] — "rooted in the traditions and conscience of our people"[59] — these are the operative phrases of due process incorporation. Stack them up against the traditional power of state government to shape and regulate the community, and what do you get? Perhaps it is hard to say with certainty, but at least it is not at all clear that the state prevails, and it probably seems like the state ought to give way. That is as simple as incorporation has been: an incantation from the political fundament, and then it is up to the judge.

1. Ninth Amendment

One can see that rights derived under the Ninth Amendment or penumbral rights theories would easily be incorporated using the due process standard. Regarding the former, the Supreme Court has not identified any better test for *deriving* a Ninth Amendment right than for *incorporating* a right under the Due Process Clause. That explains Justice Goldberg's use of language from due process incorporation decisions such as *Powell v. Alabama*[60] in deriving the right to contraceptive choice.[61] Because the same judicial tests are used to give life to both provisions, the due process approach to incorporation is

57. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

58. Powell v. Alabama, 287 U.S. 45, 67 (1932).

59. Snyder v. Commonwealth of Mass., 291 U.S. 97, 105 (1934).

60. 287 U.S. 45 (1932).

61. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (citing *Powell*, 287 U.S. at 67).

certain to result in application of Ninth Amendment rights against the states. Moreover, the Supreme Court exercises considerable restraint in selecting cases and issuing decisions on unenumerated rights, so those rights it does recognize can be characterized as essential and fundamental in nature. Thus,

> through the process of what has come to be known as "selective absorption," the Court has gradually drawn the rights in the first eight amendments into the due process clause of the fourteenth. There is no reason why the ninth amendment rights should not be subject to the same process of absorption. Those rights which have been absorbed into the fourteenth amendment are only those which are "fundamental personal rights." If the rights encompassed by the ninth amendment are the natural rights of man, analogous to speech and religion, surely they must be ranked as "fundamental." Even as a practical matter, it is highly unlikely that the Supreme Court would develop any unenumerated right under the ninth amendment which it would not classify as "fundamental." Therefore, it is almost axiomatic that if an unenumerated right is good against the federal government by virtue of the ninth amendment, it is good against the state governments by virtue of the fourteenth amendment.[62]

2. Penumbral Rights

Rights derived by the penumbral rights theory[63] would be applicable against the states in most instances. This could be viewed as perfunctory, under the logic that once something is recognized as falling within the penumbra of a right found in the Bill of Rights, it will be incorporated if the related enumerated right is. But that is too conclusory, because some penumbral rights are not related to a

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62. Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 23-24 (1968) (footnotes omitted). Of course, determining that a right is applicable to the states does not mean that the right can always be exercised. Not even fundamental rights are absolute.

63. Penumbral rights are a twofold concept. At one level, specific penumbras of individual guarantees are recognized in order to fulfill the meaning of those guarantees. At a second level, general penumbras of the entire set of guarantees enumerated in the Bill of Rights give rise to additional guarantees of similar scope, reflecting similar values to the enumerated rights. Rights inherent in both types of penumbras are considered here, because even those based on a single enumerated right arguably are themselves unenumerated rights. Consider, for example, the right of association, which finds principal support in the First Amendment. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

single guarantee, and those that are based on a single guarantee are not necessarily as important as the core value expressed by that guarantee.

Two basic observations apply to all penumbral rights. First, a penumbral right cannot be incorporated unless the basic right is. Second, if the basic right is incorporated, then incorporation of the penumbral right is contingent on its being sufficiently important to the underlying right. For example, the right of association may be extremely important to the exercise of the free speech and freedom of assembly guarantees of the First Amendment, and therefore incorporated against the states.[64] But other penumbral rights have at times been restricted to the federal government. Before the Warren Court nationalized the criminal procedure provisions of the Bill of Rights, a number of judicially derived zones of protection around constitutional guarantees were not applicable to the states. Examples include the exclusionary rule[65] and the rule against adverse comment on a criminal defendant's decision not to testify.[66] These penumbral rights were viewed at the time as sufficiently less important than the core guarantees to forego stateside application.

A two-step analysis is thus implicit in the incorporation of a penumbral right under the Due Process Clause. But where penumbral rights are not tied to a single enumerated guarantee,[67] a third potential consideration arises. Because these penumbral rights are tied to multiple guarantees, the mixture of incorporated and unincorporated base guarantees should make a difference in determining incorporation.[68] A court should consider it relevant if most of the guarantees giving rise to a penumbral right are incorporated, or if most are not. Balancing the incorporable sources of the right against the unincorporable

64. *See NAACP*, 357 U.S. at 460 ("[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

65. Wolf v. Colorado, 338 U.S. 25 (1949) (holding the exclusionary rule, which prohibits the use of evidence obtained in violation of the Fourth Amendment, inapplicable to the states), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

66. Twining v. New Jersey, 211 U.S. 78 (1908) (rejecting incorporation of the rule against comment on a defendant's failure to testify), *overruled by* Griffin v. California, 380 U.S. 609 (1965).

67. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding right of privacy based on First, Third, Fourth, Fifth, and Ninth Amendments).

68. At present this is a theoretical problem rather than a practical one, because so many enumerated rights have been incorporated, and because the only general penumbras that have been recognized are based on incorporated enumerated rights.

sources would help determine whether it is of a "fundamental" nature that warrants incorporation.

On the other hand, one might ignore the multiple underlying rights, and deal with the penumbral right independently from the rights on which it is based. This would appear to have been the case in *Griswold*, although the absence of discussion of the incorporation question by Justice Douglas makes this a speculative assessment. Justice Douglas's description of the right of privacy as "older than the Bill of Rights — older than our political parties, older than our school system"[69] defines a type of fundamental interest for which evidentiary support from the incorporated status of its source guarantees appears unnecessary. The privacy right seemed to stand on its own firm ground for purposes of incorporation.

B. *Privileges or Immunities Incorporation*

If the Supreme Court had ever really explained why unenumerated rights were incorporated (as it has for enumerated rights), its explanation would have sounded like something in the previous section of this article, because the Court would have used the Due Process Clause for incorporation. But that need not and should not be the case; incorporation would be better carried out through the Privileges or Immunities Clause.[70] Yet, recognizing the Privileges or Immunities

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69. *Griswold*, 381 U.S. at 486.

70. *See infra* section V. John Hart Ely has maintained that the Privileges or Immunities Clause can itself serve as a basis for the derivation of unenumerated substantive rights. ELY, *supra* note 1, at 28. That is difficult to justify. Ely agrees that the Article IV Privileges and Immunities Clause is an appropriate reference for interpreting its Fourteenth Amendment counterpart. But by emphasizing certain language from the opinion of Circuit Judge Washington in Corfield v. Coryell, 6 F. Cas. 546 (Wash. C.C. 1823) (No. 3,230), Ely skirts an important question: i.e., whether the Privileges and/or Immunities Clauses are empty vessels dependent on other state or federal provisions for their content, or whether they indeed have substantive import on their own.

