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America's Lived Constitution

ABSTRACT. This Feature is an adaptation of chapter 3 of a forthcoming book, *America's Unwritten Constitution*, which in turn is a sequel to a 2005 book, *America's Constitution: A Biography*. The 2005 book explores America's written Constitution in considerable detail, taking readers on a journey that begins with the Preamble and proceeds through the document, Article by Article and Amendment by Amendment. The sequel invites readers to venture beyond the written Constitution by exploring aspects of America's constitutional order that are not expressly enumerated within the four corners of the document. The unifying theme of *America's Unwritten Constitution* is that there exist various approaches to American constitutionalism that supplement the terse text without supplanting it—nontextual interpretive methods and techniques that harmonize with the text itself.

Chapter 3 of this forthcoming book—the foundation of this Feature—explores the domain of unenumerated rights. Although such rights are by definition not expressly listed in the terse text, the written Constitution signals their existence and provides broad guidance about where and how to find these rights. One of the most obvious places where these rights are to be discovered is in the lived practices and beliefs of the American people themselves. Another source of these “lived” rights is where Americans live: their homes. While privacy rights embody some of America's most notable examples of “lived” constitutional entitlements, this Feature places privacy examples alongside case studies drawn from criminal procedure and property law to illustrate the range, power, and limits of one general way of thinking about unenumerated rights. Whether the underlying (and underspecified) constitutional text is the Fourth, Fifth, Sixth, Eighth, Ninth, or Fourteenth Amendment, or some combination thereof, faithful constitutional interpreters properly attend to the expectations and practices of ordinary Americans who claim certain basic rights even though the terse text does not explicitly list these rights.

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Home Sweet Home (1877)¹

Nothing in the written Constitution explicitly guarantees the right to have a pet dog, to play the fiddle, to relax on your porch, to raise your children, or to wear a hat. Yet these and countless other liberties are generally observed by American governments, absent compelling reasons for abridgment. Many of Americans' most basic rights are simply facts of life: "This is the way we, the people, do things in America, and we therefore have the right to keep doing these things, if we please."

This Feature explores the constitutional status of these lived rights.²

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1. G.F. Gilman, *Home Sweet Home* (lithograph) (1877). Courtesy Library of Congress.
 2. Readers seeking a more detailed preview of the ground covered and the claims made by this Feature are invited to examine the next paragraph of this footnote, which provides a roadmap of the route we shall travel and a summary of the sights along the way. Readers who prefer surprise and suspense are welcome to skip this paragraph and return to the text at this point.

Part I of this Feature ponders the open-ended rights-affirming language of the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause. This Part identifies three distinct pathways by which "the people" celebrated by the Ninth Amendment and "citizens" highlighted by the Fourteenth Amendment can make clear to

I. "RIGHTS . . . PRIVILEGES . . . IMMUNITIES"

The Ninth Amendment proclaims that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." What exactly are these "other[]" rights? Where are they to be found and how are they to be enforced? What are we to make of the words "the people" in this Amendment?

Also, what about the Fourteenth Amendment? Its opening section declares that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens." Nowhere does this Amendment itemize these unabridgeable entitlements or specify where they are to be discovered. How should faithful interpreters read this pivotal provision? Which branch or

judges and other faithful interpreters that particular unenumerated constitutional rights do indeed exist even though these specific rights are not expressly listed in the Constitution's text. The third of these pathways enables the people/citizens to affirm various rights simply by living them out. Part II of this Feature offers a detailed case study of unenumerated rights in the domain of constitutional criminal procedure, a domain whose important implications for unenumerated-rights theory have often gone unnoticed in mainstream constitutional discourse. (Very few mainstream constitutional scholars teach and write in the subfield of constitutional criminal procedure.) In particular, Part II highlights the significance of a criminal defendant's unenumerated right to testify—a right nowhere recognized at the Founding but deeply rooted in the actual lived practice of post-Founding America. Part III takes some of the lessons derived from America's lived procedural rights and applies them to the domain of America's lived substantive rights—that is, "substantive due process." (I use scare quotes here because I prefer to analyze things through the prism of the Constitution's actual text. Rather than trying to pull "substantive" rabbits from a "process" hat, faithful interpreters should focus directly on the texts of the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause.) The main focus of Part III is modern privacy law, beginning with the landmark case of *Griswold v. Connecticut*. Part IV moves from procedure and privacy to another "pr-" word: property. In particular, this Part highlights the role that privately owned or rented houses have played in America. Combining deep ideas of privacy and property, houses loom large in America's lived Constitution, in specific constitutional texts such as the Third and Fourth Amendments, and in a remarkably wide range of Court cases from *Katz* to *Kyllo* to *Kelo*. Part V brings this Feature's analysis full circle by pondering another area of constitutional criminal law—the Eighth Amendment's rules concerning cruel and unusual punishment—and by showing that the proper methodological ground rules in this area resemble the proper methodological ground rules visible in classic privacy cases. In both privacy law and punishment law, judges should and do find guidance in America's actual lived Constitution—in the patterns of actual practice on the ground, patterns that in some cases have dramatically evolved since the Founding. This Part concludes with specific suggestions for properly measuring and tallying actual lived practice. For example, should the practices of Wyoming and California count equally, or should these practices be weighted by state population? How widespread must a lived practice be to warrant judicial recognition as an unenumerated constitutional right? Should judges allow America's lived Constitution to continue to evolve even after certain lived rights have been judicially declared to be full-fledged constitutional rights?

branches of government should take the lead in defining Americans' basic rights, freedoms, privileges, and immunities? Should faithful interpreters safeguard the Amendment's unspecified privileges and immunities against the federal government as well as against the states, even though the Amendment does not specifically say this?

A. America's Implicit Constitution

To begin with, faithful interpreters must peer behind and dig beneath the written Constitution to locate rights that may be *implicit* in its words. While unenumerated—that is, not expressly declared in a specific constitutional clause—implicit rights are nonetheless full-fledged constitutional entitlements on any sensible reading of the document.

A Hollywood-style hypothetical to sharpen the analysis: imagine a defendant on trial for murder in the District of Columbia who claims that he is innocent and that someone else, a man with close ties to the prosecutor's office, is the real culprit. Miraculously, the defendant has acquired decisive forensic evidence that he seeks to lay before the jury: a knife perfectly matching the victim's fatal stab wound, with her dried blood on the blade, and the real culprit's fingerprints and DNA on the handle. The defendant himself is also poised to testify about the culprit's motive. However, the prosecutor moves to exclude the knife from the trial and thereby prevent the jury from even learning of the weapon's existence because the defense team obtained the knife via certain daring acts of stealth, deception, and trespass committed by a private investigator. The prosecutor piously points to a federal statute and a complementary District of Columbia ordinance generally prohibiting the introduction of illegally acquired evidence. When the defendant counters by asserting that he has a basic constitutional right to establish his innocence, the prosecutor responds that there is no such right specifically enumerated in the Constitution and that the statute and ordinance thus govern the case. How should the judge rule?

For the defendant, of course. No matter what the prosecutor might say to the judge, the Ninth Amendment gives defense counsel a knock-down rejoinder.

For example, the prosecutor might stress that while the text of the Sixth Amendment explicitly guarantees a criminal defendant the rights to confront

the government's *witnesses* and to subpoena *witnesses* for the defense,³ the Amendment has no comparably specific language guaranteeing the defendant a right to introduce *physical evidence*, such as a knife. Thus, the argument would run, the words of the Sixth Amendment negate the very existence of the supposed constitutional right claimed by the defendant.

While this sort of move—a general and sweepingly broad argument from negative implication—might make sense in some constitutional situations, this is not one of them.⁴ The Ninth Amendment, after all, instructs us precisely *not* to read the Sixth Amendment (or any other constitutional listing of rights, for that matter) in a stingy, negative-implication, rights-denying fashion: “[t]he enumeration in the Constitution, of certain rights”—such as the rights to confront and to compel witnesses—“shall not be construed to deny or disparage other[] [rights] retained by the people,” such as the right to establish one’s own innocence, even in contexts not directly involving witnesses.

But where, our hypothetical prosecutor might ask, does this putative right to verify one’s innocence come from? Even if the Sixth Amendment does not negate the existence of such a right, our prosecutor would insist that the

3. “In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI.
4. As a rule, a negative-implication argument should never be decisive absent additional, fine-grained reasons to support its application in a given situation. To persuade fully, these fine-grained reasons will typically need to reference something beyond the mere words of the clause—for example, history, structure, common sense, or the interrelation between the clause and some other textual provision(s) of the Constitution.

For an example of a proper negative-implication argument, see *infra* notes 39, 116 and accompanying text, arguing that Section 5 of the Fourteenth Amendment empowers Congress to “enforce” Fourteenth Amendment rights but (by negative implication) does not empower Congress to undermine these rights. Several additional strands of argument support this specific negative implication. First, the entire structure of the Constitution is premised on the idea that federal power that is not delegated is withheld, and the Tenth Amendment adds textual emphasis to this implicit structural postulate. Second, no one in the Reconstruction Congress argued that Congress should generally have power to undercut rights, and indeed specific historical evidence exists that the Thirty-Ninth Congress envisioned a system in which both Congress and the courts would protect rights and in which citizens in general could claim the benefit of whichever branch had a more generous view of a given right. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 128-29 (1986); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 826 (1999). Also, as a matter of simple common sense, it would be odd to think that Congress could generally license states to flout basic Fourteenth Amendment rights, given that most of these rights are also guaranteed against Congress itself. In court, this negative-implication reading of Section 5 has carried the day. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

Amendment surely does not affirm this right, which is nowhere specifically mentioned in the Amendment's text.

Here, too, our hypothetical prosecutor errs. When properly construed alongside the Ninth Amendment, the Sixth Amendment does indeed affirm and presuppose a defendant's basic right to defend himself with truthful evidence. The Ninth Amendment tells us to look beyond "enumeration" when interpreting—"constru[ing]"—the Constitution. It reminds us that not everything in the Constitution is textually itemized and specified. Some of what is in the Constitution is implied rather than expressed. Part of the meaning that can be extracted from the document lies between the lines and beneath the words. Thus, even as the Ninth Amendment emphatically warns against certain anti-rights negative-implication readings of the terse text, the Amendment warmly invites certain pro-rights positive-implication readings.

Some implicit principles follow a fortiori from explicit provisions. For example, since the First Amendment prevents the President from censoring publishers even when Congress has purported to authorize a regime of prior restraint,⁵ surely it follows a fortiori that the Constitution prevents him from censoring publishers on his own say-so in the absence of an authorizing statute. Since the Fifth Amendment bars the government from placing a defendant twice in jeopardy for the same offense,⁶ surely it follows a fortiori that the Constitution bars the government from placing him thrice in jeopardy. Since the Sixth Amendment guarantees a defendant the right to use legal force to compel an uncooperative witness to testify,⁷ surely it follows a fortiori that the Constitution entitles a defendant to put a cooperative witness on the stand. And—returning to our hypothetical—since the Sixth Amendment entitles a defendant to use legal force against others to establish his own innocence, via subpoenas compelling testimony from uncooperative witnesses, surely it follows a fortiori that the defendant has a right to introduce reliable physical evidence already in his possession that also establishes his innocence.

When we read between the lines and dig beneath the words, we see that the deep purpose of the Sixth Amendment is to ensure a fair trial for the defendant and to enable him to show that he did not do what the government has accused

5. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

6. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* amend. V.

7. "In all criminal Prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor." *Id.* amend. VI.

him of having done.⁸ The enumerations of specific rights, such as the rights to confront and to compel witnesses and to be informed of the specific criminal charges being made by the government, imply and presuppose this fundamental unifying structure—the spirit of the Sixth Amendment.

