

## CAN YOU WATCH UNENUMERATED RIGHTS DRIFT?

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By this point in the Symposium, observers will have noticed the obvious; there is no category *unenumerated rights*. Indeed, there cannot be such a category if we think that an analytic category must have some reasonably stable content. The whole point of the so-called category is to give us a conceptual tool to use when thinking about rights that you can't find anywhere else, no matter how hard you look. But, if you can't find them anywhere else, it's not entirely clear what "they" might be. Or, more precisely, *anything* can count as an unenumerated right. Consider *Bowers v. Hardwick*<sup>1</sup> and *Lawrence v. Texas*.<sup>2</sup> Justice Byron White was surely correct in asserting that there is no enumerated right to homosexual sodomy in the Constitution,<sup>3</sup> but Justice Anthony Kennedy was equally correct in asserting that there was an enumerated right to liberty in the Constitution.<sup>4</sup>

What, then, might we think about when dealing with the category *unenumerated rights*? We could begin by observing that the term is *used* in constitutional discourse by, as the phrase goes, competent speakers. What we might do, then, is try to figure out what the term is doing in that discourse, not in the sense, "why on earth are they using *that* term?" but in a sense more like, "what are they getting out of using it?"<sup>5</sup> People will go about answering such a question in their own ways, and I do not contend that mine is the only correct one, but for me the sensible approach to an answer comes through historical and political analysis. In this short essay I do not plan to provide an extensive genealogy of the term *unenumerated rights*, but will instead be more allusive than comprehensive.

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<sup>1</sup> 478 U.S. 186 (1986) (5-4 decision), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> *Bowers*, 478 U.S. at 194 (describing the claim as "having little or no cognizable roots in the language or design of the Constitution").

<sup>4</sup> *Lawrence*, 539 U.S. at 564 (referring to "liberty under the Due Process Clause of the Fourteenth Amendment"). This is enumerated at least in a sense, as I discuss below in Part II.

<sup>5</sup> I am here resisting a formulation of the sort, "what functions does the term perform?" because that formulation suggests at least a more instrumentalist approach to the matter than seems appropriate to me.

At first I thought that this essay would deal with what Jack Balkin has called “ideological drift.”<sup>6</sup> Ideological drift occurs when a legal concept like freedom of speech starts out with a particular political valence and then comes to have a substantially different political valence. The case of free speech provides seemingly the easiest example of ideological drift. From the 1920s to the 1970s or so, liberals typically supported challenges to speech regulations because, taking all the possible occasions of regulation into account, liberals believed that, on balance, governments would try to suppress liberal or leftist expression more than they would try to suppress conservative or right-wing expression.<sup>7</sup> Since then, though, free speech has become *conservatives’* darling.<sup>8</sup> They have used it in the culture wars to challenge hate speech regulation and antidiscrimination laws.<sup>9</sup> And, as perceptive observers understood early on, it has become the modern substitute for substantive due process as the constitutional vehicle for challenging economic regulations.<sup>10</sup>

I had initially thought that I would describe a similar ideological drift in the idea of unenumerated rights. The story would be the same; unenumerated rights used to be the province of liberals, particularly with respect to privacy and individual autonomy, but has now become the province of conservatives. The most obvious examples come from the Supreme Court’s punitive damages decisions, but most of the contemporary Court’s federalism decisions, along with aspects of its regulatory takings doctrine, involve the judicial enforcement of unenumerated rights.

These cases suggest that unenumerated rights have drifted from the left to the right. On reflection, though, I have become less confident about that statement. The reason arises from the proposition

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<sup>6</sup> See, e.g., J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

<sup>7</sup> Cf. MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 389–402 (2000) (tracking the Court’s rulings regarding political speech during the mid-twentieth century).

<sup>8</sup> Cf. *id.* at 431–32 (“Today, some justify limiting speech by appealing to concepts such as . . . the idea that core constitutional values make certain messages illegitimate. . . . Ironically, suppression theories advocated by modern critics resemble historical rationales for limiting anti-slavery speech.”).

<sup>9</sup> See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (5-4 decision) (holding that a public accommodations law requiring Boy Scouts of America to admit homosexual members violated the organization’s First Amendment rights); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (ruling unconstitutional on free speech grounds an ordinance against placing hate symbols on private property). *Dale* actually invoked a right of “expressive association” related to, but distinct from, the right of free expression and, to that extent, might itself be taken as an example of a conservative use of an unenumerated right. 530 U.S. at 648.