The simple and structurally sound answer to this question is that the clauses are empty vessels. The Article IV clause ensures that out-of-staters will be treated on a par with in-staters, but it says nothing about a minimum quality of liberty in the states. The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77 (1873) (Privileges and Immunities Clause provided "no security for the citizen of the State in which they were claimed or exercised."); CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 872 (1987) (Supreme Court has settled on narrow non-discrimination interpretation, to exclusion of broad natural rights view). The Fourteenth Amendment version similarly states that all will be treated equally, but does ensure a minimum quality of liberty by establishing a national standard: the privileges or immunities of citizens of the United States. A uniform minimum standard is ensured precisely because the reference object is national. To give content to the clause, however, one must look

Clause as a more well-paved avenue for incorporation does not explain which rights can thereby reach the states. And again the question, particularly with regard to unenumerated rights, boils down to how far the states can be said to have been stripped of their power to shape and regulate their communities through regulation of individual behavior. We can begin by recognizing that the Privileges or Immunities Clause is both textually and historically consistent with applying at least some rights against the states, but a more definite answer will have to be chosen from competing interpretations of the Privileges or Immunities Clause.

Five competing interpretations were set forth earlier.[71] The first was a literalist view that ascribed to the Privileges or Immunities Clause the intentions of its congressional sponsors. But looking to legislative history is no panacea for the problem at hand; for every quote that supports holding states and the federal government equally bound by unenumerated rights (privileges and immunities are "great fundamental guarantees" and "cannot be fully defined in their entire extent and precise nature"),[72] there are other remarks that would justify a narrower reading (privileges and immunities include "first *eight*" amendments).[73]

If an attempt to parse highly specific answers out of the debates ends in frustration, but one gets the general impression that something significant did in fact happen for individual rights in 1868, then the gloss of Charles Fairman may be attractive — "ordered liberty" is as near as one can get to the "vague aspirations" of the Privileges or Immunities Clause.[74] Perhaps Fairman is right, but what does this really tell anyone? We are back to the ethereal level of generality that characterizes due process incorporation.[75] Although this may ease the frustration brought on by attempts to reconcile the legislative history, it raises the stakes for the appointment of judges who have a proper appreciation of the individual-state-national system.

The third approach, following Professor Fairman's method of measuring incorporation by comparison to state practices in 1868,

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to other national laws, just as a determination of the privileges and immunities within a given state depends on the laws of that state. This approach is more conducive to the structural soundness Ely sees in his own analysis. ELY, *supra* note 1, at 87 n.48.

71. *See supra* text accompanying notes 17-33.

72. CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).

73. *Id.* at 2765 (emphasis added); *see also* BERGER, *supra* note 3 (discussing congressional incorporation debate).

74. *See supra* text accompanying note 27.

75. *See supra* text accompanying notes 57-59.

supplies certainty in many cases.[76] Evidence of widespread practices in 1868 contrary to currently claimed rights will provide an empirical justification for rejecting incorporation. There is finally some objective touchstone for evaluating the community's claim, because governmental practices of 1868 are the standards of measurement.

On the other hand, this may be taking Reconstruction too lightly, and over-specifying the data on which to construct an image of that period. Like legislative history, the data on governmental practices will be conflicting and incomplete. Perhaps where data is incomplete the community could claim an interest in any regulation that is like the other kinds of regulation that existed, but this heads down the slope toward indefinite generality, only this time on the side of government control.[77]

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76. Accordingly, an attempt to invalidate Georgia's anti-sodomy statute was rebuffed on the basis of the clear history of state legislation prohibiting that conduct. Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986) ("In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws."). And the same argument was used by Justice Rehnquist in the case of abortion:

> By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. . . . The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the states the power to legislate with respect to this matter.

Roe v. Wade, 410 U.S. 113, 174-75 (1973) (Rehnquist, J., dissenting). Thirty-six states is many more than the eight (in the case of grand juries) or six (in the case of jury trials) cited by Charles Fairman to "prove" that some of the Bill of Rights had not been incorporated. *See infra* note 87. Yet, abortion rights have been fully incorporated, while the grand jury and jury trial provisions have not.

77. Other considerations that cut against empirical analysis of state practices include constitutional changes contemporaneous or subsequent to the Fourteenth Amendment. These changes might command attention as a matter of holistic integrity. Thus, claims particular to females might warrant peculiar consideration in light of the societal and constitutional changes that have shifted their status from that of nonentities. *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law, in* THE POLITICS OF LAW 151 (D. Kairys ed., rev. ed. 1990). Most visibly, state abortion legislation in the 1860s can be viewed as inconsistent with the current constitutional status of women. *See* Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) (*Roe* opinion is "weakened . . . by [its] concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984) (raising gender-based arguments against state control of abortion).

Further, the Fourteenth Amendment was passed in a time of prehistory with respect to the recognition of most unenumerated rights. Even the enumerated provisions of the Bill of Rights had not yet been extensively applied, much less the zones erected around those provisions to "help give them life and substance," Griswold v. Connecticut, 381 U.S. 479, 484 (1965), or those rights that are "basic and fundamental . . . [but] not guaranteed in so many words by the first

The fourth approach to the Privileges or Immunities Clause is based on a historical view of Reconstruction, and consequently may provide a satisfying way to balance the specific against the general when interpreting a monumental historic era. A conservative description of the change that took place would emphasize more than the abolition of slavery, but something less than the twentieth century understanding of liberation and individualism. The history of the abolitionist struggle encompasses many hardships, so that probably the bulk of the Bill of Rights is fit to be included among privileges or immunities. First Amendment rights and criminal procedure guarantees are at the heart of this conception. Affirmative rights to protection from lawlessness could be justified. In short, protection from any of the kinds of deprivation suffered in that era would be guaranteed by the Privileges or Immunities Clause.

Finally, Professor Amar's approach locates the Reconstruction shift more squarely in the developing traditions of liberal individualism and civil rights. The meaning of that shift looms larger for the Constitution than any historically specific set of ideas ever could. The shift favored not only abolitionists, enslaved persons, or identifiable victims of government abuse, but rather favored citizens as individuals or as members of any minority group. Amar thus lays the groundwork for a historically-rooted vindication of Justice Stone's famous footnote in *United States v. Carolene Products Co.*[78]

1. Ninth Amendment

How would these positions play out in practice? Professor Earl Maltz takes a page from Justice Hugo Black's literalist guidebook when he argues that Senator Howard's explicit intent in 1868 to incorporate the "first eight amendments" shows that the Ninth Amendment was not meant to apply to the states.[79] Placing such emphasis on those words seems almost trivial, and Maltz's attention to legislative history is easily open to internal criticism.

As noted earlier, the legislative history reveals an intent to protect not only a few discrete Bill of Rights provisions, but a large body of

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eight amendments." *Id.* at 491 (Goldberg, J., concurring). Perhaps empirical evidence is appropriate, therefore, only if it is weighed against changed understandings of the vitality and content of constitutional rights.

78. 304 U.S. 144, 152 n.4 (1938).

79. EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869, at 118 (1990); Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 CHI.-KENT L. REV. 981, 982, 985 (1988). For an excerpt of Howard's comments, see *supra* note 20.

fundamental rights from state intrusion. Senator Howard referred to the limitations being placed on state power as "a mass of privileges, immunities, and rights" and as "fundamental guarantees."[80] Interpreting Howard's recitation of Article IV, section 2, and the "first eight" amendments of the Constitution as exhausting his intent may be an overly constricted reading of his statements. It is probably more in tune with the "great object" of the Fourteenth Amendment, as Howard saw it, to simply base such a decision on whether a claimed right or constitutional provision is among the fundamental rights which the federal government is bound to respect. The purpose was not just to protect the abolitionists, who had already succeeded in their cause, but to rein in the states. Limiting Howard's purpose to the first eight amendments thus sees only the trees, and loses sight of the forest.