Indeed, a defendant's right to defend himself truthfully with reliable evidence and testimony would exist even if the Sixth Amendment had never been adopted. This root right would sensibly be understood as part of what the very word "trial" meant in the original Constitution's Article III,⁹ which in turn must be read against the Preamble promise that the Constitution would "establish Justice," not subvert it. What is the purpose of a "trial" worthy of the name, if not to allow a defendant a fair opportunity to show that he is innocent of the charges leveled against him? The very structure of the trial attests to this purpose: strictly speaking, a trial is triggered when a defendant pleads "not guilty" and ends when the trier (typically a jury) renders a verdict of "guilty" or "not guilty."¹⁰

But if all this is so, was much of the Sixth Amendment logically superfluous? Would its textually specified rules of confrontation, compulsory process, notice of charges, and so on have been properly inferred from the Philadelphia Constitution's Judicial Article even had the Bill of Rights never been adopted? Probably yes—and in this respect the Sixth Amendment was hardly unique. For example, Article I, Section 8's Necessary and Proper Clause was widely viewed as merely declaratory of the true scope and limits of federal power deducible from the rest of the Constitution, properly construed.¹¹ So,

8. See Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996) (explicating the Amendment's truth-seeking and innocence-protecting architecture); see also *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting earlier case law)).
9. "The Trial of all Crimes . . . shall be by Jury . . ." U.S. CONST. art. III, § 2, cl. 3.
10. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 108 (1998). Other words in Article III—which speaks of "Courts," "Law," "Equity," "Judges," and "judicial Power," among other things—could also be invoked to buttress the basic premises and traditions implicit in the word "trial."
11. See generally THE FEDERALIST NO. 33, at 204-05 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (commenting that the Clause is "only declaratory of a truth, which would have resulted by necessary and unavoidable implication"; "[t]he declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless"); *id.* NO. 44, at 304 (James Madison) (arguing that the Clause specifies a truth that would otherwise have been left to "unavoidable implication"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21 (1819) ("If no other motive for its insertion can be suggested, a sufficient one is

too, the core of the First Amendment's Free Speech Clause merely codified a principle of free political expression implicit in the Philadelphia Constitution as a whole and evident in the very enactment of the document.¹² Likewise, the Tenth Amendment textualized principles of federalism and popular sovereignty obviously implicit in the original Constitution and embodied in the enactment process.¹³

Nor is this brief list exhaustive. Still other explicit rules and principles of the Bill of Rights were implicit in the Constitution as a whole. Fully aware of this fact, the First Congress, which drafted the Bill of Rights, prefaced the document with official language proclaiming that some of its provisions were "declaratory" of existing law.¹⁴ Two years earlier, James Wilson and Oliver Ellsworth had similarly insisted at the Philadelphia Convention that the Article I, Section 9 Clause prohibiting Congress from passing *ex post facto* laws was logically unnecessary and merely declaratory.¹⁵

Thus far, we have focused on how the original Constitution as modified and glossed by the initial Amendments, especially the Ninth Amendment, operates to limit federal power and to protect rights against federal officials. What about Americans' unenumerated rights against state officials?

Here the key clause comes from the Fourteenth Amendment, adopted after the Civil War to ensure that states would never again abuse their citizens in ways that the Old South had done—with disastrous consequences. It is worth repeating this key language, this time with emphasis: "*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.*" With these words, Reconstruction Republicans ringingly proclaimed that all the fundamental rights, freedoms, privileges, and immunities applicable against federal officials would also apply against states. Thanks to this Amendment, the basic (albeit unenumerated) right of a man to prove his innocence obtains not merely in federal court but in state courts as

found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.").

12. For details, see Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503 (2010).
13. For more examples and analysis, see Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1 (1998).
14. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 321 (Wash. D.C., Dep't of State 1894).
15. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 375-76 (Max Farrand ed., 1911) (Aug. 22).

well—as do all other basic rights, both explicit and implicit, affirmed in the original Constitution or its first nine Amendments.¹⁶

B. America's Enacted Constitution

So much, then, for how America's *implicit* Constitution, based on precepts deduced from the document's deep logic and spirit, applies in the specific context of citizen rights. America's *enacted* Constitution—a body of principles deduced from the very manner in which the document was in fact enacted into law in 1787–88—also fully applies to rights. For example, the right of robust, wide-open, uninhibited political expression became part of the Constitution by dint of the very process of enacting the document, well before the First Amendment textualized and enumerated this right.¹⁷

A related enactment right was recognized at the very moment that the words of the Ninth Amendment were being crafted by the First Congress. An early draft of the Bill contained language proclaiming that “the people have an indubitable, unalienable, and indefeasible right to reform or change their Government.”¹⁸ This right was obviously connected to—indeed, strongly implied by—the words of the Preamble. Given that “We, the People” had a right to “ordain and establish” the Constitution, as the Preamble proudly asserted, surely the companion right to alter and to abolish existing governmental arrangements logically followed.

Indeed, this principle had been acted upon—been enacted—in the very process by which the Constitution had sprung to life, a process in which “We, the People” had altered various state laws and institutions in force prior to the Constitution's ratification and had abolished the old Articles of Confederation. This was exactly Representative Roger Sherman's argument in the First Congress: “[I]f this right is indefeasible, and the people have recognized it in practice, the truth is better asserted than it can be by any words whatever.”¹⁹

16. See AMAR, *supra* note 10.

17. See Amar, *supra* note 12.

18. 1 ANNALS OF CONG. 451 (June 8, 1789).

19. 1 *id.* at 746 (Aug. 14, 1789). There are other explicit references to how the Preamble had made this right clear in actual enacted practice. See 1 *id.* at 741 (Aug. 13, 1789) (Rep. James Jackson) (describing the Preamble as “a practical recognition of the right of the people to ordain and establish Governments”); 2 ELLIOT'S DEBATES 434–35, 458 (Oct. 28 & Dec. 4, 1787) (statement of James Wilson) (“[S]upreme power resides in the people. This Constitution, Mr. President, opens with a solemn and practical recognition of that principle: — ‘We, the *people of the United States*, . . . do ordain and establish this Constitution for the United States of America.’ . . . What is the necessary consequence? Those who ordain and

While the specific enumeration of Americans' "indubitable" right to amend fell onto the cutting room floor in the First Congress, a more encompassing, albeit unenumerated, affirmation of this right survived in the language of the Ninth Amendment itself—an Amendment which, like its "indubitable" precursor, tellingly tracked the key Preamble phrase, "the People," and its root principle of popular sovereignty.

C. America's Lived Constitution

With this phrase, the Ninth Amendment reminds us that the unenumerated rights it aims to affirm must in one way or another have been embraced/endorsed/embodied/enacted by the people themselves. Having reviewed two distinct pathways by which "the People" can bless a given unenumerated right—first, by adopting a constitutional text that implicitly entails that right; and second, by exercising that right as an integral part of the Constitution's enactment (or amendment) process—let us now focus on a third pathway through which "the People" can make clear that they do indeed claim and hold dear a particular unenumerated right.

Just as the actual internal practices and interactions of governmental institutions can gloss the meanings of various constitutional words and phrases that address government structure, so too the actual practices of ordinary Americans in their daily lives and the actual patterns of laws and customs in America have glossed the rights-declaring language of the Ninth and Fourteenth Amendments. By attending to the lived experiences of Americans, we can see more clearly which other rights are in fact claimed every day by "the People" themselves and which entitlements truly are fundamental privileges and immunities recognized as such by "citizens."

Thus, the hero in our Hollywood-style hypothetical need not rely solely on the implicit logic of Article III and Amendment VI. The Ninth and Fourteenth Amendments also invite him to root his claim of right in the fertile ground of American custom, mythos, and ethos. In other words, the defendant may properly appeal directly to principles of truth, justice, and the American way as understood and practiced by the American People.²⁰

establish have the power, if they think proper, to repeal and annul. [Supreme power] continues, resides, and remains, with the body of the people. Under the practical influence of this great truth, we are now sitting and deliberating, and under its operation, we can sit as calmly and deliberate as coolly, in order to change a constitution, as a legislature can sit and deliberate under the power of a constitution, in order to alter or amend a law.").

20. The premier exponent of this general approach to constitutional interpretation is Professor Barry Friedman. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS*

II. "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT . . ."

Our hypothetical is just that—a hypothetical—precisely because in actual American practice, governments have not routinely attempted to prevent defendants from introducing trustworthy exculpatory evidence. A closer look at the rules that have historically operated to empower and to limit criminal defendants in American courtrooms will deepen our understanding of why our hypothetical hero deserves to prevail and in the process will offer a detailed case study showing how America's unwritten Constitution has tightly intertwined with the text in the context of unenumerated rights.²¹

A. *From Silence to Speech*

At the Founding, criminal defendants were never allowed to take the stand to testify on their own behalf.²² This categorical disqualification rule, which prevailed both in the new federal courts and in every state court, derived from then-dominant understandings of truth and justice. Criminal defendants could not be sworn in precisely because it was thought that their testimonial performances were particularly apt to be untruthful and would too often be perjured fables cooked up by guilty defendants.

Criminal defendants were not the only ones disqualified from testifying at the time of the Founding. In general, no "interested party" could take the stand in American courts—neither the plaintiff nor the defendant in any civil lawsuit, nor anyone else who stood to gain or lose something as a result of the verdict. The underlying Founding-era vision was that witnesses should be governed by

INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 590-605 (1993). Professor Jeffrey Rosen's work also merits special mention here. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006). For path-breaking work on the importance of American ethos more generally in constitutional interpretation, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93-177 (1982).

21. Some readers may have expected a Feature on unenumerated rights to begin with the quintessential unenumerated right of privacy. We shall indeed examine privacy presently—in Part III, to be specific—but several ideas relevant to privacy law can best be glimpsed by first peeking at procedure law. This sneak peek will help place the Warren Court privacy law landmark *Griswold v. Connecticut* in proper context, preceded as it was by Warren Court procedure law landmarks such as *Ferguson v. Georgia*, *Griffin v. California*, *Gideon v. Wainwright*, and *Mapp v. Ohio*.
22. See *Ferguson v. Georgia*, 365 U.S. 570, 573-75 (1961); Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91 (1981).

evidentiary admissibility rules akin to the recusal rules that applied to judges and juries. Just as no man should be a judge in his own case, neither should he be a witness in his own case. Only in the nineteenth century did this Founding-era vision yield to a more modern conception allowing those with an obvious bias to testify and leaving it up to the impartial trier of fact—the judge or the jury, as the case might be—to sift and sort the conflicting accounts.

In the early republic, almost all states followed common law or state constitutional rules similar to the Federal Fifth Amendment's Self-Incrimination Clause, rules that prevented the government from obliging a criminal defendant to testify against himself. These bans on compelled self-incrimination intermeshed with Founding-era testimonial disqualification rules. If *allowed* to testify, criminal defendants might feel *obliged* to testify. Unless crafted with care, a formal right to testify might morph into a practical duty to testify, a duty in tension with the right against compelled self-incrimination. The pressure to testify would be particularly acute if jurors were permitted to assume the worst about a defendant who chose to remain silent when given the option to take the stand: "If he really is innocent, why won't he testify and tell us his story under oath?" By preventing all defendants from taking the stand, the old rule precluded this sort of jury speculation.

If allowed to testify, a guilty defendant might of course perjure himself in an effort to avoid conviction. At the Founding, many believed that lying under oath was an especially grievous offense against both man and God—a willful and wicked act that might cause the perjurer to lose his immortal soul or suffer some other horrible punishment in the afterlife. But fallen and frail human beings, especially criminals, could not always be counted on to take the long view. Were defendants permitted to testify under oath, a person who up to that point was merely guilty of, say, an unplanned assault might go on to commit what many eighteenth-century Americans viewed as the even greater offense of premeditated perjury. Alas, a liar might lose his soul even if he saved his skin. And this sad outcome would have been induced by the legal system itself, which in effect would have led men into temptation by creating a perjury trap for petty criminals—a trap potentially triggering cosmic punishment vastly disproportionate to their underlying pretestimonial offenses. As a matter of tenderness and justice to defendants, it was better to spare them any temptation to perjure themselves.²³

Or so many at the Founding believed. In an age when no other interested witness was allowed to take the stand, would juries properly credit a criminal

23. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2641-46 (1996).

defendant's sworn testimony even if he were telling the truth? At the Founding, any proposed right of a criminal defendant to testify under oath at his own trial would have posed unique risks while offering only doubtful benefits to its supposed beneficiaries.

Over the ensuing decades, background legal norms and cultural understandings evolved, and constitutional interpretations shifted accordingly. Perjury came to be seen as more continuous with other human failings, and new rules began to allow persons to take the stand in civil cases even if they had something to gain or lose by their testimony. In 1864, Maine became the first state to allow all criminal defendants to testify under oath at trial. The federal government followed suit in 1878 and by the turn of the twentieth century only Georgia persisted in barring criminal defendants from the stand.²⁴ Many jurisdictions aimed to ease the burden on nontestifying defendants by instructing jurors not to draw adverse inferences against mute defendants. An innocent defendant, after all, might wish to remain silent for any number of reasons—for example, because he was apt to stutter or sweat or become confused upon close interrogation and thus look guilty even though he was in fact truthfully attesting to his innocence.²⁵

In a trio of cases in the latter half of the twentieth century—*Ferguson v. Georgia*,²⁶ *Griffin v. California*,²⁷ and *Rock v. Arkansas*²⁸—the Supreme Court constitutionalized this new American consensus by proclaiming a constitutional right of every criminal defendant, state or federal, to take the stand if he so chose and by entitling any defendant who chose instead to stay mute to a jury instruction that no inference of guilt should be drawn from his silence.