<sup>10</sup> See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4–5 (1979) (critiquing a case in which the Supreme Court found business advertising to be protected speech).

that, for a legal concept to drift from left to right or right to left, it had to have been somewhere in the first place. And it is not clear to me that unenumerated rights—and, indeed, *any* rights—ever were located anywhere on the political spectrum. By this I do not mean that the domain of rights exists somewhere above or independent of politics. Rather, I mean to make three points. First, and perhaps least interesting, everyone, right and left, believes that the courts should enforce unenumerated rights. They simply disagree about which such rights the courts should enforce. Second, as noted earlier, it may be that no rights are enumerated in any interesting sense. At the point of application or specification, constitutional text disappears and something else takes its place. And third, as a result of the first two points, unenumerated rights are always everywhere on the political spectrum. The category certainly cannot drift and, I believe, neither can any particular right within the category.

This essay proceeds by elaborating on those three points.

## I. CATALOGUING UNENUMERATED RIGHTS

Here I enumerate unenumerated rights, with an initial effort at locating them on the political spectrum. The discussion will be brief, because other articles in this Symposium provide the particulars in ways that need no repetition here. My aim here is to show that unenumerated rights have been, and are, used in the service of conservative as well as liberal goals—and to resist a narrative in which unenumerated rights were once the property of conservatives, became the property of liberals, and have become the property of both.

### A. *On the Left*

The liberal versions of unenumerated rights are well-known. Consider this list, offered by James Fleming as a positive description of unenumerated rights recognized in contemporary U.S. constitutional law:

- liberty of conscience and freedom of thought
- freedom of association, including both expressive association and intimate association, whatever one's sexual orientation
- the right to live with one's family, whether nuclear or extended
- the right to travel or relocate
- the right to marry
- the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy
- the right to direct the education and rearing of children

the right to exercise dominion over one's body, including the right to bodily integrity and ultimately the right to die.<sup>11</sup>

Two issues leap out upon reading this list. First, why eight unenumerated rights and not ten or fifteen (if we were to break out some of the clauses into separate rights), or one or two (if we were to subsume some items into others)? Precisely because the rights are not differentiated in some authoritative text, unenumerated rights can proliferate or disappear, making it hard to watch them over time.

Second, and more interesting, even describing these rights as unenumerated is problematic. For all the criticism he has taken, Justice William Douglas tied the right to privacy in *Griswold v. Connecticut* to several constitutional provisions.<sup>12</sup> The Court in *Roe v. Wade*<sup>13</sup> and *Lawrence* located the right to autonomy in the Due Process Clause,<sup>14</sup> and—again despite John Hart Ely's well-known derisive comment on the very idea of substantive due process<sup>15</sup>—the proposition that the Due Process Clause protects against substantively arbitrary government actions goes back a long way, indeed to the Clause's origins in the Magna Carta.<sup>16</sup> And, if you do not think that is good enough, consider the proposition that the right can readily be rooted in the Privileges or Immunities Clause,<sup>17</sup> a text that was unavailable to the Court in *Roe* only because of the mistaken earlier decision in the *Slaughter-House Cases*.<sup>18</sup> The right of expressive association might be rooted in the First Amendment,<sup>19</sup> as could liberty of conscience and freedom of thought.<sup>20</sup>

Even at the start, then, calling something an unenumerated right seems problematic. Those who believe a particular right deserves protection by means of judicial enforcement *might* accept the charac-

<sup>11</sup> JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 91 (2006).

<sup>12</sup> See 381 U.S. 479, 484 (1965) (describing the various guarantees in the Constitution's amendments that produce an implicit privacy right). For defenses of Justice Douglas's textualism in *Griswold*, see David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 31-32 (1999), and Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 75 (1991).

<sup>13</sup> 410 U.S. 113 (1973).

<sup>14</sup> U.S. CONST. amend. XIV, § 1, cl. 3.

<sup>15</sup> JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

<sup>16</sup> See JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 7 (2003) (describing the Magna Carta's influence on development of constitutional due process rights).

<sup>17</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>18</sup> 83 U.S. (16 Wall.) 36 (1870).

<sup>19</sup> See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (describing the right of association as closely related to the enumerated freedoms of speech and assembly).