Professor Maltz's position also is difficult to support because of what does *not* appear in the legislative history. It is more speculative to exclude than to include Ninth Amendment rights, if indeed they exist. While the first eight amendments were cited by Howard, so too was the Bill of Rights in general.[81] And it is apparent from the Senator's remarks that he regarded "the first eight amendments" as synonymous with the Bill of Rights.[82] That his focus was not "the first nine amendments" is not surprising, given the fact that the Ninth Amendment had not yet been invoked by the Supreme Court as a vehicle for the protection of fundamental rights. If the Supreme Court's recognition of unenumerated rights is in fact constitutionally proper, then quotations from persons exposed only to the dark ages of American justice should not be manipulated to subvert the basic intentions of those persons. Senator Howard probably did not perceive the significance of the Ninth Amendment as we do today, but it remains more safe to assume that he would include that provision among the "great fundamental guarantees" limiting the states, than to assume he would not.

Similarly, bifurcation of the Bill of Rights can be seen as unwarranted absent a more explicit intention to do so. As noted above, the legislative history contains simultaneous references to "the first eight amendments," the "bill of rights," and "great fundamental guarantees."[83] There is no suggestion that the Bill of Rights is to be carved

80. *See supra* note 20.
81. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866).
82. *See id.*
83. *See supra* note 20.

up in the process of incorporation.[84] The language of the Ninth Amendment itself should be borne in mind; it preempts any interpretation which relies on the enumeration of certain rights (in the first eight amendments) to "deny or disparage" others.[85] Interpreting the Fourteenth Amendment to categorically incorporate enumerated rights but not unenumerated rights is certainly to deny, or at least disparage, the latter. Of course, those who passed the Fourteenth Amendment were not bound by the Ninth Amendment to give equal footing in the states to unenumerated rights and enumerated rights. The point is that if such a plan were enacted, it would represent a deviation from the wisdom of the original constitutional plan which would warrant some explanation.

Treating non-incorporation as impermissible disparagement admittedly is subject to objections of overbreadth. Because some enumerated rights are not incorporated, it might be error to assume that "no disparagement" requires incorporation of all unenumerated rights. The disparagement idea does not tell us whether unenumerated rights should be grouped with the incorporated enumerated rights or the unincorporated ones. But this objection ultimately serves to refine and strengthen the concept of disparagement as applied to incorporation. It leads to the principle that enumerated and unenumerated rights must be treated equally for purposes of determining incorporation — that unenumerated rights shall not be subjected to a more rigorous test. Prohibiting disparagement accordingly prevents an absolute refusal to apply unenumerated rights to the states, but does not guarantee such application; incorporation must turn on the outcome of an independent and evenly applied test. And the legislative history approach advocated by Justice Black or Professor Maltz is of no help because it prematurely truncates the analysis.

The remaining approaches to the Privileges or Immunities Clause, which are less textual in nature, would also provide no categorical answer regarding the suitability of Ninth Amendment rights for incor-

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84. Of course if one maintains that no incorporation whatsoever is effected by the Privileges or Immunities Clause, then the lack of directive for dividing the Bill of Rights is not a problem. Even the *Slaughter House* Court was not so restrictive, however, finding that at least the rights to peaceably assemble and to petition the government were among the federal privileges or immunities. *See* The Slaughter House Cases, 83 U.S. (Wall.) 36, 79-80 (1873). It is also worth noting that the lack of express intention to divide the Bill of Rights undermines the selective incorporation theory as much as it supports incorporation of the Ninth Amendment. That reality can be accommodated, however, by recognizing that it is not irrational to establish a prevailing rule and permit exceptions for idiosyncracies.

85. U.S. CONST. amend. IX.

poration. Rather, those rights would have to be evaluated on a case-by-case basis in accordance with the standards of each approach. The approaches do differ, however, in ways that could be significant to incorporation. First, under Professor Fairman's "ordered liberty" conclusion, the plausibility of incorporation is virtually unobjectionable. This was explained earlier in the context of due process incorporation, which employs the same judicial test.[86]

Second, applying an empirical conception of privileges or immunities based on an evaluation of state practices contemporaneous to ratification of the Fourteenth Amendment could have serious consequences for Ninth Amendment rights. According to this approach, where a sufficient number of states had laws on their books contrary to a claimed right, incorporation would not lie.[87] It is easy to imagine

86. *See supra* notes 57-59 and accompanying text.

87. *See* Fairman, *supra* note 21, at 84-132. Fairman's refutation of Justice Black's total incorporation thesis has gained a reputation completely out of proportion to its true strength. Fairman's analysis of Reconstruction-era practices of the states goes a long way to proving the case for nearly total incorporation. The only Bill of Rights provisions with which a considerable number of states deviated were the Grand Jury Clause of the Fifth Amendment and the jury trial guarantee of the Seventh Amendment. Regarding the grand jury, Fairman found eight states with deviant constitutions or laws, three that entertained deviant proposals without discussion of the Fourteenth Amendment, and one in which a court decision paid no heed to the federal guarantee. *Id.* It should also be noted that the United States Supreme Court in 1869 rejected an attempt to hold Pennsylvania to the Grand Jury Clause. Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1869). With respect ot the jury trial provision, six states had practices inconsistent with the Seventh Amendment. Isolated incidents were reported involving the Fourth Amendment's search and seizure protection, the Fifth Amendment's Due Process Clause, and the Seventh Amendment's double jeopardy prohibition. Fairman, *supra* note 21, at 84-132.

Philip Kurland has contended that the rejection of a federal constitutional amendment in 1876 that would have explicitly applied the religion clauses to the states shows that their incorporation was not intended by the Fourteenth Amendment. Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 10 (1978). Fairman, however, found that conflict with the religion clauses of the First Amendment was minimal. One state (New Hampshire) clearly deviated in this respect, and another (Ohio) entertained an arguably deviant proposal without discussion of federal rights. Fairman, *supra* note 21, at 86, 97.

Empirical conclusions from this data comport rather well, if one is generous to the anti-incorporationist cause, with the actual results of selective incorporation — that is, near total incorporation. The Grand Jury Clause of the Fifth Amendment has not been incorporated. And the present-day incorporation of the right to a jury trial is generally consistent with the Reconstruction-era practices cited by Fairman, because the Court has declined the application of federal practices "jot-for-jot" to the states. *See* Ballew v. Georgia, 435 U.S. 223 (1978); Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970).