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24. See *Ferguson*, 365 U.S. at 577; Alschuler, *supra* note 23, at 2660-64; Bodansky, *supra* note 22, at 93.
25. See Akhil Reed Amar & Renée Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995); see also *Wilson v. United States*, 149 U.S. 60, 66 (1893) (“It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.”).
26. 365 U.S. 570 (1961) (affirming a criminal defendant’s constitutional right to testify).
27. 380 U.S. 609 (1965) (entitling a nontestifying criminal defendant to a have the jury instructed not to draw any negative inference from his decision not to testify).
28. 483 U.S. 44 (1987) (reaffirming and extending a criminal defendant’s constitutional right to testify).

B. Theorizing Practice

At this point in our story, we should pause to savor the significance of the reversal in the relevant rules over time: at the Founding, no criminal defendant could testify at his own trial, but today, every defendant has a clear constitutional right to do so. No specific constitutional clause between the Founding era and the present day has expressly dictated this about-face. Yet the reversal is plainly justified and notably uncontroversial. In 1987, Justices spanning the ideological and methodological spectrum unanimously agreed that a defendant ordinarily had a constitutional right to take the stand, even as the Court splintered over the precise contours of this right.²⁹ No major political party or mainstream national politician has taken aim at the defendant's constitutional right to testify or has attacked "activist" judges for recognizing such a right—even though the right is not enumerated in the written Constitution, and even though Founding-era practice was precisely to the contrary.

What gives?

Three factors explain and justify the modern consensus. First, nothing in the written Constitution prohibits the recognition of an unenumerated right to testify in one's own criminal case. The new right merely supplements the text but does not supplant it—and of course the language of both the Ninth and Fourteenth Amendments invites supplementation of enumerated rights with unenumerated rights. The Fifth Amendment also comes into play here, with its sweeping, albeit nonspecific, promise of fair courtroom procedures—"due process of law," a phrase repeated in the Fourteenth Amendment and specifically made applicable there to state and local governments as well as the feds.³⁰

It is possible to imagine various putative unenumerated rights that would contradict the text and thereby justifiably provoke strong resistance were they to win official recognition. Consider for instance a criminal defendant who

29. In *Rock v. Arkansas*, the Court majority held that a defendant had a right to testify even though he had previously undergone hypnosis to recover repressed memories. Four dissenters thought that hypnotically refreshed testimony could be barred under a general evidentiary rule, applicable to other witnesses, that this sort of hypnosis rendered a witness's testimony uniquely unreliable and uniquely impervious to cure via vigorous cross-examination. *Id.* In *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006), a unanimous Court cited *Rock* with approval and built upon its central teaching. *Holmes*, incidentally, was the maiden opinion of Justice Samuel Alito, himself a former prosecutor.

30. U.S. CONST. amend. V ("[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . ."); *id.* amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

concedes that a fair federal trial can be held in the state where the crime occurred but who prefers a different trial spot and who claims an unenumerated right to relocate the trial across state lines—a right, in effect, to one peremptory challenge of the prosecutor's initial choice of venue. Were judges to recognize this particular claim of right, the new right would negate the core meaning and clear command of Article III, which mandates that “[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.”³¹ By contrast, no textual violation occurred when courts recognized a criminal defendant's right to testify.³²

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31. *Id.* art. III, § 2, para. 3. In the extremely unusual case in which a fair federal trial simply cannot be held in the crime-scene state, a defendant is entitled to insist that the trial be moved to some other state where a fair trial can be had. While unenumerated, the right to a fair trial is obviously implicit in the Fifth and Sixth Amendments and indeed in the entire Constitution, read as a whole. Even seemingly literal and absolute legal commands—in this case, the clear words of Article III establishing the crime-scene state as the proper venue—may sometimes yield in unusual cases that were not within the contemplation of the law's enactors when they laid down a command. As Blackstone explained the applicable background principles of proper interpretation:

[W]here words bear . . . a very absurd signification, if literally understood, we must a little deviate from the received sense of them. . . . [S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have expressed.

1 WILLIAM BLACKSTONE, COMMENTARIES *61-62. A narrow rule moving federal criminal trials beyond the crime-scene state in extremely unusual cases where the move is required by a fair-trial imperative can be brought within the scope of this background interpretive principle. A sweeping rule mandating a trans-state venue change any time a defendant so requests cannot be; this latter rule is simply a blanket negation of the main object of the Article III Venue Clause, which aims to prescribe a fixed trial location regardless of the defendant's preferences—or the prosecutor's or the judge's preferences, for that matter.

Before a federal trial is properly moved to another state, all legitimate in-state options—relocation to another district within the state, extra-strict rules of juror selection, extra-careful jury instructions—must be unavailing. If one of these alternatives is workable, there is no ultimate conflict between the crime-scene-state-venue command of Article III and the fair-trial command of the Constitution as a whole, and both commands should be followed.

32. A possible objection: while the written Constitution recognizes a defendant's right to remain silent, the unwritten Constitution recognizes his right to speak. Since silence and speech are opposites, isn't this a contradiction?

No. A contradiction would arise if, for example, judges purported to recognize an unwritten constitutional right of a violent crime victim to force the criminal defendant to take the stand at his own criminal trial and answer all relevant questions propounded by the victim. Such an interpretation of the unwritten Constitution would indeed negate the written Constitution, which plainly declares that a criminal defendant cannot be compelled to testify in his own criminal trial. But there is no contradiction in saying that the

Of course, to say that an unwritten right to testify is logically compatible and textually consistent with a written right to stay mute is to say very little. An infinite number of putative constitutional rights, many quite outlandish, could pass a simple noncontradiction test. For instance: "Criminal defendants have an unenumerated constitutional right to government-provided soft drinks every Thursday." Surely this alleged right and countless others do not deserve recognition as proper Ninth or Fourteenth Amendment entitlements or as entailments of due process of law.

A second key factor thus differentiates the criminal defendant's right to testify from other claims that have, justifiably, not prevailed: before this entitlement won official recognition as an unenumerated constitutional right/privilege, it had already established itself in everyday American practice and in the hearts and minds of the American people. Only in the late twentieth century did the Court proclaim this right, decades after Americans had been exercising it on a daily basis in virtually every courthouse in the country.

Indeed, the entitlement to testify has principled roots as old as the written Constitution itself, even though the specific right announced by the modern Court ran counter to Founding-era practice (as the Justices candidly acknowledged).³³ The sea change that occurred in the late nineteenth century, when the old rules barring defendant testimony gave way to new rules welcoming defendants to tell their stories under oath, did not mark a revolution in first principles of law and justice. Rather, the new rules merely involved the application of old principles to a new context.

Constitution recognizes a defendant's right to stand mute or to take the stand, as he chooses. On this reading the Constitution simply gives him the option, the freedom to decide for himself—a waivable right and a right to waive. Had the Constitution explicitly guaranteed the defendant the right to testify or be silent, no contradiction would have arisen. The matter is no different merely because the Constitution explicitly guarantees his right to silence while only implicitly guaranteeing his right to testify.

First Amendment first principles confirm that the paired rights of speech and silence are sometimes best viewed as two sides of the same coin. The Amendment's text guarantees "the freedom of speech," which encompasses both a right to speak and a right not to speak. The Amendment's core meaning, visible on the surface of the explicit text, is that citizens have an absolute right to voice their opinions. As a general matter, government may not muzzle speech. The Amendment also, if somewhat less explicitly, entitles citizens to decline to voice their opinions. As a general matter, government cannot mandate speech of a certain sort. Thus a long string of canonical cases makes clear that government may not generally require citizens to salute the flag, recite a government-prescribed prayer, or endorse an official government motto. *See, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713-17 (1977).

33. *See* *Ferguson v. Georgia*, 365 U.S. 570, 574-75 (1961).

While the new rules directly reversed the old rules in specific application, the alternative—hidebound continuation of the old rules—would have raised serious problems of its own for interpreters seeking general legal coherence and fidelity to Founding principles. The Founders, after all, had disallowed criminal defendant testimony largely because this testimony was at the time deemed distinctly unreliable—as all testimony from interested parties was at that time deemed distinctly unreliable. But in a changed mid-nineteenth-century world in which other biased persons were for the first time being allowed to testify—civil plaintiffs and civil defendants, for example—the premises of the old criminal procedure rule no longer made sense. If a jury could be trusted to discount the bias of interested witnesses in civil cases, why not in criminal cases? Given that the Fifth and Sixth Amendments had been drafted to give criminal defendants greater and more explicit rights than civil defendants, wasn't it perverse to allow civil defendants to take the stand while denying this privilege to criminal defendants? Once civil defendants could testify to escape civil liability, didn't the right of criminal defendants to testify to escape criminal conviction follow a fortiori?

Even were it conceded that a criminal defendant's right to testify was a wholly new invention of the late nineteenth century, with absolutely no connection to Founding-era principles or practices, this concession would hardly doom the right as a proper candidate for protection under the Ninth and Fourteenth Amendments. One of the core unenumerated rights of the people under the Ninth Amendment is the people's right to discover and embrace new rights and to have these new rights respected by the government so long as the people themselves do indeed claim and celebrate these new rights in their words and/or their actions.

This reading of the Ninth Amendment is consistent with, but not compelled by, the Amendment's text and original public meaning when enacted. In the Founding era, there were at least two plausible ways of construing the Amendment's clipped reference to other rights "retained by the people." On one reading, the word "retained" suggested a historical test: the people were entitled to various preexisting and customary rights already in place at the Founding, rights that they would continue to possess—that is, "retain." On another reading, the word "retain" sounded more in logic and political theory than in history. Rights were logically superior and/or philosophically prior to government and thus were conceptually withheld from government—that is, "retained"—when governments were established. Even if a given right only became analytically clear or won recognition in actual practice after the adoption of the Ninth Amendment, this right was still best

understood to supersede governmental power and was thus fully covered by the Amendment's letter and spirit.³⁴

In choosing between these two plausible readings of the Ninth Amendment, faithful interpreters should embrace the second, which helps the written Constitution cohere with settled contemporary practice—with the actual world of American constitutional law that recognizes and reverences many utterly uncontroversial rights (such as the right of a criminal defendant to testify at his own trial) even though these rights are unenumerated and emerged after the Founding. Those who respect the terse text and want it to succeed in its general project should hesitate to reject a perfectly plausible reading that ultimately strengthens the text by connecting it with the basic rights claimed and practiced by each generation of Americans.

But even if this reading of the Ninth Amendment were rejected, no matter. Here we come to the third and final key factor that explains and justifies the modern recognition of unenumerated rights whose emergence postdates the Founding. While the original public meaning of the Ninth Amendment is somewhat murky, the key clause of the Fourteenth Amendment is quite clear. The core “privileges” and “immunities” of “citizens” safeguarded by the Amendment encompassed not merely rights already recognized in canonical sources such as the Federal Bill of Rights, the Declaration of Independence, and state constitutions, but also rights that Congress was empowered to identify in *subsequent* civil rights laws to be enacted under Section 5 of the Amendment. The Amendment was drafted by Congress for Congress; its rights provisions were phrased in broad open-ended language precisely to enable future Congresses to protect basic civil rights, both old and new. To be sure, Congress was not the only branch with authority to recognize new rights. Judges, too, were expected to play their part and in the process to pay heed to emerging privileges and immunities embodied, among other places, in evolving American laws and practices.³⁵

The Fourteenth Amendment promised that basic rights, freedoms, privileges, and immunities would constrain not just states but also the federal government. Although the Amendment's key clause, which appears in the second sentence of Section 1, explicitly applied to states—“No state shall . . .”—readers must take special care to avoid the negative-implication

34. In the words of Dr. Benjamin Rush, a signer of the Declaration of Independence, at the Pennsylvania ratifying convention: “Our rights are not yet all known. Why should we attempt to enumerate them?” 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 440 (Merrill Jensen ed., 1976).

35. See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); AMAR, *supra* note 10; Amar, *supra* note 4.

trap lurking in this passage. By dint of Section 1's opening sentence, the Amendment also obliged the federal government to respect fundamental civil rights. That opening sentence made clear that all American-born persons were citizens³⁶ – and for the Reconstruction Republicans who drafted and ratified this Amendment, what it meant to be a citizen was, ipso facto, to have certain basic rights, freedoms, privileges, and immunities. These basic rights simply went without saying vis-à-vis the federal government. But thanks to an 1833 Marshall Court decision, *Barron v. Baltimore*,³⁷ the Framers of the Fourteenth Amendment were on notice that if they wanted to limit states as well as the federal government, they needed to add specific language explicitly mentioning states, language akin to the wording of the Philadelphia Constitution's Article I, Section 10. Following *Barron's* teaching to the letter, Reconstruction Republicans therefore parroted the Article I, Section 10 phrase, "No State shall"; but in doing so the Amendment's drafters nowhere said or meant that the federal government would be exempt from obedience to basic rights.³⁸

A more faithful negative implication flows from the Amendment's final sentence: Congress was given broad power to "enforce" rights, old and new, but no power to abridge these rights. In general, the Amendment was thus designed to give decisive weight to whichever federal enforcement branch, Court or Congress, had the broader view of a given civil right, whether old or new.³⁹

C. Symmetries and Asymmetries

With this background, let us return, one last time, to our Hollywood-style hypothetical. The best tack for our prosecutor to take would be to concede that unenumerated rights exist and to concede further that a criminal defendant ordinarily does have an unenumerated right to testify and present reliable exculpatory evidence. But our prosecutor could argue that the specific facts of our hypothetical justify a limited exception to these general rights, an exception that itself has roots in basic American ideals of fair play – that is, in America's unwritten Constitution. With this tack, our prosecutor would at least be playing the right game. But he would still deserve to lose.

36. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

37. 32 U.S. (7 Pet.) 243 (1833).

38. See AMAR, *supra* note 10, at 195-96 & n.*, 281-82 & n.*.

39. For an important qualification of this generalization, see the concluding paragraph of this Feature.

As an opening gambit, the prosecutor might point to symmetry as the relevant, albeit unwritten, constitutional principle: “Ordinarily, a defendant should be allowed to present his own witnesses and evidence because the prosecution is allowed to present its own witnesses and evidence. But since the prosecution cannot introduce evidence that the police acquired illegally, neither should the defendant be allowed to introduce evidence that his team acquired illegally.”

Symmetry can indeed be seen as an implicit element of the Constitution’s criminal procedure provisions. For example, the defendant’s Sixth Amendment right of compulsory process generally entitles him to the same subpoena power enjoyed by the prosecutor—a pure symmetry rule.⁴⁰ The prosecutor may typically confront defense witnesses, and the defendant is symmetrically entitled under the Sixth Amendment to confront prosecution witnesses. When the jury convicts the defendant, the prosecutor gets to keep the win and need not retry the case; symmetrically, the Fifth Amendment Double Jeopardy Clause entitles the defendant to keep the win if the jury acquits.

Symmetry can also help explain and justify the Court’s celebrated twentieth-century recognition that an indigent felony defendant is entitled to an attorney at government expense. Since the government pays for its own counsel (namely, the prosecutor), it must symmetrically finance counsel for the defendant if he so requests. However, Founding-era practice fell short of this standard. The First Congress—the same Congress that drafted the Bill of Rights—provided appointed counsel to all capital defendants but relegated other defendants to a different version of the symmetry principle: the judge—a government-paid official—was himself supposed to provide legal advice to any unrepresented defendant who requested assistance.⁴¹

As the years passed and the American adversarial system took firm hold, it became increasingly clear that this quaint judge-as-counsel model was unworkable. A judge could not both properly umpire the game and effectively coach the defense team. In 1938, the Court read the Sixth Amendment Clause entitling federal criminal defendants to “the Assistance of Counsel” to include, by implication, a right to a government-provided lawyer.⁴² A quarter-century later, the Warren Court held that the Fourteenth Amendment guaranteed state

40. See Amar, *supra* note 8, at 697-705.

41. For capital defendants, see Federal Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118. For discussion of the general model of judge-as-counsel, see AKHLI REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 140-41 (1997); and John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1050-52 (1994).

42. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

criminal defendants the same basic rights as federal criminal defendants, including the right to government-paid counsel.⁴³ By the time *Gideon v. Wainwright* famously declared the right to appointed counsel for all felony defendants, this right was already settled practice in every federal court and in forty-five of the states encompassing roughly 90% of the national population.⁴⁴ (Even in the five outlying states, appointed counsel was made available to all capital defendants, to various defendants in noncapital cases of special complexity, and in some states to all defendants in certain cities and counties.) In short, a basic right to appointed counsel was already part of the fabric of America's lived Constitution. Of the twenty-five states that filed or signed onto legal briefs in the *Gideon* case, twenty-two sided with the indigent defendant, as the *Gideon* Court proudly noted in its concluding coda.⁴⁵

The shift from Founding-era-style symmetry to *Gideon*-style symmetry should remind us that symmetry is not a self-defining concept. Even today, *Gideon* and its progeny do not oblige government to finance both prosecutors and public defenders equally; nor does this line of cases entitle a defendant to government subsidies for defense-team private investigators remotely comparable to governmental expenditures for the prosecutor's investigatory team—also known as the police.

In any event, the symmetry principle does not suffice to capture all of the rights, enumerated and unenumerated, that a criminal defendant may properly claim. Both at the Founding and today, the prosecutor may not oblige the defendant to take the stand. Under one reading of symmetry, there would be nothing wrong with a rule likewise disabling the defendant from putting himself on the stand. This was indeed Founding-era practice. But as we have seen, current law gives the defendant more than mere symmetry. Only the defense can call the defendant to the stand.

Even more flamboyantly asymmetric—and more illustrative of first principles—is the rule, applicable in every criminal court in America, state and federal, that the prosecution must bear the burden of proof and indeed must prove the case against the defendant beyond reasonable doubt. If it is equally likely that the defendant is innocent or guilty, the trier of fact must acquit. Imagine a case where it is absolutely certain that one of two identical twins did the deed, but it is utterly uncertain which one. Neither may be convicted,

43. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

44. The five outlying states were Alabama, Florida, Mississippi, North Carolina, and South Carolina. See Brief of Petitioner at 29–31, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115120; see also *McNeal v. Culver*, 365 U.S. 109 app. at 120–21 (1961) (Douglas, J., concurring).

45. *Gideon*, 372 U.S. at 345.

because America's Constitution is premised on the asymmetric idea that it is better to let a guilty man walk free than to convict an innocent man.

Perhaps Blackstone overstated when he proclaimed in his *Commentaries* that it was "better that *ten* guilty persons escape than that *one* innocent suffer."⁴⁶ But today almost no one believes that the Court overstated or overreached when it made clear in the celebrated 1970 case, *In re Winship*, that the Constitution recognized the right of every criminal defendant, state or federal, to be acquitted in the absence of "proof beyond a reasonable doubt" of his guilt.⁴⁷ The *Winship* Court cited opinions stretching back into the nineteenth century clearly foreshadowing its holding and also stressed that its ruling codified the lived Constitution of American practice. In the Court's words, the reasonable-doubt standard played "a vital role in the American scheme of criminal procedure," commanded "virtually unanimous adherence" in both state and federal courts, and formed part of the "historically grounded rights of our system."⁴⁸ Yet the *Winship* Court also candidly acknowledged that the crystallization of the specific verbal formula "beyond a reasonable doubt" did not occur in America until 1798—that is, a decade *after* the ratification of the original Constitution and seven years *after* the adoption of the Ninth Amendment.⁴⁹ *Winship* thus provides yet another example of an uncontroversial, unenumerated, post-Founding fundamental right.

Winship also provides a decisive rebuttal to our hypothetical prosecutor's claim that a defendant can somehow be barred from introducing decisive evidence that he is innocent simply because prosecutors are sometimes barred from introducing decisive evidence that the defendant is guilty. The fact that the guilty sometimes go unpunished is hardly an acceptable reason for punishing the innocent instead. As *Winship* makes clear, the first principles of the entire criminal justice system aim to make it highly unlikely that an innocent man would suffer erroneous conviction.

Not only does our hypothetical prosecutor dishonor these first principles, but he also errs in trying to extend a dubious doctrine, the so-called exclusionary rule. Under this doctrine, the modern Supreme Court has routinely prevented prosecutors from introducing reliable evidence of guilt if such evidence was obtained in an unconstitutional search or seizure. Although the Court has promulgated this rule in the name of the Constitution, nothing in the document's letter or spirit says or implies anything like the exclusionary

46. 4 BLACKSTONE, *supra* note 31, at *358 (emphasis added).

47. 397 U.S. 358, 364 (1970).

48. *Id.* at 361-63.

49. *Id.* at 361.

rule; no Founder ever embraced anything of the sort; and for the first century after the Declaration of Independence, no court in America, state or federal, ever practiced or preached any type of exclusionary rule.⁵⁰ (Although the Federal Bill of Rights did not directly apply against the states early on, most state bills of rights featured language that paralleled the Federal Fourth Amendment's ban on unreasonable searches and seizures.)

Unlike *Winship*, *Gideon*, and several other twentieth-century criminal procedure cases that we have just surveyed, the modern exclusionary rule draws no strength from the deeply rooted American ideal of innocence-protection. Instead, the rule perversely benefits the guilty as such. The guiltier a person turns out to be—the bigger the pile of reliable evidence that the police find in the search—the bigger the windfall to the defendant when the evidence is tossed out.⁵¹ If a search target is innocent, the police find no incriminating evidence and so there is nothing to exclude—which means that the rule does nothing to deter the police from harassing a person whom they know to be innocent. Were the exclusionary rule the only remedial game in town, it would be open season on the innocent. Fortunately, the rule is not the only game in

50. Indeed, when a defense lawyer floated the idea of exclusion in 1822, the bookish Justice Joseph Story dismissed the concept as unheard of:

In the ordinary administration of municipal law the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained. . . . [T]he evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means. . . . In many instances, and especially on trials for crimes, evidence is often obtained from the possession of the offender by force or by contrivances, which one could not easily reconcile to a delicate sense of propriety, or support upon the foundations of municipal law. Yet I am not aware, that such evidence has upon that account ever been dismissed for incompetency.

United States v. La Jeune Eugenie, 26 F. Cas. 832, 843-44 (C.C.D. Mass. 1822) (No. 15,551).

51. The classic rebuttal is that the exclusionary rule does not truly benefit guilty defendants or create any windfall but merely restores the status quo ante: had the cops followed the Constitution and refrained from the search, no evidence would have been found, and the exclusionary rule simply puts the defendant in the position he would have occupied had the Constitution been obeyed. This rebuttal ignores all the ways in which the evidence surely would have surfaced or might well have surfaced even had no Fourth Amendment violation ever occurred. In other words, there is a massive “causation gap” in the exclusionary rule as currently practiced. For example, if police could have obtained a needed warrant but did not, evidence is excluded by today’s courts even though it would have been easy enough to get the warrant and, with the warrant, the evidence would have been discovered just the same. Although the Court has allowed in some evidence on an “inevitable discovery” exception to the exclusionary rule, the exception is currently far too narrow in application, leading to boatloads of exclusionary windfalls that make guilty defendants much better off than they would have been had the police fully complied with the Fourth Amendment.

town; other remedies to protect the innocent from abusive searches and seizures exist and many of them have strong roots in Founding-era practices and principles. But once these remedies are properly in place, what need is there for an exclusionary rule whose incremental effect is to benefit *only* guilty persons?

Suppression of reliable evidence was a rare practice in America before 1914, when the Supreme Court, in *Weeks v. United States*,⁵² read the exclusionary rule into the Constitution as a limit on the federal government (but not states). Prior to *Weeks*, only one state (Iowa) was on record supporting the basic doctrine of exclusion.⁵³ After *Weeks*, some states—via legislation or, more typically, state court reinterpretation of state bills of rights—began to embrace the exclusionary rule to rein in errant state officials. Other states, however, continued to resist the idea that highly probative evidence should be suppressed—an idea that seemed particularly troubling in cases involving violent crimes such as murder, rape, and robbery. On the eve of the Court's 1961 *Mapp v. Ohio* decision to impose the exclusionary rule on states, twenty-four states rejected the entire concept of exclusion and four others practiced only limited exclusion.⁵⁴ Altogether, these twenty-eight states accounted for roughly fifty-five percent of the nation's population. Unlike *Gideon*, *Winship*, and the right-to-testify cases, *Mapp* did not merely codify a preexisting national consensus.

Even today, nearly a century after *Weeks* and a half-century after *Mapp*, the exclusionary rule remains controversial in many circles, with articulate critics on the Court, in Congress, in the Justice Department, in state houses and governors' mansions, in the legal academy, on the airwaves, and throughout American culture more generally. Thus the real question is not whether the exclusionary rule should be expanded to punish innocent persons such as our hypothetical defendant, but rather whether the rule should be narrowed, having never won the broad and deep support of the American people.

Elsewhere, I have probed the exclusionary rule in more detail.⁵⁵ For now it suffices to say that even with the exclusionary rule in full effect, our hypothetical prosecutor's proposal to extend the rule against defendants cannot

52. 232 U.S. 383 (1914).

53. See *Wolf v. Colorado*, 338 U.S. 25, 33-34 (1949).

54. See *Elkins v. United States*, 364 U.S. 206, 224-25 (1960); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

55. See, e.g., AMAR, *supra* note 41, at 145-60; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) [hereinafter Amar, *Fourth Amendment First Principles*]; Akhil Reed Amar, Terry and *Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998); Amar & Lettow, *supra* note 25.

stand. Recall that at the Founding, reliable physical evidence was universally admissible. As one mid-nineteenth century English court bluntly summarized the traditional Anglo-American rule: "It matters not how you get it; if you steal it even, it would be admissible in evidence."⁵⁶ Note what this means. At the Founding, criminal defendants had an absolute right (and prosecutors likewise had unfettered power) to introduce reliable physical evidence, even if evidence had been acquired improperly. While the modern exclusionary rule has stripped prosecutors of their power to introduce improperly acquired evidence, defendants have not thereby forfeited their ancient rights. A defendant's entitlement to show that he is innocent of all the charges the government has trumped up against him is surely one of the basic, albeit unenumerated, rights that has always been retained by the people under the Ninth Amendment and is likewise protected as a core privilege or immunity under the Fourteenth Amendment. Various new unenumerated rights are one thing—a perfectly proper thing, thanks in part to these two Amendments. But new limits on ancient rights are something very different, something that the Ninth and Fourteenth Amendments, rightly read, do not support.