<sup>20</sup> For a discussion of the connection between freedom of conscience and religious liberty, see Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little “Conscience,”* 1996 BYU L. REV. 645, 649 (arguing for a statute linking “conscience” and religious liberty).

terization of their favored right as unenumerated, but they need not do so: texts are available for pretty much everything—and maybe the qualification is unnecessary. To use Frank Michelman's terminology, perhaps there are *no* rights outside the domain identified by the use of "standard legal methods,"<sup>21</sup> because those methods are so eclectic, flexible, and accommodating that a good lawyer can use them to explain how any particular right is compatible with the law as it is.<sup>22</sup>

### B. On the Right

The conservative catalogue of protected unenumerated rights is newer but by now familiar. The clearest case is *BMW of North America, Inc. v. Gore*, in which the Court held that excessive punitive damages violated the Due Process Clause.<sup>23</sup> Having rejected arguments based on the textual Excessive Fines Clause<sup>24</sup> and procedural due process,<sup>25</sup> the Court majority was left only with substantive due process, as Justice Antonin Scalia pointed out.<sup>26</sup> The subsequent decision in *State Farm Mutual Auto Insurance Co. v. Campbell* gives ample fuel to critics of the judicial enforcement of unenumerated rights who worry that, in doing so, judges simply make things up.<sup>27</sup> There the majority held that punitive damages in excess of ten times actual damages were presumptively unconstitutional.<sup>28</sup>

Even Justice Scalia has sometimes bought into the enforcement of unenumerated rights, though. Writing for the Court in *Printz v. United States*, Justice Scalia enforced a principle barring Congress from "commandeering" the legislative or executive apparatuses of state government to perform national tasks.<sup>29</sup> Justice Scalia acknowledged that "there is no constitutional text speaking to this precise

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<sup>21</sup> Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 126 (2006).

<sup>22</sup> For additional discussion, see *infra* text accompanying notes 38–46.

<sup>23</sup> 517 U.S. 559, 562, 568 (1996) (5–4 decision). *But cf.* Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 121 (2005) (observing that *Gore* "appears to be textually untethered").

<sup>24</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 (1989) (rejecting an Excessive Fines Clause challenge to punitive damages); *cf.* U.S. CONST. amend. VIII, cl. 2 ("[E]xcessive fines [shall not be] imposed.").

<sup>25</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991) (rejecting a procedural due process challenge).

<sup>26</sup> *Gore*, 517 U.S. at 600–02 (Scalia, J., dissenting); see also Zipursky, *supra* note 23, at 110–29 (describing the Court's path in evaluating the punitive damages question).

<sup>27</sup> 538 U.S. 408 (2003).

<sup>28</sup> *Id.* at 425 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

<sup>29</sup> 521 U.S. 898, 925, 935 (1997).

question.”<sup>30</sup> In other contexts that observation would have led him to end the opinion immediately. Instead, he went on to find what can only be called an unenumerated right for states to be free from commandeering.

The same can be said of the Court’s jurisprudence immunizing state governments from monetary liability for their violations of national law. Initially Justice Scalia worried that such an immunity could not be justified on textual grounds.<sup>31</sup> Eventually he came to the view that the immunity rested on constitutional structure and presuppositions.<sup>32</sup> And, when the Court enforced this immunity against suit in *state* courts,<sup>33</sup> the disconnection between text and right was transparent.

As with the unenumerated rights liberals invoke, these rights find their justification in constitutional structure and presuppositions. For conservatives, the structure is one of federalism, for liberals, one of individual liberty; for conservatives, the presupposition is that the national government has limited powers, for liberals, that all governments must avoid arbitrary infringements on fundamental liberties. But the structure of the constitutional right is similar.

Even the regulatory takings doctrine is only loosely tied to constitutional text. True, the Fifth Amendment refers to takings of private property.<sup>34</sup> But, as scholars have demonstrated, it is about as clear as these things get that in the founding era, a “taking” was what we now know as a permanent physical occupation, not a regulatory restriction on a property owner’s use of his property.<sup>35</sup> When confronted with

<sup>30</sup> *Id.* at 905.

<sup>31</sup> *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 495–96 (1987) (plurality) (Scalia, J., concurring in part and concurring in the judgment). The reason is that the only text bearing on the issue, the Eleventh Amendment, clearly provides immunity only against suits brought against a state by those who are not its own citizens. *See* U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

<sup>32</sup> *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669–70 (1999) (Scalia, J.) (“Though its precise terms bar only . . . suits brought against one State by citizens of another State . . . , we have long recognized that the Eleventh Amendment [restored] the sovereign immunity that the States possessed before entering the Union.”).