Strictly empirically speaking, though, it might be difficult to avoid total incorporation given the foregoing evidence. There were 37 states in 1868. Therefore, to show that a constitutional majority (three-quarters) would have been unlikely to develop because of inconsistent practices,

how the power of government to control individuals in the name of the community would be substantial if it depended only on analogy to the statute books of 1868. For most Bill of Rights provisions, all states were in at least de jure compliance.[88] But unenumerated rights claims are often made against morals legislation having roots in the oldest colonial communities.[89] Many state practices could be found to ward off modern claims of right.[90] On the other hand, by the time of the Civil War, "the state stopped punishing . . . crimes against morality, but never repealed the laws against these acts."[91] It is dubious, therefore, whether the mere existence of laws on the books in 1868 can be taken as a reliable expression of communal government power. With the exception of this potential dormancy rationale for ignoring the

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one would have to find 10 states with practices inconsistent with a claimed right. But explicit constitutional or statutory inconsistencies only numbered eight in the case of grand juries and six regarding jury trials. One could make up the difference for grand juries by looking to unadopted proposals entertained without constitutionally-based objection, and to court decisions. The case against incorporation, however, then hangs by a thinner thread. And even if quorums of constitutionally defective state practices were gathered in an attempt to bar incorporation, one might ask whether those states did not, in a time of high-minded political action, adopt federal liberty principles notwithstanding the inconsistent prior outcomes of their ordinary political processes. *Cf.* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (explaining that constitutional principles result from relatively infrequent moments of heightened political attention, while ordinary legislation fills the intervening historical spaces). For additional criticism of Fairman's analysis, see William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

It is possible to argue that by incorporating rights that are inconsistent with practices contemporaneous with ratification of the Fourteenth Amendment, the states have been sold a bill of goods, or at least a bill of rights. But this tension is not textually apparent; the Constitution says that federal privileges or immunities are not to be abridged, and does not say "except to the extent they are abridged now." Thus, the Fourteenth Amendment commands that "[n]o state shall make *or enforce*" laws abridging privileges or immunities. U.S. CONST. amend. XIV (emphasis added). The language is both prospective and retrospective as to the laws it addresses. Earlier laws, if left on the books, cannot constitutionally be enforced. Yet, the ratifiers' intentions do remain confusing to the extent they failed to practice what they preached. Given this situation, we could decide that we will follow the ratifiers' best intentions and highest values, as stated in the Constitution. Or we could decide, as the opponents of incorporation have, that contemporaneous inconsistent behavior is thereby forever legitimized.

88. *See supra* note 87.

89. *Cf.* Lawrence M. Friedman, *Notes Toward a History of American Justice*, 24 BUFF. L. REV. 111, 113 (1974) (discussing colonial view of crime as sin). Abortion regulations originating in the nineteenth century are somewhat anomalous, having been motivated by safety as well as morality, science as well as religion, and professional capture as well as democratic influence on the legislature. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 28-34 (1990).

90. *See, e.g., supra* note 76.

91. Friedman, *supra* note 89, at 120.

data in certain cases, incorporation of Ninth Amendment claims could be seriously curtailed by an empirical approach.[92]

Third, the historical conception of privileges or immunities would also limit Ninth Amendment rights considerably from the essentially automatic incorporation they enjoy under present doctrine. Indeed, one might construct a better defense for Professor Maltz's "enumerated rights only" view through historicist arguments for an intermediate level of generality in interpreting the Privileges or Immunities Clause. By placing emphasis on the specific deprivations suffered by abolitionists in southern states, privileges or immunities could be limited to protection of political and religious expression and criminal procedure guarantees. This heightened attention to historical context would obviously undermine the privacy-oriented interests with which the Ninth Amendment is most often related. For example, the yoke of the abolitionist in the South was certainly unrelated to denial of contraceptives.[93]

Some of the more recently recognized unenumerated rights, such as the right of the public to attend criminal trials,[94] might nevertheless be able to survive this incorporation analysis. That is especially true if the deprivations of the abolitionist are taken at a sufficient level of generality regarding political and religious freedom. Accordingly, any rights that support and check the political process and administration of government could be incorporated, including those which are not enumerated.[95]

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92. Some Ninth Amendment rights could survive the empirical haymaker. Thus, the right of the public to attend criminal trials, recognized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), would be applicable against the states, at least under the history presented by the Court in its opinion. *See id.* at 565-69.

93. Such an approach would also do much to undermine the enumerated rights as we know them. Consider the range of free speech that might plausibly go unprotected if the Court's *nihil obstat* of "political" or "religious" content had to be obtained. That very scenario may already be with us, however, as a latent factor in courts' behavior when addressing cases that involve expressive conduct and morals legislation. Conduct expressing a message at odds with prevailing political morality is likely to be more strongly protected against state intervention than conduct expressing a message at odds with prevailing sexual morality. *Compare* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (nude dancing is not constitutionally protected) *with* Schact v. United States, 398 U.S. 58 (1970) (negative symbolic use of military uniforms is constitutionally protected) *and* Collin v. Smith, 578 F.2d 1197 (7th Cir.) (wearing "military-style" uniforms is constitutionally protected), cert. denied, 439 U.S. 916 (1978).

94. *See Richmond Newspapers*, 448 U.S. at 555.

95. Indeed, assuring political freedom across state borders, with the concomitant diffusion of political and moral ideas, is highly consistent with a motive to prevent repetition of the sort of tragic division that engendered the Civil War. Whether this is the only purpose of the Privileges or Immunities Clause is the point of departure between this and broader interpretations of the clause.

Finally — and somewhat at odds with the preceding view — is Professor Amar's proposal that we incorporate only the individualistic or group-oriented portion of any claimed right, discarding any state right portion.[96] At first, the Ninth Amendment's reference to rights retained by "the people" might seem to place those rights in the collectivist category that Amar would be wary of incorporating.[97] But Amar avoids such hypertextualism,[98] and apparently leans toward incorporating Ninth Amendment rights.[99] That is fortunate, because the Ninth Amendment seeks equivalence between all enumerated rights and others retained by the people — it works to break down the individual-collective distinctions that underlie Amar's theory. There may still be trouble on the horizon, however, because certain Ninth Amendment claims are very much collectivist in substance.[100]

2. Penumbral Rights

The considerations outlined in the discussion of due process incorporation of penumbral rights[101] generally apply to privileges or immunities incorporation. And the foregoing observations regarding privileges or immunities incorporation of Ninth Amendment rights generally hold for penumbral rights as well. Thus, textualism is unlikely to give any straight answer; "ordered liberty" analyses tend to be permissive; and empirical and historical methods tend to be more or less restrictive. The Amar thesis, for its part, would yield the same answer for a penumbral as for a base guarantee, because an individual or group right will not generate a state's right or collective right penumbra.

IV. THE COMMON LAW: BACK ROADS BETWEEN THE INDIVIDUAL AND THE COMMUNITY

In the mind of Justice Black, the penumbras of *Griswold v. Connecticut*[102] were the inevitable result of an illicit approach to constitutional law that had been nurtured for many years by the likes of Justices Frankfurter and Harlan. They created extra-constitutional

96. Amar, *supra* note 33, at 1197.

97. *Id.* at 1264 ("[W]e must ask whether it is a personal *privilege* — that is, a private right — of individual *citizens*, rather than a right of states or the public at large.").

98. *Id.* at 1226.

99. *Id.* at 1284.

100. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right of public to attend trial even when accused prefers closed courtroom).

101. *See supra* text accompanying notes 63-69.