At this point in the hypothetical argument, our prosecutor would have one final card up his sleeve. He could argue that the defendant is hardly innocent *tout court*. The defendant, after all, did apparently conspire with his private investigator to swipe the knife. But at most, that fact would make the defendant technically guilty of theft, conspiracy, or trespass, not murder. It would never fit actual Americans' sense of justice to punish a person for a greater crime simply because he may have committed a lesser one. (Recall how the Founders recoiled at the prospect that a petty criminal might be tempted into committing what was, to them, the more serious crime of perjury.)

Even if a subsequent prosecution for theft were brought after the government lost its murder case, the accused would have a compelling self-defense excuse to sway the jury: "I stole to prove my innocence of murder and to bring the true murderer to justice!" Is there much doubt how this case would in fact come out? If not—if readers are confident how a feel-good Hollywood movie with this plotline would end—then this confidence is itself confirmation that there is such a thing as the American sense of justice and fair play, embodied not only in American laws and practices, but also in our culture and narratives and ultimately in ourselves as a people.⁵⁷

56. *Regina v. Leatham*, (1861) 8 Cox Crim. Cas. 498, 501 (Q.B.) (Crompton, J.).

57. Were our defendant inclined to supplement his basic fairness defense in a theft/trespass prosecution with a couple of additional legal arguments, the following two lines of legal analysis would be worth considering. First, he could remind the jurors in his trespass/theft case that he had an explicit Sixth Amendment right to subpoena the culprit to testify at his

The preceding analysis has aimed to demonstrate that unenumerated rights have bloomed profusely and may properly continue to bloom even in a domain—constitutional criminal procedure—where the terse text lays down what might seem to the untrained eye to be an exclusive grid of specific rules. In this domain, explicit texts, implicit rights, and lived rights have blended together with results sure to surprise the blinkered literalist. In sum, a document whose text says merely that a criminal defendant cannot be compelled to testify now also entitles him to take the stand if he wishes;⁵⁸ the government must provide defense lawyers to all indigent felony defendants

own murder trial and an implicit right to subpoena the culprit for physical evidence in the culprit's possession. Although the culprit of course would not have complied with any subpoena of the murder weapon, had the defendant tried to initiate such a subpoena, the defendant was legally entitled to have the knife introduced at his own murder trial. Thus the defendant was simply using a self-help remedy to take possession of an item to which he had a lawful claim of right. The case is thus loosely akin to "stealing back" an item from a thief who had no proper right to the item to begin with. Second, the Sixth Amendment was designed to give the defendant the same compulsory process power enjoyed by the government. Since the government is allowed to use search warrants instead of subpoenas in situations where a subpoena is apt to be disobeyed—as when the government is trying to locate a murder weapon in the possession of the murder suspect—a criminal defendant should likewise be allowed to oblige the government to conduct a surprise search for evidence sought by the defense whenever the defendant can show probable cause to believe that the evidence will be found in a particular location and probable cause to believe that a subpoena would be dishonored. Since the government did not give our defendant this proper option, self-help was excusable—at least in the very special case in which the defendant in fact succeeds in finding the actual murder weapon on his own. For more discussion of these underlying theories, see AMAR, *supra* note 41, at 136, 247 n.212.

58. Thus, the Constitution vests a defendant with a supplemental implicit right to do the opposite (testify) of what he has an explicit right to do (decline to testify). Similarly, a defendant has an explicit right to legal counsel and an implicit right to forego all counsel and represent himself. He has an explicit right to compel and cross-examine witnesses and an implicit right to decline to do so. But not all of his explicit criminal procedure rights are matched by supplemental implicit rights to the opposite thing. For example, a defendant has a constitutional right to a jury trial but no constitutional right to insist upon a bench trial. Nor does he have an implicit right to an unspeedy trial or a nonpublic trial. Why the different standards for different rights when the Sixth Amendment's text does not clearly signal these differences?

By now, the answer should be clear: the text must be read against various background legal principles derived from history, structure, spirit, justice, and common sense. In the domain of criminal procedure, for example, some rights are rooted in a vision of defendant autonomy and are thus best understood as giving each defendant a constitutional option to choose *X* or not-*X*. Other rights are not pure autonomy rights of the defendant alone and thus are not best read to entail a defendant's right to do the opposite thing. The people themselves—members of the general public apart from the defendant—have implicit constitutional rights to, or legitimate interests in, public trials, speedy trials, and jury trials. Hence, these areas are not governed simply by the preferences of the defendant.

even though the Founders neither clearly enumerated nor fully established this right; prosecutors must prove guilt “beyond reasonable doubt,” a phrase that postdates the Bill of Rights; defendants must be allowed to present physical evidence notwithstanding the fact that the text says nothing about this; and, above all, government must honor the values of truth and innocence, words that nowhere appear in America’s written Constitution.

III. “DUE PROCESS”

A. *Griswold*

Lived rights also blossom in domains where the document speaks much less specifically. Perhaps the most illustrious instance of judicial protection of a lived right occurred in the 1965 case of *Griswold v. Connecticut*.⁵⁹ Connecticut had purported to criminalize the use of contraception, even by married couples in the privacy of their own bedrooms, prompting the Supreme Court to strike down the state law as unconstitutional. Seven of the nine Justices voted to recognize a right of sexual privacy within marriage. Today the decision is accepted—indeed, celebrated—by judges, politicians, academics, journalists, and ordinary citizens from virtually every point on the political compass.

Writing for the *Griswold* majority, Justice Douglas famously proclaimed that a general “right of privacy” could be found nestled between the lines of the Bill of Rights. This approach, deducing implicit constitutional rights by probing explicit constitutional clauses to identify their unifying spirit and purpose, is a splendid way to identify unenumerated rights. But Douglas, a Justice notorious for his nonchalance, did a sloppy job proving his specific case, breezing through clauses that did in fact foreshadow modern privacy ideology (in particular, the Third and Fourth Amendments) while stretching other clauses past the point of plausibility.

Douglas began his too-brisk tour of the Bill of Rights by emphasizing the First Amendment rights of “association” and “assembly.”⁶⁰ (The first word was itself merely implicit in the Amendment, while the second appeared explicitly via its cognate, “assemble.”⁶¹) Unfortunately for Douglas’s general argument, the original meaning of the amendment’s assembly and association principles had little to do with the private domain of human sexuality. The core

59. 381 U.S. 479 (1965).

60. *Id.* at 482-84.

61. “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble.” U.S. CONST. amend. I.

Founding-era right of “the people” to “assemble” centered on citizens’ entitlement to gather in public conventions and other political conclaves.⁶² This original vision was miles removed from the erotic urges of a man and a woman seeking to “assemble” on a bed. Douglas also relied on the Self-Incrimination Clause of the Fifth Amendment,⁶³ but this provision likewise originally had (and continues to have) little to do with sexual privacy. With a proper grant of immunity from prosecution, the government may, consistent with the Self-Incrimination Clause, compel a person to divulge the most intimate and embarrassing sexual details.⁶⁴ (Just ask Monica Lewinsky.)

Writing separately in *Griswold*, the second Justice Harlan found a different basis for invalidating the Connecticut law, focusing less on constitutional texts and their implicit logic and more on the actual lived experience of ordinary Americans:

[C]onclusive, in my view, is the utter novelty of [Connecticut’s] enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.⁶⁵

For Harlan, a right of married spouses to use contraceptive devices in the privacy of their bedroom was a basic element of America’s lived Constitution.

Alas, Harlan overlooked the words of the Fourteenth Amendment that best made his case and best fit the facts before him: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” Instead, Harlan leaned on the Amendment’s adjoining

62. See AMAR, *supra* note 10, at 26-32.

63. 381 U.S. at 484-85. Douglas’s reliance on the Fifth Amendment Self-Incrimination Clause built upon earlier cases that tried to read the Clause as intimately interrelated with the Fourth Amendment. In particular, Douglas cited the Court’s then-recent decision in *Mapp v. Ohio*, which had relied on both the Fourth and Fifth Amendments, and quoted *Mapp*’s explicit affirmation of a “right to privacy, no less important than any other right carefully and particularly reserved to the people.” *Id.* at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)).

For more discussion of the Supreme Court’s attempt over the course of many years to fuse the Fourth and Fifth Amendments, and examination of the analytic errors of this effort, see Amar, *Fourth Amendment First Principles*, *supra* note 55; and Amar & Lettow, *supra* note 25.

64. See Amar & Lettow, *supra* note 25, at 90-91.

65. *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting). In *Griswold*, Justice Harlan in effect incorporated by reference his *Poe* opinion. See *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment).

passage: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law” Harlan’s reliance on the Due Process Clause is understandable but unfortunate—understandable, because many pre-*Griswold* cases had used this Clause whereas very few had rested on the Privileges or Immunities Clause; but unfortunate, because the Court’s ultimate responsibility is not to thoughtlessly exalt the case law but to thoughtfully expound the Constitution.⁶⁶

When we carefully examine the Constitution, the Due Process Clause relied on by Harlan seems quite unpromising. This Clause suggests that government may indeed deprive persons of life, liberty, or property, so long as proper legal procedures are followed. However, Harlan and his *Griswold* Court colleagues failed to identify any procedural problem with the Connecticut law, which had been duly enacted by the state legislature in conformance with the standard legislative protocols (such as bicameralism) and was being duly enforced in keeping with ordinary legal procedures (impartial judges, properly selected juries, fair rules of evidence, and so on).⁶⁷ The Court’s real objection to the law was not procedural but substantive. No state law, regardless of the niceness of its procedures, could properly intrude into the private space of consensual conjugal relations in the marital bedroom. The outlandish Connecticut law flunked a privacy test, not a process test.

While the constitutional language that Harlan invoked seems precisely off-point, the clause that he overlooked was spot-on. That Clause bars all state abridgements of basic “privileges” and “immunities,” regardless of procedural pedigree. The entire turn of the spot-on phrase naturally invites readers to ponder the need to insulate private domains from governmental intrusion. Conceptually and etymologically, “privacy” and “privilege” are linked, and the Clause further suggests that certain areas should simply be “immun[e]” from governmental intrusion or regulation.

Harlan built his edifice on a phrase—“substantive due process”—that borders on oxymoron. Substance and process are typically understood as opposites. The phrase comes from judges and has been deployed by judges in

66. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

67. Elsewhere, I have tried to explore one possible failure of the political process associated with the Connecticut contraception law—a process failure due to the fact that no woman ever voted for this law, even though the law imposed special and potentially self-entrenching burdens of unwanted pregnancy upon women. See Akhil Reed Amar, *Concurring and Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 152, 166 (Jack M. Balkin ed., 2005). No member of the *Griswold* Court, however, highlighted the gender issue.

some of the worst cases in American history, including *Dred Scott v. Sanford*⁶⁸ and *Lochner v. New York*.⁶⁹ Because of this tainted lineage, Douglas and most of the other Justices in the *Griswold* majority loudly denied that they were relying on the concept of substantive due process or doing anything like what the Court had done in *Lochner*.⁷⁰

By contrast, the spot-on phrase comes directly from the Constitution itself—and therefore from the citizenry that ratified this language. The Clause naturally directs interpreters to muse upon the wisdom of ordinary citizens rather than the case law of judges. Many of the privileges and immunities of citizens may be found by paying heed to citizens—what they do, what they say, what they believe. This is in fact what Harlan did in his pivotal sentence when he directed attention to the “conclusive” fact that citizens in virtually every state and every era had in fact practiced consensual marital sex wholly free from governmental intrusion.

It might at first be thought that the Due Process Clause holds special promise as a sturdy guarantor of rights because it appears twice in the written Constitution—first in the Fifth Amendment, announcing a right against the federal government, and later in the Fourteenth Amendment, proclaiming a right against states. But as we saw earlier, the Fourteenth Amendment’s Privileges or Immunities Clause, in tandem with companion language safeguarding citizenship rights in the Amendment’s opening sentence, also vested citizens with fundamental entitlements against both federal and state officials. Just as the Amendment incorporated the Federal Constitution’s basic set of rights against states, so it also incorporated the Reconstruction-era vision of rights back against the federal government. The Amendment’s big idea was that the basic rights of American citizenship, rights both substantive and procedural, should apply fully and equally against all American governments—federal, state, and local.⁷¹

It might be wondered why, if the Fourteenth Amendment’s Privileges or Immunities Clause plainly incorporated basic constitutional rights against states, including the Fifth Amendment right to due process, the Fourteenth Amendment immediately went on to explicitly restrict state abridgments of “due process.” Was this an artless repetition worthy of inclusion in the department of redundancy department? Au contraire! The Fourteenth Amendment’s opening sentence and its companion language guaranteeing

68. 60 U.S. 393 (1857).