<sup>33</sup> *See Alden v. Maine*, 527 U.S. 706, 758–60 (1999) (Kennedy, J.).

<sup>34</sup> *See* U.S. CONST. amend. V, cl. 5 (“[N]or shall private property be taken for public use, without just compensation.”).

<sup>35</sup> *See* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1101 (1999) (arguing “that the Takings Clause was originally understood as referring only to appropriation”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (“The Clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.”). *But see* Eric R. Claeyes, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553 (2003) (arguing that the natural rights philosophy prevalent at the founding informed the

this evidence, Justice Scalia, for the Court, wrote a footnote saying that, whatever was true at the founding, by the time the Fourteenth Amendment was adopted and certainly by today, the concept of *taking* had expanded to include regulatory takings.<sup>36</sup> Treating regulatory takings as within the category of constitutional takings reflects a modernist conception of property, and to that extent the regulatory takings doctrine protects a right not enumerated in the original text.

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Here we have the first reason why unenumerated rights cannot drift from left or right, or otherwise: For something to drift, it first has to be somewhere, and then later somewhere else. But, because people located at all points on the political spectrum want the courts to enforce unenumerated rights, the category is already spread out across that spectrum. The reason, once again, is that standard legal methods are accommodating indeed.

## II. HOW ALL RIGHTS ARE EQUALLY ENUMERATED OR UNENUMERATED

The fact that the judges who decided the cases I have described did not think that they were simply making things up suggests the difficulty with the term *unenumerated rights*. As far as I am aware, no one advocates enforcing truly unenumerated rights, that is, rights that have no connection whatever to the Constitution's text. Saying that a decision enforces an unenumerated right is sometimes simply to disparage the decision as entirely groundless, or, as Justice White suggested, perhaps only to disparage a claim as among the weakest possible within our system.<sup>37</sup> To that extent, we have an answer to the

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founders' understanding of property in a way that makes a regulatory takings doctrine compatible with their understanding).

<sup>36</sup> Justice Scalia used the note to expand on his point that the understanding of Takings Clause compact has changed and "become part of our constitutional culture":

Justice Blackmun expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant. The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses . . . were out of accord with *any* plausible interpretation of those provisions. Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in *Mahon*. Since the text of the Clause can be read to encompass regulatory as well as physical deprivations . . . , we decline to do so as well.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 & n.15 (1992) (references omitted).

<sup>37</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

question, “what are they doing when they use the term?” The answer is that they are criticizing or jeering or insulting the decision or claim. In this aspect, *unenumerated right* is a term of abuse.

Somewhat less disparagingly, saying that a decision enforces an unenumerated right might mean that the connection between the right enforced and the Constitution’s text is not strong enough. Then, though, it would be nice to have some coherent account of how we know when a connection is strong enough. Here is another take on this point: Return to the dispute between Justices White and Kennedy over whether there is an enumerated right that protects gays’ sexual activities; the former says there is no enumerated right to engage in homosexual activities, the latter that there is a right to be free from arbitrary restrictions on fundamental interests. The example could be repeated: there is an enumerated right to freedom of speech but no enumerated right to freedom to impose reputational harm on others by distributing false statements about them, there is an enumerated right to equal treatment under the law but no enumerated right to have government decisions made without regard to race, and on and on. In one sense, then, questions about unenumerated rights are questions about the level of abstraction on which we are to understand constitutional language. And, I think, scholars and judges have established that there is no *analytic* basis for selecting one rather than another level of generality or specificity.<sup>38</sup>

We can see this point in a common critical rhetoric about Supreme Court decisions. In the context of unenumerated rights, the rhetoric is embodied in the demand; show me the place in the Constitution where you find the right to privacy—or the right to an abortion—located. But, exactly the same rhetoric is available, and used, when the Court makes a controversial decision that it ties to constitutional text: “You say that the Constitution protects nude dancing. Where does it say that?” And, of course, the answer, “in the First Amendment,” is inadequate, at least to the critical questioner, because she will respond, “but how is dancing—wordless, after all—‘speech’?” At that point, the discussion gets into considerations of free speech theory, precedent, and the like—precisely what happens when the Court enforces what its critics describe as an unenumerated right.

Justice Scalia’s observation in *Printz* that “there is no constitutional text speaking to this *precise* question”<sup>39</sup> is universally true. The reason is that all constitutional provisions are written on a reasonably high

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<sup>38</sup> For the classic discussion, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“The selection of a level of generality necessarily involves value choices.”).