102. 381 U.S. 479 (1965).

rights while denigrating explicit rights, based on an approach that can be referred to as "common law constitutionalism."[103] The present section examines the relationship between the common law role played by judges in unenumerated rights cases and the application of such rights against the states, and concludes that an informal incorporation doctrine is embedded within the common law aspects of substantive due process rights. Common law sources and methods are used to derive unenumerated rights, and the resulting common law status of unenumerated rights is a vehicle for traveling between different locations along the road between individualism and community control.

A. *Common Law Sources and Methods*

In the well-known case of *Erie Railroad v. Tompkins*,[104] Justice Brandeis found that "[t]here is no federal general common law."[105] That may be so, but the existence of a specialized body of federal common law has been amply demonstrated since the *Erie* decision.[106] All constitutional rights, whether enumerated or unenumerated, are defined to some extent by reference to their historical underpinnings. These may include specific statements by the framers of the Constitution,[107] problems contemporaneous to adoption of the Constitution,[108] or long-standing traditions and principles.[109] This last source may be properly characterized as common law,[110] and its inclusion in constitu-

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103. *See* Bruce A. Ackerman, *The Common Law Constitutionalism of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991). Ackerman has characterized the task of judges as "how to organize common law and constitutional law into a meaningful whole," *id.* at 5, adding that "John Harlan sought to revitalize common law constitutionalism." *Id.* at 7.

104. 304 U.S. 64 (1938).

105. *Id.* at 78.

106. *See, e.g.*, Henry J. Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV L. REV. 1, 10 (1975).

107. *E.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947) (Rutledge, J., dissenting) (quoting liberally from Madison's *Memorial and Remonstrance Against Religious Assessments* and setting forth same in Appendix).

108. *Id.* at 33 ("No provision of the Constitution is more closely tied to its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.").

109. Prior restraints, for example, are not mentioned in the Constitution, but when the Court explained the incompatibility of prior restraints with the First Amendment in Near v. Minnesota, 283 U.S. 697 (1931), its rationale was that of Blackstone as modified and extended by Madison. *Id.* at 713-14; *see also infra* notes 114-25 and accompanying text.

110. The term "common law" has been defined as follows:

> [T]he common law comprises the body of those principles and rules of action, relating to the government and the security of persons and property, which derive

tional decisionmaking infuses the meaning of the Constitution with common law substance.

Even the definition of enumerated rights is infused with common law sources, but unenumerated rights are truly imbued with those sources. After all, there is little specific guidance from the adoption of the Constitution as to what are, for example, the rights "retained by the people."[111] Out of a sense of restraint, a court deriving unenumerated rights will probably attempt to offer historical justification for its decision, and the obvious legal realm to which it will turn is the common sense of the common law.[112] Justice Douglas's opinion in *Griswold v. Connecticut*[113] demonstrates this compulsion (or inhibition). Justice Douglas referred to "a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."[114] Justice Goldberg similarly found it difficult to believe that

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> their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs . . . .

BLACK'S LAW DICTIONARY 250-51 (5th ed. 1979).

111. U.S. CONST. amend. IX. Professor Randy Barnett has concluded that "[t]he freedom to act within the boundaries provided by one's common law rights may be viewed as a central background presumption of the Constitution — a presumption that is reflected in the Ninth Amendment." Barnett, *supra* note 3, at 41. Barnett's thesis suggests that common law sources are not the only possible origins of unenumerated rights, and Barnett advocates a more restrictive interpretation of legislative powers. *Id.* at 27, 41.

An obvious difficulty with elevating common law interests to constitutional status is that common law rights have traditionally been subject to revision or rejection by normal legislative majorities. Changes in constitutional status require the extraordinary supermajority to wield its power, or at least some comparably meaningful political action. *See* Ackerman, *supra* note 87, at 1055-56. Barnett recognizes this problem, and proposes that common law constitutional rights be accorded a presumption of supremacy, so that legislative incursions would be permissible on the same bases as for enumerated rights, i.e., traditional common law limitations on the rights or the pursuit of enumerated powers using the least restrictive means. Barnett, *supra* note 3, at 41-42. But this begs the question of whether common law rights should be elevated to constitutional status in the first place, and underestimates the difference between the enumerated powers of Congress and the traditional plenary powers of state legislatures. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM 38 (1989) ("[S]tate constitutions are very different from those of the federal Constitution. The U.S. Constitution creates and defines a government of limited, enumerated, delegated powers. . . . The state governments, by contrast, . . . exercise all residual or plenary powers of sovereign governments. . . .").

112. The Supreme Court has relied on common law constitutionalism, as the cases following in the text illustrate, and commentators have affirmed such a role for the Court. *See, e.g.*, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 114-17 (1991).

113. 381 U.S. 479 (1965).

114. *Id.* at 486.

just because the Constitution did not explicitly forbid "the State from disrupting the traditional relation of the family — a relation as old and as fundamental as our entire civilization," the state therefore had the power to do so.[115]

The Court's opinion in *Roe v. Wade*[116] likewise reflects a reliance on common law sources. Justice Blackmun's majority opinion considered at length pre-constitutional conceptions of the right to abortion.[117] The cited sources range from the attitudes of the Persian empire, through the Greek and Roman eras, and into the more traditional sources of English law, including Bracton, Coke, and Blackstone.[118] Justice Blackmun found it significant that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect."[119]

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115. *Id.* at 496.

116. 410 U.S. 113 (1973).

117. *Id.* at 129-38. Justice Blackmun may have regarded the common law as a more limited source than the cited text might be understood as suggesting: the section of his opinion captioned "common law" spanned only five of the cited pages. 410 U.S. at 132-36. Nevertheless, the term common law is used broadly here, to encompass all extra-constitutional sources employed for the purpose of establishing well-rooted traditions, customs, or principles. *See supra* note 110.

118. *Roe*, 410 U.S. at 132-36.

119. *Id.* at 140. The citation to Coke is curious. Coke unquestionably sought in his day to place restraints on the exercise of governmental power, and in this general sense is an apt authority to cite. John Locke also contributed significantly to the same effort, however, yet was not cited by Justice Blackmun. This is somewhat ironic because Coke's approach to the problem involved the assertion that rights possessed by individuals at English common law (using the term in a more specific sense than in this article) were protected against government intrusion. Locke, on the other hand, conceived of individual liberties more as a product of natural law, not bound to the historical idiosyncracies of the common law proper. The distinction has been described as follows:

> Locke's version of natural law not only rescues Coke's version of the English constitution from a localized *patois*, restating it in the universal tongue of the age, it also supplements it in important respects. Coke's endeavor was to put forward the historical procedure of the common law as a permanent restraint on power, and especially on the power of the English crown. Locke, in the limitations which he imposes on legislative power, is looking rather to the security of the substantive rights of the individual — those rights which are implied in the basic arrangements of society at all times and in all places. While Coke rescued the notion of fundamental law from what must sooner or later have proved a fatal nebulosity, yet he did so at the expense of archaism. Locke, on the other hand, in cutting loose in great measure from the historical method of reasoning, opened the way to the larger issues with which American constitutional law has been called upon to grapple in its latest maturity.

Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law, in* THE RIGHTS RETAINED BY THE PEOPLE, *supra* note 3, at 75. "Larger issues" would include the

The importance of common law sources was perpetuated in *Bowers v. Hardwick*.[120] Finding no constitutional right for "homosexuals to engage in acts of sodomy,"[121] the Court explained that "[p]roscriptions against that conduct have ancient roots," and that "[s]odomy was a criminal offense at common law."[122] And yet another example of common law constitutionalism is the Court's "right to die" decision.[123] Eight of nine Justices worked from the premise of a constitutional right to refuse lifesaving artificial feeding procedures.[124] Both majority and dissent relied on common law sources to support their premises.[125]

Common law derivation of unenumerated rights has readily apparent consequences for incorporation doctrine, and for government power to shape the life of the community by regulating the lives of individuals. If the Supreme Court is limited to traditional, common law sources in deriving unenumerated rights, that places significant limits on the extent to which traditional state regulation can be revised. Those rights that are recognized will be easily incorporated because of their common law pedigrees, but the number of rights with the required pedigree will be limited.[126]

B. *Common Law Status*

Equally significant is the combined constitutional and common law *status* of unenumerated rights that are derived using common law

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right to abortion, no doubt. By acknowledging Coke and not Locke, however, Blackmun may have credited a doctrine that would unduly limit the type of common law source material from which he truly wished to draw. The formal common law of England advanced by Coke simply does not support the expansive individual privacy rights that Blackmun would constitutionalize in modern America. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). To the extent that the Supreme Court takes the approach of Coke, requiring historical legitimization of claimed constitutional rights, the scope of possible individual liberty interests is considerably narrowed, as the *Bowers* decision demonstrates.

120. 478 U.S. 186 (1986).

121. *Id.* at 190-91.

122. *Id.* at 192. The dissent thought that the claimed right did have strong roots in fundamental values, not because it thought sodomy is an American tradition, but because it viewed the underlying question as whether individuals have a right to decide matters of intimate association within their own homes. *Id.* at 199 (Blackmun, J., dissenting).

123. Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

124. The majority assumed the right for purposes of its decision, *id.* at 2852, while the dissent clearly recognized such a right. *Id.* at 2865.

125. *Id.* at 2846, 2865.

126. The same judicial tests are presently used for derivation and incorporation, which makes it difficult indeed to find one without the other. *See infra* notes 141-45 and accompanying text. Given the depth of sources from which the common law approach can draw, however, rights might be found far enough outside the core interests recognized thus far that they would bind only the federal government and not the states.

sources and methods. That status is at once characterized by constitutional supremacy and, like the common law, vulnerability to revision. Moreover, the Court that creates common law constitutional rights is solely competent (absent constitutional amendment) to permit their modification or eradication.

Because of the Court's supreme control over common law constitutional rights, it has flexibility in establishing and maintaining their status — and in providing for change. This flexibility provides a perpetual opening for governmental attempts to recapture or broaden community power. The Court can accede to such changes in two ways: by treating governmental regimes of regulation as potentially satisfactory alternatives that respect a right the Court recognizes, or by expanding or revising the Court's own definition of a right.[127]

The possibility of equal alternative regimes of rights and regulation is evident in the status the Court accords to the judicial tests it employs for determining constitutional issues. Some tests are set on a par with the constitution itself; governmental action will be invalid if it does not conform.[128] Other tests, however, are not accorded constitutional status, in that a failure to meet the test does not conclusively establish unconstitutionality;[129] if the challenged governmental entity can show that a satisfactory alternative was employed, it will prevail. By allowing the other branches of government to alter or discard the Court's approach in favor of another constitutional option, the Court ascribes common law status to its own suggested practice.[130]

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127. Clearly this process can occur in all areas of the law, including enumerated constitutional rights. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (adding child pornography to categories of unprotected speech). The argument presented here is that unenumerated rights are peculiarly open to such changes because of their inherently extra-textual common law origins.

128. *E.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (establishing test for unprotected obscene speech); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (creating test for matters respecting an establishment of religion).

129. Thus, the custodial warning rule set out in Miranda v. Arizona, 384 U.S. 436 (1966), is a proper way for states to meet their constitutional obligation, but not the only way. *Miranda* explicitly states that "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 [by the Court]." *Id.* at 490; *see also* Monaghan, *supra* note 106, at 20.

130. Of course, for the Supreme Court to announce that a particular procedure is surely constitutional, while others might be as well, is to exercise a strong power of suggestion that the Court's ordained procedure be employed. On balance, however, such hortatory prescriptions reflect a self-deprecating acknowledgement of the Court's limitations in defining perfectly and permanently the limits of constitutionally permissible activity; compliance with many constitutional values can be achieved in more ways than a single Supreme Court formulation can delineate. This harks back to the early days of the incorporation debate, when opponents of

Common law status is most clearly visible in the case of procedural rights, where the Constitution requires affirmative acts of the government.[131] Statecraft in such cases consists of fashioning a preferred equivalent to a Court-approved procedure. Common law status is obscured, by contrast, in the case of unenumerated rights (and substantive rights in general), where the Constitution *forbids* certain affirmative acts of the government.[132] Statecraft in these cases consists of legal argumentation to gain the Court's acceptance of a limitation as not "unduly" at odds with the recognized right.[133] Yet this distinction between procedure and substance is contingent on the substantive "right" being unsusceptible of changed and enriched definitions. Just as alternative constitutional procedures provide an enriched vision of procedural rights, so might alternative definitions of a substantive right reflect an enriched vision of those rights. And these enriched definitions may not be appreciated until a state adopts an enlightened practice that is then challenged under the original understanding of the right.

As a practical example, take the familiar trimester definition of the abortion right in *Roe*.[134] Abortions cannot be prohibited until after the sixth month without impermissibly interfering with a woman's right to choose.[135] Imagine, however, a state which really cares about the difference between aborting a sixth month fetus and aborting a seventh month fetus, and which also cares about the right to choose. The state undertakes to educate its female citizens fully about their right, and provides all medical services associated with pregnancy termination, but also prohibits abortions during the sixth month. Is there not a meaningful distinction between this state and another that provides no services and prohibits abortions after the usual six months? Or rather, can a justifiable constitutional distinction be drawn that establishes one practice as permissible and the other impermissible?

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due process-based incorporation argued that requiring the states to follow procedural guarantees in the Bill of Rights would bind states to past practices and "deny every quality of the law but its age." Hurtado v. California, 110 U.S. 516, 529 (1884).

131. For an example, see *supra* note 129.

132. *See, e.g., Lemon*, 403 U.S. at 602 (forbidding government statutes which result in excessive entanglement between government and religion).

133. *See, e.g., Cruzan*, 110 S. Ct. at 2854 (upholding state's requirement of clear and convincing evidence of incompetent's wish to refuse nutrition and hydration); Maher v. Roe, 432 U.S. 464, 473-74 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion.' . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.").

134. 410 U.S. 113 (1973).

135. *Id.* at 164-65.