69. 198 U.S. 45 (1905).

70. 381 U.S. 479, 481-82 (1965).

71. See generally AMAR, *supra* note 10.

privileges and immunities protected only citizens. The Amendment's Due Process Clause went on to make clear that even noncitizens—all "persons," including aliens—were entitled to fair procedures.⁷²

Some devotees of substantive due process have tried to make hay of the fact that the Due Process Clause directs the reader's gaze to the crucial and attractive concept of "liberty." Justice Stevens, who eventually took Justice Douglas's seat on the Court, was particularly fond of referring to "the Liberty Clause" of the Constitution.⁷³ Nice try, but not quite. The Clause speaks of "life, liberty, and property" as a trio. The Clause is thus no more a liberty clause than a property clause. If governments under this Clause may restrict property so long as they follow proper procedures, then the same grammatically holds true for liberty. If, conversely, fair procedures do not suffice when liberty is restricted—the approach favored by Harlan and Stevens—then the same would logically hold true for property. This could take us back to the bad old days of *Dred Scott* and *Lochner*, when the Court in fact did use the Clause, outrageously, to insulate various property holders, including slaveholders and sweatshop owners, from perfectly reasonable governmental regulations endorsed by a broad swath of the citizenry.

B. Beyond Griswold

The extreme outlandishness of the Connecticut contraception law, when measured against the actual experience of Americans at all times and in all places, made *Griswold* an especially easy unenumerated-rights case under a lived-Constitution analysis—too easy, in fact. Most officious laws will not be quite so eccentric and intrusive, yet many may still merit condemnation as violative of basic rights, as ordinary Americans have come to understand and practice these rights.

Consider, for instance, laws that prohibited the *distribution* of contraceptive devices to *unmarried* adults. There was a time in America when such laws were routine, but the sexual revolution of the mid-twentieth-century rendered the handful of priggish statutes still on the books post-1970 at odds with actual social practices and norms of ordinary law-abiding Americans. Unsurprisingly, it was precisely in the early 1970s that the Supreme Court struck down these

72. *Id.* at 171-73.

73. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3091-92 (2010) (Stevens, J., dissenting); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20 (1992); John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1298-99 (1993).

outlier statutes.⁷⁴ Unfortunately, in so doing the Court once again overlooked the Privileges or Immunities Clause, thus making it harder for ordinary Americans to see the obvious connection between the Court's commonsensical holdings and the Constitution's plain meaning.

Many loving couples in modern America have at times engaged in oral sex and anal sex as forms of contraception, channeling their romantic urges into nonprocreative expressions of physical intimacy. In 2003, the Court struck down the handful of state laws that purported to criminalize these intimate acts. Justice Kennedy's landmark opinion in *Lawrence v. Texas* contained a soaring philosophical ode to liberty and equality.⁷⁵ But Kennedy also wove into his opinion strong threads that recalled Justice Harlan's more modest empirical approach:

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private [for much of American history]. It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . . Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them.⁷⁶

Noting that as of 2003 only thirteen states had laws on the books prohibiting consensual adult sodomy, four of which enforced their laws only against homosexual conduct, Kennedy stressed that "[i]n those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private."⁷⁷ In short, enforcement of sodomy laws against private adult consensual conduct ran hard against the actual lived practices of twenty-first-century Americans.

74. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

75. 539 U.S. 558, 562-75 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. . . . Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. . . . When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . demeans the lives of homosexual persons.").

76. *Id.* at 569-70.

77. *Id.* at 573.

On the other side of the empirical spectrum, the Court's 1973 ruling in *Roe v. Wade*⁷⁸ cannot be justified by recourse to the actual practices of Americans at that time. According to Professor Laurence Tribe, every state except perhaps New York had laws on the books at odds with *Roe*'s sweeping vision of abortion rights.⁷⁹

This fact alone does not doom *Roe*. A right may properly exist and deserve judicial enforcement on grounds that do not depend on America's lived Constitution. For example, if a right is expressly enumerated in the terse text or reflects a principle plainly implicit in the written Constitution (whether in a specific clause or in the instrument as a whole) or forms an integral part of the process by which the document was enacted or amended, then such a right is a full-fledged constitutional entitlement worthy of protection even if the right runs counter to actual practice.

But if a right is not an express, implied, or enacted entitlement, nor part of America's lived Constitution, then in what way, precisely, is it a genuinely constitutional right? Justice Blackmun's opinion for the Court in *Roe* failed to squarely address this crucial question. Remarkably, his opinion seemed almost uninterested in explaining what clause or clauses of the Constitution in fact supported the specific right announced by the Court in the name of the document. He did not even quote the constitutional patch of text on which he claimed to be relying—the Fourteenth Amendment's Due Process Clause. Had he bothered to examine this Clause, he would have found the word "process" to be a large stumbling block to his openly substantive approach to abortion rights. Notably, nearly four decades after it was handed down, *Roe* still roils and polarizes, unlike many of the other unenumerated rights cases that we have thus far encountered.⁸⁰

In other areas where claims made on behalf of unenumerated rights have had little grounding in daily American practice, the Court has generally declined to rush in and declare the alleged rights to be constitutional entitlements. For example, a strong philosophical claim might be made on behalf of a right of any competent adult to end his own life at the time and in the manner of his own choosing and to enlist professional medical assistance in implementing his free choice. Nothing could be more private—none of

78. 410 U.S. 113 (1973).

79. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 13 (1992). For different tallies, see FRIEDMAN, *supra* note 20, at 297; and ROSEN, *supra* note 20, at 92-93.

80. Elsewhere, I have probed an entirely different and far more plausible line of defense of abortion rights, focusing not on privacy and substantive due process à la *Roe* but instead on principles of sex equality and women's rights, principles that *Roe* itself overlooked. See Amar, *supra* note 67.

government's business!—than the question of how and when one chooses to leave this world, advocates of this right have argued. Yet in 1997, the Court unanimously reversed an exuberant circuit court opinion that had declared a broad constitutional right to die. After setting forth the facts of the case, the Court launched its analysis as follows:

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.⁸¹

The Justices have likewise declined to recognize a constitutional right of patients to use otherwise illegal drugs such as marijuana even when a licensed physician has prescribed the drug in order to alleviate intense pain.⁸² Although such a right has considerable moral appeal to many thoughtful analysts and may one day come to persuade a majority of Americans and the lawmakers who answer to them, that day has not yet arrived. On this issue, as on many other issues involving unenumerated rights, the Court has shown little interest in leaping far ahead of America's lived experience.

IV. "HOUSES"

On New Year's Eve, 1787, Federalist Noah Webster (of later dictionary fame) spoofed Anti-Federalists who smelled tyranny around every corner and who had already begun to compose long lists of proposed amendments to the Constitution explicitly guaranteeing specific rights that these skeptics deemed at risk from the new regime. These critics had not gone nearly far enough, wrote Webster as he offered up an additional amendment proposal: "That Congress shall never restrain any inhabitant of America from eating and

81. *Washington v. Glucksberg*, 521 U.S. 702, 710-11 (1997) (citations and footnotes omitted); see also Michael W. McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 681-701.

82. *Gonzales v. Raich*, 545 U.S. 1 (2005).

drinking, *at seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on *his right*."⁸³

Webster was not alone in resisting the Anti-Federalist push for a detailed Bill of Rights. In most states, leading Federalists argued that no enumeration could possibly list all rights and that any omitted right might be at greater risk if stingy interpreters ever construed the list in negative-implication fashion. In the First Congress, Federalist Theodore Sedgwick declared that if the aim were truly to itemize all of the people's rights, Congress would need to specify "that a man should have a right to wear his hat if he pleased, that he might get up when he pleased; and go to bed when he thought proper."⁸⁴

In the end, the Founding generation rejected the broad Federalist argument that a Bill of Rights was unnecessary and dangerous. (It surely did not help that the Federalists had also argued, quite inconsistently, that the Philadelphia Constitution already contained a *de facto* Bill of Rights, in Article I, Section 9.) But in the drafting of the Bill, the Webster-Sedgwick concern did persuade the First Congress to stress, via the Ninth Amendment, that the new Bill of Rights did not aim to enumerate exhaustively all the rights that were in fact retained by the people.

Some of the very intrusions that Webster and Sedgwick smugly assumed that governments would never attempt—or at least close cousins of these intrusions—have in fact come to pass, often at the hands of state or local officials rather than the dreaded feds. The Framers of the Ninth Amendment and its Fourteenth Amendment counterpart, the Privileges or Immunities Clause, were thus farsighted in attempting to equip posterity with weapons to wield against government oppression whenever officials tried to overreach in the ways that Webster and Sedgwick thought unimaginable.

True, governments have generally not regulated on which side a man may lie in his own bed or when he must rise from that bed, but governments have at times tried to dictate with whom he may lie in that bed and have also tried to outlaw certain physical positions in that bed. Contrary to Webster's sanguine expectations, governments have also sought to regulate what persons may place in their mouths—perhaps not with intrusive rules about "eating and drinking," but rather with detailed dictates about which body parts of fully consenting adults may lawfully be brought into oral contact.

83. Noah Webster, N.Y. DAILY ADVERTISER, Dec. 31, 1787, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 34, at 194, 199 (Webster writing as "America").

84. 1 ANNALS OF CONG. 759-60 (Aug. 15, 1789).

A. *Property and Privacy*

Modern substantive due process law emerged in response to laws such as these. Notably, the particular brand of substantive due process revived by Justice Harlan in *Griswold* and prominently on display in unenumerated rights case law ever since has departed in one key respect from the brand of substantive due process that characterized the *Lochner* era. *Lochner's* watchword was “property,” whereas modern substantive due process instead highlights “privacy.”

Property by its very nature lends itself to a broad range of possible distribution patterns. Some of these patterns may be so highly unequal and so easily translatable into unequal political power as to threaten the Constitution’s vision of proper republican equality between voters and among candidates. In the *Lochner* era (which ran roughly from the mid-1880s to the mid-1930s), a wide property gap had begun to open up in America, separating the plutocratic haves from the proletarian have-nots. *Lochner*-style substantive due process aimed chiefly to thwart various governmental programs seeking to reduce these emerging inequalities of wealth and property.

Privacy, by contrast, is inherently more egalitarian. Whether fabulously wealthy or penniless, a person can be in only one bed at a time. Intimacy is distributed more equally across social classes than is property and in a way is far less likely to distort the nature of democratic politics.

To a blinkered literalist, property might seem to have a stronger constitutional claim than privacy. The word “property,” after all, appears twice in the Bill of Rights and again in the Fourteenth Amendment, whereas the word “privacy” is altogether absent from the written Constitution. But when we read between the lines and heed the document as a whole, with particular attention to its arc across the centuries, a different picture emerges. One of the most transformative amendments of the twentieth century blessed redistributive economic policy—in particular, a federal income tax that everyone understood would likely feature a progressive structure taxing the wealthy at steeper rates.⁸⁵ Many modern amendments have reinforced the idea of equality, even though the word itself is often absent. In centering modern unenumerated rights law on “privacy,” the modern Court has intuitively latched onto a concept that nicely blends the best of property and equality—a concept that has been an important element of America’s lived Constitution

85. See U.S. CONST. amend. XVI. For documentation of the expected progressivity of taxation under this Amendment, see AMAR, *supra* note 35, at 408-09.

from the Founding on, and one whose strength has only increased in American law and culture over time.