<sup>39</sup> *Printz v. United States*, 521 U.S. 898, 905 (1997).



level of abstraction, as they must be for the document to be a constitution.<sup>40</sup> During the confirmation hearings on Judge Samuel Alito's nomination to the Supreme Court, Senator Dick Durbin tried to make the point:

The reason I asked you about [*Brown v. Board of Education* and *Roe v. Wade*] is that neither of those cases referred to explicit language in the Constitution. Those cases were based on concepts of equality and liberty within our Constitution, and the *Griswold* case took that concept of liberty and said it means privacy, though the word is not in our Constitution, and the *Brown v. Board of Education* case took the concept of equality, equal protection, and said, that means public education will not be segregated.<sup>41</sup>

Judge Alito responded with an extended description of *Brown v. Board of Education*, in the course of which he said that *Brown* was "based squarely on the language of the Equal Protection Clause," and the "magnificent principle" of equality.<sup>42</sup> The precise content of that principle, though, surely is not set out in the words "equal protection of the laws."<sup>43</sup> To make the obvious points: Judge Alito said, "the principle that was finally recognized in *Brown v. Board of Education*, after nearly a century of misapplication of the Fourteenth Amendment, is that denying people the opportunity, people of a particular race the opportunity to attend schools, or for that matter, to make use of other public facilities that are open to people of a different race, denies them equality."<sup>44</sup> As a critic of *Brown* might have said, you can look at the words "equal protection of the laws" as hard as you can, and you are not going to find *that* principle enumerated in the text. You are not even going to find a principle of racial equality "squarely" in "the language of the Equal Protection Clause."<sup>45</sup> To get from that clause to the result in *Brown*, you have to do some legal analysis, the effect of which is to lead the courts to enforce a right specified at a level on which it cannot be said that the right is an enumerated one.<sup>46</sup>

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<sup>40</sup> That is one of the things John Marshall meant in writing, "[W]e must never forget, that it is a constitution we are expounding." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>41</sup> *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 452 (2006) [hereinafter *Confirmation Hearing*] (statement of Sen. Durbin).

<sup>42</sup> *Id.* at 453 (statement of then-Judge Alito).

<sup>43</sup> U.S. CONST. amend. XIV, § 1, cl. 4.

<sup>44</sup> *Confirmation Hearing*, *supra* note 41, at 453.

<sup>45</sup> *Id.*

<sup>46</sup> One of the more amusing examples of describing specific constitutional principles as expressly set out in the Constitution is the claim that race-based affirmative action programs are made unconstitutional by the plain language of the Equal Protection Clause. They may be unconstitutional, but if so it is not because they violate a right whose content is given by the Constitution's text alone.

All constitutional rights are equally enumerated and unenumerated. I know of no metric that would allow us to say that the distance between the word *liberty* and the rights protected in *Roe* and *Lawrence* is any greater than the distance between the words *freedom of speech* and the rights protected in the flag-burning cases or the nude-dancing cases or, indeed, the seditious-speech cases. We have to do legal analysis that goes beyond the text, and even beyond the understandings at the time the relevant constitutional provisions were adopted, with respect to all of them.<sup>47</sup>

We now have a second reason that unenumerated rights cannot drift. The category, including as it does either all constitutional rights or none, has either too much or too little content for us to observe drift. Still, as I noted at the outset, there seems to be some sense that something *like* drift seems to occur. I turn to an examination of how that sense might arise.

### III. THE POLITICAL VALENCE OF UNENUMERATED RIGHTS

We can begin this examination by returning to the use of the phrase *unenumerated right* as a term of abuse and opprobrium. I have argued that it is available to everyone for this purpose. Its recent history is that conservatives first deployed it in this way, and liberals responded either with a freestanding use of the term or (probably less effectively) in the *tu quoque* form.<sup>48</sup> I suggest two mechanisms associated with the prevalence of the use of the phrase as a term of opprobrium: denial and opportunism. The basic idea is that the term is used as a way of suggesting without arguing that the toolkit of “standard legal methods” is, or should be, smaller than it has been. It is only because the toolkit is so large that any right can be described as enumerated (because connected by standard legal methods to text). Restrict the permissible methods, and the term *unenumerated rights* becomes intelligible.