As the foregoing example suggests, the potential reception of satisfactory alternative ways of respecting a right can be closely associated with potential redefinition of the right itself. Unenumerated rights are especially susceptible to judicial amendment because of their judicatory origin. Thus, the Court explained in *Webster v. Reproductive Health Services*[136] that

> [w]e have not refrained from reconsideration of a prior construction of the Constitution that has proved "unsound in principle and unworkable in practice." . . . We think the *Roe* trimester framework falls into that category.
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> . . . [T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework . . . are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.[137]

The Court's rhetoric, if taken literally, would undermine a substantial amount of its constitutional jurisprudence; exegesis and implementation of judicial tests has been elemental to the Court's decisions. But the most accurate way to view *Webster* is as an expression of the Court's aversion to formulaic tests in the area of unenumerated rights. Unenumerated rights are preferably accorded a unique common law status that depends on case-by-case decisionmaking, or that at least permits free revision of any tests that are developed.

Common law status provides a means for courts to secure constitutional rights without encroaching unnecessarily on other governmental entities, by treating judicial explications of rights as constitutionally non-essential.[138] The technique is politically deft, and the effect is an ongoing correspondence between the Court and the states over the extent of rights — and therefore the extent of state autonomy.[139] The

136. 492 U.S. 490 (1989).

137. *Id.* at 518 (citations omitted).

138. There is an interesting parallel between this manifestation of judicial humility and the political question doctrine. The latter "is premised both upon the separation of powers and the inherent limits of judicial abilities." Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990). Rigid conceptions of unenumerated rights are to be avoided for similar reasons; the Court does not want "to serve as the country's '*ex officio* medical board.'" *Webster*, 492 U.S. at 519.

139. *Cf.* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 364 (1992) ("[M]id-level scrutiny is an important jurisprudential innovation that holds considerable promise in many different contexts. Its great virtue, from my perspective, is its conversational character: when the Court invalidates a statute on this basis, this action permits and even invites a legislative response.").

latent potential in any constitutional right for multiple expressions of its essence fosters different regimes under which the same essential right can be enjoyed. By keeping an open mind, the Supreme Court allows the states to play an active role in fashioning their own shackles to fit as comfortably — as loosely around their desired regulations in the name of the community — as possible.

V. INTERPRETIVE LEGITIMACY AND COHERENCE

The foregoing sections show that there is a menu of plausible views on the application of unenumerated rights to the states, and also a great deal of continuing judicial oversight of the individual-state-national relationship. The first step, in any event, is to make a selection from the menu. Toward that end, this section offers a prescription up to a point, and then presents a basic choice to be made. The Privileges or Immunities Clause is advanced as a more defensible avenue than the Due Process Clause for incorporation of unenumerated rights. But the choice among different views of the Privileges or Immunities Clause involves an interesting paradox. Selecting a more certain vision of the clause sacrifices coherence with its Article IV, section 2 counterpart,[140] and pursuing coherence means uncertainty.

A. *Legitimacy*

The Supreme Court presently uses the concept of "fundamental rights" in deciding whether unenumerated rights exist, and also in deciding whether the same rights are incorporated. "Fundamental" means roughly the same thing in both contexts.[141] But laying the same open-ended fundamental rights logic over both the unenumerated rights and incorporation issues may create an unnecessary appearance of arbitrariness and arrogation of power by the judiciary.[142] Critics

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140. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, para. 1.

141. Consider, for example, Justice Goldberg's opinion in *Griswold* as a model for assessing Ninth Amendment claims. Goldberg's opinion swerves back and forth between incorporation and derivation precedents, and in fact he suggests that using exactly the same standard for determining the two issues serves to restrict judicial discretion. Griswold v. Connecticut, 381 U.S. 479, 494 n.7 (1965).

142. *Cf.* BORK, *supra* note 6, at 16 ("There is . . . strong reason to suspect that the ['revisionist'] judge absorbs those values he writes into law from the social class or elite with which he identifies."); Lino A. Graglia, *The "Open-Ended" Clauses of the Constitution*, 11 HARV. J.L. & PUB. POL'Y 87, 88 (1988) ("Constitution does not . . . authorize Supreme Court Justices to make up constitutional law as they go along in accordance with their policy preferences"). The political significance of the readily understandable, realpolitik types of accusations leveled

can point with glee to the use of vague and indeterminate judicial "tests."[143] This criticism is strengthened to the extent that the tests are not only vague, but appear loosely bound to the text of the constitution itself.[144]

Alternatives are available. The most attractive of these would be to employ the Privileges or Immunities Clause of the Fourteenth Amendment to deal with the incorporation question, and the Ninth Amendment to tackle unenumerated rights issues. Each of these provisions enjoys a textually and historically demonstrable commitment to the purpose it would serve—a commitment that the Due Process Clause lacks.[145] A choice remains, however, between different ap-

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at the Court in recent years should not be underestimated. The many legal victories fought and won in the cause of liberty in this century are only as strong as the reasoning on which they are based. If that reasoning can be portrayed as liberal babble rather than a bedrock of principles anchored in the Constitution, those victories may prove temporary. As an example of the grass roots appeal, or at least comprehensibility, of the current criticisms, one needs only to consider that Robert Bork's *The Tempting of America* spent four months on the New York Times best-seller list. *See also* Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A)* <26; (B) 26; (C) >26; (D) ALL OF THE ABOVE), 8 CONST. COMMENTARY 409, 426 (1991) ("Other techniques seem so fancy, while reference to a text seems to eliminate any problems.").

143. Indeterminacy has been the basis for skepticism as to even the enumerated constitutional rights. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 177 (1988); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 6-7 (1986). As Professor Levinson expressed in an earlier work, "[i]t would obviously be nice to believe that *my* Constitution is the true one . . . but that is precisely the belief that becomes steadily harder to maintain. There are simply *different* Constitutions. There are as many plausible readings of the United States Constitution as there are versions of *Hamlet*." Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982). The political value of these scholarly analyses is marginalized by their complexity and theoretical nature. Unenumerated rights are easily criticized on the basis of the self-evidently vague language the Court uses to derive those rights, while indeterminacy of enumerated rights requires much more subtle lines of reasoning. As a result, the power of the latter idea is compromised as an immediate political matter, while the former is able to quickly gain a strong footing in even lay circles. *See supra* note 142.

144. Thus, a judicial test for due process such as "rooted in the traditions and conscience of our people," Snyder v. Commonwealth of Mass., 291 U.S. 97, 105 (1934), is bound to be vague, and its application in any given case will be open to second-guessing. But because the test is so broad as to encompass substance as well as "process," even the judicial test becomes questionable, and the recognition of rights becomes more suspect. Two weak links are worse than one.

145. Regarding the Privileges or Immunities Clause, see ELY *supra* note 1, at 18. A yet-unmentioned advantage of improving the structure of interpretation in this area is the rehabilitative effect it would have on the legitimate procedural protection offered by the Due Process Clause of the Fourteenth Amendment. Although some who rejected substantive content for the Due Process Clause also declined to give the clause an independent procedural role, see *In re* Winship, 397 U.S. 358, 377-84 (1970) (Black, J., dissenting), others allowed for such a

proaches to the Privileges or Immunities Clause, and that choice will affect how much the appearance of arbitrariness is relieved as well as the extent of incorporation.