While Founding-era laws at the state and local level were often quite intrusive in purporting to regulate family structures and human sexuality, not all laws on the books were vigorously enforced. For instance, although various edicts in the early republic formally prohibited consensual sexual relations between adults, evidence rules at the time often prevented the “accomplices” from testifying against each other. (Both sexual partners were in a sense “interested parties” under Founding-era evidence theory.) As a result, these laws in practice were usually enforced only in cases where the offense had occurred in public in front of scandalized third parties who could testify to the breach of public-decency norms, or in cases of coercive sex where the defendant’s sexual partner was not an “accomplice” but rather a victim.⁸⁶

In their discussions of unenumerated rights, both Webster and Sedgwick had highlighted privacy, though neither man used the word. Both had invoked the bedroom as an obvious place where government ordinarily did not belong. A similar vision animated a Pennsylvania Anti-Federalist essayist, who raised the specter that a federal constable looking for “stolen goods” might pretextually “pull[] down the clothes of a bed in which there was a woman and search[] under her shift.”⁸⁷

In an effort to assuage privacy concerns such as this, the First Congress adopted a Fourth Amendment limiting the power of government to search and seize. Though the word “privacy” does not appear on the surface of the text, the concept is strongly implicit. Indeed, shortly after the Warren Court began reorienting unenumerated rights jurisprudence away from “property” and toward “privacy” in the 1965 *Griswold* case, the Justices did the same thing to Fourth Amendment jurisprudence in the 1967 *Katz* case. Prior to *Katz*, Fourth Amendment rules had pivoted on property law concepts, such as trespass. But in *Katz*, the Court held that the Fourth Amendment could apply even if no technical property rights violation had occurred. An unreasonable wiretap, for example, would violate the Fourth Amendment even if government had never set foot on the private property of the search target. As the second Justice Harlan explained in his influential concurrence in *Katz*, the key Fourth

86. See *Lawrence v. Texas*, 539 U.S. 558, 569-70 (2003).

87. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 154 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Historical Soc’y of Pa. 1888). This essay has recently been reprinted. See *Essay of a Democratic Federalist*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981).

Amendment issue was whether the government had violated a person's "reasonable expectation of privacy."⁸⁸

At least two of the words of the Fourth Amendment itself offered strong support for this vision: "persons" and "houses." The Amendment affirmed a general right of Americans to be secure against unreasonable searches and seizures of "their persons, houses, papers, and effects." The word "property" itself went unmentioned and was swept into the catchall category of all "effects." But intrusions upon individual bodies—"persons"—raised special concerns. As with privacy more generally, bodies are distributed in egalitarian fashion; the rich man and the poor man alike each has one body, one "person" entitled to special Fourth Amendment solicitude. Similarly, "houses" were singled out above and beyond all buildings in part because a person's house has always been a special place of privacy,⁸⁹ and in part because houses in American fact and folklore have been a particularly broadly distributed type of property.

At the Founding, one of the most famous, and famously egalitarian, affirmations of the sanctity of houses had appeared in a 1763 speech of William Pitt, a hero to many colonists:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!⁹⁰

88. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

89. In addition to "persons" and "houses," the Fourth Amendment singled out "papers" for special protections above and beyond all other stuff—"effects." The word "papers" also implicated a proto-privacy principle, as Lord Camden had made clear in a famous colonial-era search and seizure case in which he notably declared that "[p]apers are the owner's . . . dearest property; and . . . will hardly bear an inspection; . . . where *private* papers are removed and carried away, the *secret* nature of those goods will be an aggravation of the trespass." *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (C.P. 1765) (emphasis added); see also *id.* at 1063 (stating that the warrant at issue threatened "the secret cabinets and bureaus of every subject in this kingdom"). The special concern for "*private* papers" recurred in a companion case. *Wilkes v. Halifax*, 19 Howell's State Trials 1406, 1408 (C.P. 1769) (emphasis added); see also *Beardmore v. Carrington*, (1764) 95 Eng. Rep. 790, 793-94 ("[C]an we say that 1000 [lbs.] are monstrous damages as against him, who has granted an illegal warrant to a messenger who enters into a man's house, and prys into all his secret and *private* affairs . . . ?" (emphasis added)).

90. *Miller v. United States*, 357 U.S. 301, 307 (1958).

A similarly egalitarian vision surfaced during Reconstruction, as the Republican Party promoted homeownership in the Homestead Act's promise of 160 acres to Western farmers and flirted with a reformist ideal of forty acres and a mule for Southern freedmen.⁹¹ In the late twentieth and early twenty-first centuries, politicians of both parties have found common ground in a national policy promoting homeownership for Americans of all races and classes. Enormous and expensive pillars of this national policy—federal facilitation of the home-mortgage market and federal tax deductions of home-mortgage interest payments and of local property taxes—are virtually untouchable politically, and in this respect resemble relatively clear constitutional texts that place particular issues off-limits politically. These pillars are politically untouchable precisely because homeownership is a broadly egalitarian American ideal and practice, open to a wide slice of the voting citizenry.⁹² Homeownership is part of the American Dream and the basic national narrative. For many citizens, the home is the single largest family asset.⁹³

True, nothing in the written Constitution explicitly demands special protection of “houses” or “privacy,” but surely the document invites judges (and other interpreters) to attend to this explicit word and this implicit concept in pondering which unenumerated rights are properly claimed by the people. It also bears notice that the explicit word “house” and the underlying privacy concept are visible in the Third Amendment, preventing the peacetime quartering of troops in homes.⁹⁴

Whether intentionally or intuitively, the Justices have in fact developed a case law of both enumerated rights and unenumerated rights that recognizes the special significance of houses and what happens inside them. In *Griswold*, Justice Douglas's opinion for the Court began to move in just the right direction when he mentioned the Third and the Fourth Amendments in

91. See Homestead Act of 1862, 12 Stat. 292; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 70-71 (1988).

92. Social security benefits are politically entrenched in modern America for similar reasons.

93. See Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326 (1988).

94. See AMAR, *supra* note 10, at 62-63, 267. On the way in which this Amendment may also be seen as connected to sexual privacy issues, see, for example, Robert A. Gross, *Public and Private in the Third Amendment*, 26 VAL. U. L. REV. 215, 219 (1991), which quotes a colonist expressing hostility to Parliament's Quartering Act placing soldiers “abed” with America's “Wives and Daughters.”

tandem and even quoted the “house” language of both Amendments.⁹⁵ Alas, Douglas did not quite close the deal. He failed to highlight the word “house” as he should have; nor did he clearly and carefully explain how this key word could be read to signal the special sanctity of bedrooms.

In an earlier case involving the same Connecticut contraception law, Justice Harlan, writing only for himself, did a better job of drawing attention to the word “house,” to its explicit role in the constitutional text, and to the robust vision of privacy rights and family rights—of home life—animating this word. Harlan began by noting that “the concept of the privacy of the home receives explicit Constitutional protection at two places.” Harlan then quoted the Third and Fourth Amendments. While conceding that “this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home,” Harlan nevertheless insisted that Connecticut had created “a crime which is grossly offensive to this privacy” of the home. As Harlan explained:

[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. . . . [I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life.⁹⁶

Building on a similar foundation, Justice Kennedy’s majority opinion in *Lawrence* began with the special role of the home: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.”⁹⁷ Echoing both Douglas and Harlan, Justice Kennedy criticized laws criminalizing sodomy for their “far-reaching consequences, touching upon the most private human contact, sexual behavior, and in the most private of places, the home.”⁹⁸

95. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). At this precise point in his opinion, Douglas also quoted earlier Court language explicitly building on the proto-privacy reasoning of *Entick v. Carrington* discussed above in note 89. *Id.* at 484 n.*.

96. *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting). Note in particular the post-*Lochner* distinction that Harlan explicitly draws between “mere[] . . . property rights” and “the privacy of the home.” See also *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (reaffirming his views as expressed in *Poe*).

97. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

98. *Id.* at 567.

Beyond the contraception and sodomy cases, with their repeated emphasis on homes and bedrooms, the Court has crafted a series of specific house-protective doctrines in Fourth Amendment case law regarding home arrests, home surveillance, and the “curtilage” area surrounding homes;⁹⁹ has affirmed the right of persons at home to possess sexually explicit materials that might otherwise be unprotected by the First Amendment;¹⁰⁰ has recognized the constitutionally protected role of parents in making basic choices about their minor children’s education, including homeschooling;¹⁰¹ has ringingly upheld the unenumerated rights of extended family members to live together as a single household;¹⁰² and has also affirmed in connection with the Second Amendment the deeply rooted historical right of a homeowner to keep a gun in his home for self-protection.¹⁰³

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99. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (generally requiring warrants for home arrests but not for arrests outside the home); *United States v. Dunn*, 480 U.S. 294 (1987) (reaffirming and defining special protection for the curtilage the around home); *Kyllo v. United States*, 533 U.S. 27, 38 (2001) (demonstrating special sensitivity to high-tech surveillance of homes, especially of bathrooms and bedrooms, and stressing that the high-tech search technique at issue would enable the government to determine “at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’”).
100. See *Stanley v. Georgia*, 394 U.S. 557 (1969).
101. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing a constitutionally protected right to “establish a home and bring up children”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (“Under the doctrine of *Meyer v. Nebraska*, [there exists a] liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” (citations omitted)); *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (exempting Amish children from compulsory secondary education laws in a context in which “modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student’s home and alien to his daily home life”). Note that both *Meyer* and *Pierce* were prominently invoked in Justice Douglas’s opinion for the Court in *Griswold*, 381 U.S. at 481-83.
102. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
103. See *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); cf. *Semayne’s Case*, (1604) 77 Eng. Rep. 194 (K.B.) 198; 5 Co. Rep. 91 a, 93 a (“The house of every one is his castle, and if thieves come to a man’s house to rob or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is no felony and he shall lose nothing.”).

B. *Just Compensation*

One particularly visceral area of modern Court case law straddles the border between property-protection in general and house-protection in particular. Textually, the Fifth Amendment Takings Clause protects all forms of property: “Nor shall private property be taken for public use without just compensation.” But in practice, might it make sense for judges to be particularly vigilant in enforcing the vision of this Clause when private dwellings—houses—are involved?

For example, how much compensation is truly “just” compensation when the government uses its power of eminent domain to force a property owner to sell his parcel so that the government may use it for some legitimate government purpose? Where mere investment property is concerned, judges have good reason to avoid giving any special bonus or premium to the owner. To a pure investor, all property is fungible, and the money gotten from the forced sale of one parcel can easily be used to purchase another parcel of equal economic value. If judges generally gave investors a bonus above fair market value in setting the rate of just compensation, clever investors would have incentives to buy up land one step ahead of the government. Rewarding such strategic behavior would serve neither efficiency nor fairness.

But in a case of a homeowner displaced from his homestead, the matter seems different. In America’s lived Constitution, persons understandably have sentimental attachments to their houses.¹⁰⁴ These are not merely fungible investments. Rather, your house is your home—the place, perhaps, where you grew up, where your children were born or your parents died, where you have loved and been loved, and where many of the other most important events in your life have occurred. Putting a fair price on such a place when the government asserts a compelling need for the property involves a very different kind of calculus. If the government ends up paying a special bonus whenever a house is taken from its owner, this result is less likely to be grossly unfair or inefficient.

In a high-profile 2005 case, *Kelo v. City of New London*,¹⁰⁵ homeowner Susette Kelo argued that the government had no right to take her home and lot—even though the city stood ready to pay “just compensation”—because, she claimed, the taking was not for a proper “public use.” The government planned to use her lot by transferring it to a private real estate developer as part of a general neighborhood redevelopment project that would, it was hoped,

¹⁰⁴. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013 (1982).

¹⁰⁵. 545 U.S. 469 (2005).

shore up the local tax base. The Supreme Court sided with the city and held that this proposed use was every bit as legitimate as if New London had planned to use Susette Kelo's lot as part of a public park. The Court's decision provoked a firestorm of protest from grassroots activists and property rights advocates across America, and many states and localities responded with new legislation narrowing or prohibiting the use of eminent domain in situations involving private redevelopment projects.

Would *Kelo* have provoked the same populist backlash had the case involved the taking of a piece of commercial property from an absentee investor? If not, perhaps the deepest issue on the facts of *Kelo* was not how best to parse the phrase "public use" in the Takings Clause but instead how homeowners deserve to be treated under both the written and the unwritten Constitution—in particular, how a homeowner's emotional attachment to her home merits special respect, either in the compensation formula or in some other appropriate way.¹⁰⁶

It matters little whether judges enforce the idea that homes are special as a particular subdoctrine under the law of Fifth Amendment just compensation; or instead use the Fourth Amendment to craft special rules when the government tries to "seize" a "house"; or instead rely more openly on an unenumerated right of the people to special consideration whenever government asserts the power to oust them from their homes. What matters more is that faithful interpreters of the Constitution heed America's lived Constitution both in construing the meaning of enumerated rights and in pondering the possible existence of various unenumerated rights.

V. "UNUSUAL"

Honoring America's lived Constitution requires careful counting to assess accurately the daily reality of rights. But how should faithful interpreters count? Should they analyze the data using the yardstick of one state, one vote, or the competing metric of one person, one vote? How large a consensus is needed before recognition of a new right is justified? After that number is

106. See generally John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783 (2006). In addition, see DANIEL A. FARBER, *RETAINED BY THE PEOPLE* 166-70 (2007). In floating the idea of special eminent domain rules to protect houses above and beyond other real property, Professor Farber astutely highlights several key facts about Susette Kelo: "The house had been in her family for more than one hundred years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son, who also joined in the lawsuit, lived next door with his family in the house he was given as a wedding gift." *Id.* at 168-69.

reached and a new right is declared, should interpreters stop counting or should they continue to track the new right's ongoing popularity?