- Denial: “The rights you like are truly unenumerated; the ones we like are tied (closely enough) to constitutional text, and so are enumerated.” The question about denial is, how can it work given that, as I have argued, all rights are equally tied—closely or loosely—to constitutional text? I believe that the answer is that the person in denial actually has an implicit constitutional theory that explains why the rights he or she likes are closely enough tied to the text as to

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<sup>47</sup> I do not mean to deny that sometimes one has to do “more” work to defend the claim that a constitutional right is violated, or even implicated, than at other times. My claim is only that the distinction between enumerated and unenumerated rights does not track the distinction between “less” and “more” work.

<sup>48</sup> That is, how can you criticize *us* for liking unenumerated rights when you do too?

count as enumerated, and why the opponent's rights are not closely enough tied to text. Why, then, doesn't the argument take the form of a defense of that implicit constitutional theory? I think the answer is something like this: The person in denial knows or suspects that the implicit constitutional theory, and particularly the implicit account of "closely-enough linked," could not stand up to critical scrutiny.<sup>49</sup> In addition, he or she believes, probably accurately, that his or her own demand to know where the opponent's theory is in the Constitution will force the opponent to mount a (necessarily) ineffective defense, thereby obviating the need for a defense of the critic's own constitutional theory.<sup>50</sup>

• **Opportunism:** "Good unenumerated rights are good, bad ones aren't." The speaker understands that the critical references to unenumerated rights are simply surrogates for underlying value or policy judgments, but believes that making such references happens at the moment to weaken support for the bad rights. As Balkin pointed out, there is nothing intrinsically bothersome about this kind of opportunism in political discourse.<sup>51</sup> Indeed, it might be its most characteristic feature. Put another way: when we talk about political discourse, saying that someone is being opportunistic is simply descriptive, not critical.

Note, though, that we can shift our attention to opportunism as it operates on a higher level. That is, so far I have been describing the use of the phrase *unenumerated rights* as a term of opprobrium. But there is nothing inherent in the phrase that makes it so. Indeed, one can imagine circumstances in which the fact that a right was unenumerated was an argument *in favor of* enforcing it. So, for example, we might think that some rights were so important at the time the Constitution was written—was made text—that it literally went without saying that the Constitution protected those rights.<sup>52</sup> Unenumerated

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<sup>49</sup> Or that, though the theory might be ably defended by someone more skilled than he or she, the person in denial lacks the ability to do so effectively.

<sup>50</sup> I suspect that metaphors of visibility matter here, and that some cognitive psychologist has shown that metaphors of visibility are more motivating than metaphors of hearing or speaking.

<sup>51</sup> See Balkin, *supra* note 6, at 880–84 (discussing the concept of "theoretical opportunism" in political debate).

<sup>52</sup> We can see echoes of this argument in the invocation of constitutional presuppositions in the Court's state immunity cases, *see supra* notes 31–33 and surrounding text, in contemporary arguments for judicial review of congressional legislation, *see, e.g.*, Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITT. L. REV. 691, 696 (1988) ("Does this mean, ipso facto, judicial review? I think so. . . . Indeed the Framers manifestly thought it, as do I, obvious enough to go without saying."), and in some arguments about the meaning of the Ninth Amendment, *see, e.g.*, Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 144 (1988) (proposing that Justice Chase failed to cite the Ninth Amendment in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), because it "went without saying" that it was the source of the unenumerated rights involved in the case).

rights might be those that are central to national identity, protected not by specific constitutional text (or in ways only loosely tied to constitutional text) but by the genius of the nation's people.<sup>53</sup>

So, it seems, we have a series of negative results: no abstractly-stated enumerated constitutional right has any general political valence, nor does any abstractly-stated unenumerated right, nor does the entire category of unenumerated rights. And yet, and yet—people do seem to be doing something when they describe a right they like or loath as unenumerated. How can that be?

At this point, I think, the right course would be to move into political history, to track the changing political valences associated, not analytically, but in real-world political discourse with the idea of unenumerated rights. The reason the category *unenumerated rights* seems worth talking about at this moment may be that we are at a point of transition in that valence, so that the fact that the category has no inherent political valence forces itself into our awareness. A decade ago everyone knew that unenumerated rights were things liberals loved. A decade hence, perhaps, everyone will know that those rights are things conservatives love. At that time, the essays in this Symposium might serve as reminders of an awareness that has since disappeared—and this particular essay will seem peculiarly out-of-date.

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<sup>53</sup> And invocation of “who we are as a people”—what Philip Bobbitt called *ethical argument*—is a standard legal method. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 94 (1982) (defining an “ethical argument” as one “whose force relies on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical argument . . .”).