Two approaches especially limit judicial discretion, and therefore the appearance of arbitrariness: Professor Fairman's empirical method, which merely requires counting up the governmental practices of 1868, and Professor Amar's theory, which turns on whether a right can be characterized as belonging to citizens on an individual or group basis rather than collectively. Justice Black's interpretation of legislative intent also strives for neutrality, although his aversion to discretion might be said to have driven him to distraction. Somewhat less neutral would be the historical approach that assesses incorporation in the context of the broader purposes of the Civil War and Reconstruction. Defining that context is open to disagreement, and therefore manipulable.[146] Least neutral is the general "ordered liberty" principle that Professor Fairman ultimately decided was nearest to an expression of true legislative intent.[147]

Put in these terms, one might opt for something other than the least neutral, most uncertain interpretation. But applying that broad view of privileges or immunities still has two significant advantages over the present condition in which substantive due process doubles for incorporation and unenumerated rights. First, anchoring the supports of the two issues — incorporation and substantive derivation — in separate provisions strengthens the overall interpretive structure. Two weak links in parallel are stronger than two weak links in series. Second, the broad view of the Fourteenth Amendment Privileges or Immunities Clause would bring that constitutional provision into step with its counterpart, the Comity Clause, in Article IV, section 2.

B. *Coherence*

There is logical currency to the idea that the Article IV and Fourteenth Amendment provisions, having essentially identical language,

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role. For example, Justice Frankfurter can be identified with an "approach that, at its core, focused on procedural fairness in the state courts," while drawing the line at substantive content. JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 173-74 (1989). But the vitality of procedural protection offered by the clause may be compromised by enlisting it to do double duty as a source of unenumerated rights. Lifting the burden of substance might incline the judiciary toward placing a little more procedural weight in the clause. ELY, *supra* note 1, at 19.

146. *See supra* notes 30-32 and accompanying text.

147. *See supra* notes 21-28 and accompanying text.

should be interpreted consistently.[148] Under present Supreme Court doctrine, the Comity Clause requires equal treatment between state citizens and out-of-staters with regard to fundamental matters.[149] Incorporation doctrine, meanwhile, presently binds the states to federal matters found to be fundamental. Thus, the law of incorporation and the law under the Comity Clause are substantively equivalent, yet incorporation has been accomplished through the Due Process Clause rather than the Comity Clause's textual counterpart. It is as though two ships have passed in the night.

This situation is *not* the result of the Court's having overstated the importance of the Bill of Rights in the incorporation setting, while giving the same rights their properly menial station in Article IV cases. Would one seriously ask whether it would be consistent with the Comity Clause for New York to guarantee free speech to its residents while censoring Pennsylvanians? Could only non-residents be forced to pay a tax to attend or perform religious activities in New York? Might state police search non-residents without a warrant, while protecting residents from the same intrusions? Hopefully, these may be accepted as rhetorical questions. And consider an example that could have modern significance: the Grand Jury Clause of the Fifth Amendment. Professor Fairman's argument and the Supreme Court's conclusion against incorporation of this protection continue to be widely accepted. But would the Comity Clause permit a state to employ a grand jury for its own "capital, or otherwise infamous"[150] offenders, while denying that procedure to out-of-state persons? Chances are that the procedure would be suddenly viewed as fundamental (or at

148. *See, e.g.*, The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 75 (1873) ("purpose of both these provisions is the same, and . . . the privileges and immunities intended are the same in each"); RAOUL BERGER, GOVERNMENT BY JUDICIARY 241 (1977) ("two of the [Fourteenth Amendment's] clauses — 'due process' and 'privileges or immunities' — were drawn from the Constitution, and under established canons of construction they were to be given their accepted meaning" (footnote omitted)).

149. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387-88 (1978); *cf.* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (stating that Article IV, section 2 "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States"). The Fourteenth Amendment Privileges or Immunities Clause goes beyond discriminatory treatment of non-residents, and indeed it must, because the resident/non-resident distinction is not present; one is simultaneously a resident of a state and of the nation. By its terms, the clause adds a dose of federal supremacy to the constitutional order by making the rights of national citizenship superior to state law. The issue is what is comprehended within those rights of national citizenship.

150. U.S. CONST. amend. V.

least "fundamental enough"), unlike the conclusion reached for incorporation purposes.[151]

Query then why we become so embroiled in debate over whether the Privileges or Immunities Clause of the Fourteenth Amendment prevents states from abridging guarantees of the Bill of Rights, even admittedly fundamental guarantees. The question should be as rhetorical as the foregoing hypotheticals. But interpreters have been reluctant since the *Slaughter House* decision to employ the Privileges or Immunities Clause for incorporation, even though the states probably could not discriminate between their own citizens and out-of-staters on the same matters. The source of this irony is the *Slaughter House* decision's legitimation of continued hostility toward federal protection of individual liberty, in favor of state power over individuals.

In sum, constitutional coherence supports an ordered liberty or fundamental rights approach to the Fourteenth Amendment's Privileges or Immunities Clause. But coherence is only one of many potentially competing values, and in this case the competing values are certainty, limitation of judicial discretion, and one or another brand of historical truth. If we wish to depart from the vagaries of due process incorporation, then a broad view of privileges or immunities might not take us far. Thus in the attempt to find an ideal theory on the application of unenumerated rights to the states, it is found that idealism is insatiable, and some constitutional goals will have to be chosen over others.

VI. CONCLUSION

The overriding goal of any theory of unenumerated rights incorporation must be to do justice to the Reconstruction revolution; otherwise we are flying blind. Two things are certain. First, antebellum governments enjoyed nearly unbridled power in the name of the community over the individual as far as the federal Constitution was concerned. Second, Reconstruction changed that in some respects. The degree of change has been at issue for over a century. And the present conflict

151. One might object that the Equal Protection Clause of the Fourteenth Amendment stands at the ready to correct such abuses. But non-residents are probably not a "suspect class" and such discriminations could therefore be legitimated by a rational basis, if one could be contrived. *See Baldwin*, 436 U.S. at 389 (holding that although the State of Montana imposed a substantially higher fee for nonresidents its "efforts [were] rational, and not invidious, and therefore not violative of the Equal Protection Clause"). Moreover, to rely on such a contention would assume that the hypothetical injustice set forth in the text was permissible until Reconstruction.

over unenumerated rights is best understood within the context of that struggle between the individual and the community.

The difficulty has been, and continues to be, that no single reading of Reconstruction is commanded with regard to unenumerated rights. Perhaps this should come as no surprise, because those rights were not yet developed and many of the challenged statutes were not yet enacted. But that only brings into relief the epistemic defect of Reconstruction as applied to the unenumerated rights question. In this light, the inclination of the judiciary to brush aside the incorporation issue with respect to unenumerated rights is understandable. Any decision would be speculative. New conditions, however, have not prevented judicial decisions in the past.[152] And in reality, the Supreme Court is making decisions when it applies unenumerated rights to the states; it just fails to explain itself, burying its regulation of state autonomy in unarticulated common law practices. This failure to clearly address the application of unenumerated rights to the states does a disservice to the clarity of constitutional doctrine, and ultimately to our understanding of justice and how we govern ourselves. Hopefully this article offers a framework for more accurately interpreting judicial activity, and a template for more candid argumentation.

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152. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (finding constitutional violation in use of electronic eavesdropping device). Recognition of new rights is obviously an odd type of "new condition." But the propriety of recognizing unenumerated rights has not been the focus of this article. Rather, the issues here solely concern incorporation, and for purposes of that analysis unenumerated rights are indeed just a new condition.