A. *How To Count*

Suppose that the policies of, say, Wyoming and California differ dramatically on a rights-related issue. Should the norms and practices of Wyoming's half-million inhabitants be given the same weight, Senate-style, as those of California's thirty-six million residents? Or should a proper tally reflect the population differential, House-style? This issue has pointedly arisen in cases pondering whether a given form of criminal punishment practiced in some states but not others violates the Eighth Amendment, which prohibits "cruel and unusual punishment."

While the modern Court has splintered on various issues of counting methodology,¹⁰⁷ "unusual" should mean what it says. If 240 million modern Americans live in states that flatly prohibit punishment *X* while only sixty million live in states that vigorously practice punishment *X*, then *X* is "unusual" in the ordinary everyday meaning of that word. This fact is true regardless of state lines—true, that is, whether the sixty million live in the two most populous states or the twenty-six least populous states. Citizens, not states, should thus count equally in interpreting both the Eighth Amendment word "unusual" and modern America's lived Constitution more generally. (Note that whether hypothetical punishment *X* is "cruel" as well as unusual is of course a separate question. Perhaps punishment *X*, although unusual, is in general less cruel than counterpart punishments in other places.)

The historical evolution of the Eighth Amendment confirms this plain-meaning approach to the word *unusual*, a word whose significance has varied across time and space. The Founders borrowed the phrase "cruel and unusual" from the celebrated English Bill of Rights of 1689.¹⁰⁸ In England, the phrase aimed chiefly to prevent bloodthirsty judges from inflicting savage penalties that were legislatively unauthorized—that is, "unusual."¹⁰⁹ If Parliament had

107. For more detailed discussion and analysis, see Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part One): How the Atkins Justices Divided While Summing*, FINDLAW (June 28, 2002), <http://writ.news.findlaw.com/amar/20020628.html>; and Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part Two): How the Atkins Justices Divided While Summing*, FINDLAW (July 12, 2002), <http://writ.news.findlaw.com/amar/20020712.html>.

108. "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., ch. 2 (1689).

109. AMAR, *supra* note 10, at 87, 279.

previously approved a given punishment for a given crime, that punishment, even if unspeakably inhumane, was not “unusual” within the meaning of the 1689 declaration. To get a sense of the savagery that Parliament was willing to authorize and that therefore was perfectly lawful in post-1689 England, we need only hearken to the typical sentence that a judge was instructed to read to a defendant convicted of high treason:

You are to be drawn upon a hurdle to the place of execution, and there you are to be hanged by the neck, and being alive cut down, and your privy-members to be cut off, and your bowels to be taken out of your belly and there burned, you being alive; and your head to be cut off, and your body to be divided into four quarters, and that your head and quarter be disposed of where his majesty shall think fit.¹¹⁰

Of course, in England Parliament was sovereign, and so it made perfect sense that an English bill enacted by Parliament itself would operate to restrict not Parliament but the king’s men—including judges, who in the 1680s still answered to the crown. The American Bill of Rights, by contrast, emerged a century later in an effort by the sovereign People to limit all federal servants, including Congress. In this new context, the Eighth Amendment Cruel and Unusual Punishments Clause had some bite against Congress. But not much; so long as Congress routinely authorized a particular punishment, it would be hard to say that the punishment, even if concededly cruel, was “cruel *and unusual*.”

Here, as elsewhere, the meaning of the Bill of Rights shifted when its words and principles were refracted through the prism of the Fourteenth Amendment. Reconstruction Republicans used Section 1 of that Amendment to take special aim at the abusive practices of state governments of the Deep South, a region that had lagged behind national norms of liberty and equality. Even if a particular state legislature consistently authorized a given punishment, that consistency hardly made the practice “usual” *when judged by the national baseline envisioned by the Fourteenth Amendment*.¹¹¹ Thus a clause that originated in England in 1689 as a limit on (crown) judges vis-à-vis (parliamentary) legislators morphed in America in 1868 into a clause empowering (federal) judges vis-à-vis (state) legislators—and also vis-à-vis federal legislators if Congress ever tried to enact harsh punishments at odds with the broad consensus of state practice.

110. *Id.* at 82 (quoting John H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND 1550-1800*, at 15, 42 (J.S. Cockburn ed., 1977)).

111. *Id.* at 279-80.

Although Justice Scalia has argued that modern Eighth Amendment interpreters should count each state equally regardless of state population, this approach warps the Reconstruction vision. According to Scalia, any effort in a judicial survey of actual state practice to give California more weight than Wyoming because California has far more people and far more punishment cases is “quite absurd” because what should matter is “a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.”¹¹² Justice Scalia somehow missed the fact that, strictly speaking, the case before him when he wrote these words was a Fourteenth Amendment case—a case about whether a particular state practice violated the Reconstruction Amendment’s vision of basic rights. (Indeed, almost all “cruel and unusual punishment” cases that arise today are, strictly speaking, Fourteenth Amendment cases.) The enactors of the Fourteenth Amendment surely believed that congressional legislation would provide important evidence of proper national norms and baselines. But on Scalia’s logic, such legislation cannot count because this legislation emerges from a process in which California does weigh more than Wyoming in both the House and the presidency—two of the three bodies involved in ordinary lawmaking.

Contrary to Scalia’s principles, the modern Court has paid special heed to congressional legislation in measuring state penal practices and has also counted punishment practices in the national capital, which Scalia’s approach, with its strict emphasis on “sovereign States,” would presumably brush aside as constitutionally irrelevant.¹¹³ While modern case law has not always openly paid more attention to more populous states, the Justices in future cases should do so routinely and explicitly—or at least they should do so if they seek to maximize expositional clarity and optimize the soundness of their rulings. Judicial interpreters should be seeking to discover and channel the collective wisdom of the American people, and on certain questions the wisest way to tap that collective wisdom is to survey all Americans and to weight each American equally.¹¹⁴

112. *Atkins v. Virginia*, 536 U.S. 304, 346 (2002) (Scalia, J., dissenting).

113. See, e.g., *Atkins*, 536 U.S. at 314 & n.10 (majority opinion); *Kennedy v. Louisiana*, 554 U.S. 407, 421-25 (2008); *Kennedy*, 554 U.S. at 455-57 & n.4 (Alito, J., dissenting, joined inter alia by Scalia, J.); *Kennedy v. Louisiana*, 129 S. Ct. 1, 3 (2008) (denying rehearing); *Graham v. Florida*, 130 S. Ct. 2011, 2024 (2010).

114. In ordinary language, the word “unusual” focuses not merely on laws on the books but also on the law as actually applied. Laws exist allowing jaywalkers to be jailed; but being jailed for jaywalking in America is surely “unusual.” (Whether it is also “cruel” is another question.) Examining law as actually applied properly brings constitutional institutions other than the legislature into the frame of Eighth Amendment analysis. Criminal laws are often written in overbroad ways precisely because it is understood, and in some respects

The basic idea here is that there is no reason to think that citizens of small states are any wiser than citizens of larger states about the proper meaning and scope of fundamental rights. Unless there is some particular reason to believe that distinct and vital interests of small states are at special risk, why should the views of each small-state voter count for more than the views of each large-state voter? Even if it makes sense in certain contexts—contexts such as the constitutional amendment process—to overweight small states in order to help these states preserve their proper status and separate existence against potential large-state self-aggrandizement, the domain of fundamental rights does not place small states at any distinctive risk of subjugation. As any properly recognized right would bind large states in the same way that it binds small ones, there is little risk of large-state oppression or self-dealing in this constitutional quadrant.

Treating Americans equally need not entail simple majority rule. All members of a given jury vote equally, but a criminal jury must typically be *unanimous* to convict; some civil juries by contrast operate by *supermajority* rules; and grand juries typically use *simple majority* rule. Similarly, different counting thresholds may be appropriate for different sorts of rights cases. If the issue is whether a given punishment is genuinely *unusual*, presumably the punishment may sometimes be upheld even if it is a minority practice. If, say, states accounting for forty-five percent of the nation's population routinely use punishment *X*, it would be hard to say that *X* is truly *unusual* even though it is a minority practice in America. In pondering other unenumerated rights, however, in cases where judges are not purporting to apply the Eighth Amendment word *unusual*, it may sometimes make sense for courts to strike down a practice simply because fifty-five percent of ordinary Americans strongly believe that this practice violates their fundamental rights. Textually, a strongly held belief by fifty-five percent of Americans that they have a constitutional right against abusive practice *Y* may suffice to say that this right is truly an unenumerated right of "the people," a genuine privilege "of citizens" recognized as such by citizens.

Some scholars have suggested that a new unenumerated right should not be recognized absent support for that right in three-fourths of the states—the high bar set by Article V for constitutional amendments.¹¹⁵ But in recognizing

constitutionally required, that such laws will be softened in practice by merciful discretion exercised by prosecutors, grand juries, criminal trial juries, trial judges, governors, and parole boards. Each of these institutions represents the public, too, and helps define what modern America really does believe and practice when it comes to punishment.

115. See, e.g., Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM.

new rights, judges are not *amending* the document. Rather, they are *applying* it, construing directives in the Ninth and Fourteenth Amendments that call for protection of fundamental but nonspecified rights—directives that have *already* cleared Article V hurdles at the time these Amendments were enacted. Part of the reason that Article V sets a high bar for ordinary constitutional amendments is that if the bar were set too low, then government-initiated amendments might end up weakening explicitly protected rights. But this concern about the risk of rights diminution is irrelevant when the issue is instead whether new rights rooted in evolving popular sentiments and practices should be added to the existing stock of enumerated and unenumerated entitlements.

Section 5 of the Fourteenth Amendment clearly authorized Congress to enact legislation recognizing new rights, and this Section envisioned only ordinary national majorities, not special Article V supermajorities. Since the Fourteenth Amendment also envisioned judicial recognition of new rights to supplement Congress whenever Congress was asleep at the switch, overwhelmed with other agenda items, or controlled by critics of Reconstruction, Section 5 provides a better benchmark for judicial rights-finding than does Article V. Thus, judges should look for the same kind of broad national support for a new right that would warrant a properly motivated and smoothly functioning Congress to recognize the right under its own authority.¹¹⁶

B. After the Count

If judges may properly strike down highly unusual state (or even federal) laws that intrude on a lived experience of liberty, will governmental innovation and experimentation be unduly stifled, as trigger-happy judges kill the first glimmerings of legal reform when new issues arise and new approaches begin to win popular support? Not if the judges proceed with caution and humility, with close attention to the danger of what might be called “judicial lock-in.”¹¹⁷

& MARY L. REV. 923, 1001 (2006); cf. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 16 (2008) (noting this position but neither endorsing nor rejecting it).

¹¹⁶ For more discussion of Congress’s role under Section 5 as envisioned by the Framers of the Fourteenth Amendment, and of the Court’s role as a critical backstop in the event that Congress ever fails to act with proper vigor, see notes 4 and 35 above and the sources cited therein.

¹¹⁷ For a wide-ranging discussion, see Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1 (2001).

The danger is that once a particular government practice has been invalidated by judges, the practice will thenceforth wither away and thus be forever off-limits even if a broad swath of Americans would like to see the practice revived at some later point. Such a judicially induced lock-in would turn proper unenumerated-rights jurisprudence on its head. Doubtful laws should be judicially invalidated because they are unusual, not unusual simply because they have been judicially invalidated.

The most democratically sensitive and sophisticated version of lived constitutionalism would avoid judicial lock-in of unenumerated rights by inviting judges (or other constitutional decisionmakers) to reconsider their initial invalidations when presented with updated evidence of recent legislative patterns. For example, if a large number of large states were to enact new laws similar to a law previously struck down – new laws with delayed start dates so as to allow for anticipatory judicial review – such enactments themselves would be new data to ponder.¹¹⁸

While a wave of legislation would not ordinarily suffice to trump a clearly specified textual right, we must recall that here we deal with rights that have never been textually enumerated in the Constitution. If the original judicial reason for deeming these rights to be full-fledged constitutional entitlements derived from the fact that American lawmakers generally respected these rights in practice, then such rights should lose their constitutional status if the legislative pattern changes dramatically. In this particular pocket of unwritten constitutionalism, what should ideally emerge is a genuine dialogue among courts, legislators, and the citizenry.

118. The Court's death penalty jurisprudence offers an illustrative case study. In the late 1960s, actual executions dropped to zero in America. In response to this apparent national consensus, the Court in 1972 seemed to hold the death penalty categorically unconstitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972). Over the next four years, both Congress and some thirty-five states representing an overwhelming majority of the American population pushed back against this ruling with a new round of death penalty statutes. In response, the Court reconsidered its position and gave its blessing to the penalty in certain situations where the underlying crime was particularly heinous and where strict procedural safeguards were in place. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Since then the Court has imposed additional substantive and procedural limits on capital punishment with a close eye on evolving American practice. *See, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling, in effect, *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Roper v. Simmons*, 543 U.S. 551 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).