

THE ENUMERATION OF RIGHTS: "LET ME COUNT THE WAYS"

*John V. Orth**

The primary meaning of the word "enumeration" is a "list" or "catalog," with a secondary meaning of a "numbering" or "counting."¹ The U.S. Constitution uses the word in both senses. The decennial census required for purposes of apportioning representatives and direct taxes is actually referred to in the text as "the enumeration."² "Enumeration" is also used in the Ninth Amendment of the Bill of Rights to refer to rights listed elsewhere: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³

Notwithstanding the words of the Ninth Amendment, in the Constitution as originally adopted, the word "right" appears only once and then not in the sense used in the Bill of Rights. Copyrights and patents are described as conferring on authors and inventors "the exclusive Right" to their intellectual property.⁴ In the amendments added after the Bill of Rights, the word is used five times in the phrase "the right to vote"⁵ and twice in the phrase "the right of choice," referring to the power of the House of Representatives and

* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University.

¹ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 759 (1966).

² U.S. CONST. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."); see also *id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."); *id.* amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

³ *Id.* amend. IX. Perhaps the reference to rights enumerated in "the Constitution" was adopted because many of the drafters, including Madison, expected that the amendments would be inserted in the text, probably in Article I, Section 9, rather than appended at the end. See 1 ANNALS OF CONGRESS 451-53 (J. Gales ed., 1789).

⁴ U.S. CONST. art. I, § 8.

⁵ *Id.* amend. XIV, § 2 (reducing representation on account of denial of voting rights); *id.* amend. XV, § 1 (prohibiting denial of voting rights based on race); *id.* amend. XIX (same concerning sex); *id.* amend. XXIV, § 1 (same concerning failure to pay poll or other tax—limited to federal elections); *id.* amend. XXVI, § 1 (same concerning citizens eighteen years of age or older).

Senate to choose a president and vice president in case no candidate for election receives a majority of the electoral votes.⁶

The word "right" appears five times in the first eight amendments, although the actual number of rights, specifically so called, is not easy to determine. The "right of the people peaceably to assemble, and to petition the Government for a redress of grievances" in the First Amendment⁷ seems to be at least two rights rather than one, since the right to assemble is not limited to assembly in connection with petitioning, nor is the right to petition limited to petitioning by an assembly. In addition, the right to assemble, sometimes referred to by scholars as the "freedom of assembly," has been extended to include a general "freedom of association."⁸

The "right of the people to keep and bear Arms" in the Second Amendment⁹ may also be a double rather than a single right: it seems to protect both those who keep and those who bear arms; that is, the right seems to extend to persons who bear arms kept by others and to persons who keep the arms borne by others. Likewise, the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" prohibits both unreasonable searches and unreasonable seizures.¹⁰ The Sixth Amendment clearly enumerates several distinct clusters of rights of persons accused of crime:

the right [1] to a speedy and public trial, [2] by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and [3] to be informed of the nature and cause of the accusation; [4] to be confronted with the witnesses against him; [5] to have compulsory process for obtaining witnesses in his favor, and [6] to have the assistance of counsel for his defence.¹¹

Finally, the Seventh Amendment guarantees "the right of trial by jury," "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars."¹²

In strict Hohfeldian analysis, "right" correlates with "duty" in the sense that the presence of a right in one party implies the presence of

⁶ *Id.* amend. XX, § 4 (superseding part of amend. XII).

⁷ *Id.* amend. I.

⁸ See, e.g., Henry J. Abraham, *Freedom of Assembly and Association, Citizenship*, in OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 60–61 (Kermit L. Hall ed., Oxford University Press 2d ed. 2005). "Freedom" may be used interchangeably with "right." See WEBSTER'S, *supra* note I, at 906.

⁹ U.S. CONST. amend. II.

¹⁰ *Id.* amend. IV.

¹¹ *Id.* amend. VI.

¹² *Id.* amend. VII.

a duty in another.¹³ In this sense, each of the rights listed in the Bill of Rights implies a duty on the part of the government to respect that particular right. The Second Amendment makes the connection obvious: “The right of the people to keep and bear Arms, shall not be infringed.”¹⁴ That is, the existence of the right imposes a duty on the government not to infringe it. If rights imply duties, duties may also imply rights.¹⁵ In consequence, the duties in the form of prohibitions imposed on the government by the Bill of Rights may add to the list of rights.

The First Amendment forbids Congress from passing any law “respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.”¹⁶ These restrictions imply a right to be free from the imposition of a religious establishment, as well as rights to, respectively, the free exercise of religion, free speech, and a free press. The Third Amendment’s restriction on the quartering of soldiers in private houses correlates with rights not to be subject to such impositions in times of peace without consent and in times of war only “in a manner to be prescribed by law.”¹⁷ The Fourth Amendment’s prohibition on the issuance of warrants “but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” implies one, fairly complex right.¹⁸

The Fifth Amendment—

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

¹³ See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36 (Walter Wheeler Cook ed., 1919) (originally published as two separate articles: *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917)) (characterizing “right” and “duty” as “jural correlatives”); cf. Oliver Wendell Holmes, *Natural Law*, 32 *HARV. L. REV.* 40, 42 (1918) (describing a “right,” in a typically trenchant phrase, as “only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it”).

¹⁴ U.S. CONST. amend. II.

¹⁵ There may be duties that do not give rise to corresponding rights of enforcement in the public. “Political questions” have historically been regarded as nonjusticiable. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

¹⁶ U.S. CONST. amend. I.

¹⁷ *Id.* amend. III.

¹⁸ *Id.* amend. IV.

law; nor shall private property be taken for public use without just compensation¹⁹

—generates a host of rights, including procedural rights of the criminally accused, against double jeopardy and self-incrimination, and of course the rights to due process and against uncompensated governmental takings. The Seventh Amendment safeguards the right to trial by jury: “[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”²⁰ And, finally, the Eighth Amendment—“[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”²¹—correlates with rights, respectively, to bail and against “excessive fines” and “cruel and unusual punishments.”

A census of rights expressly so called in the Bill of Rights, while not without difficulty, would produce a finite number. Adding rights generated by prohibitions imposed by the amendments makes the task more difficult. The enumeration of rights is further complicated by the fact that the Constitution outside the Bill of Rights, while not listing rights in that sense other than the right to vote, imposes a host of duties in the form of prohibitions on the federal and state governments, which if enforceable by private parties correlate with rights. For example, Congress may not suspend the “Privilege of the Writ of Habeas Corpus” except in military emergencies,²² and the states may not enact legislation “impairing the Obligation of Contracts.”²³ Constitutional guarantees may also generate rights. For example, the right to travel between the states, which had been an expressly enumerated right in the Articles of Confederation,²⁴ has been held to be implicit in the Privileges and Immunities Clause of Article IV.²⁵

¹⁹ *Id.* amend. V.

²⁰ *Id.* amend. VII.

²¹ *Id.* amend. VIII.

²² *Id.* art. I, § 9. “Privilege” may be used interchangeably with “right.” See WEBSTER’S, *supra* note 1, at 1805.

²³ U.S. CONST. art. I, § 10. In the late nineteenth century, judicial attention shifted to the Due Process Clauses for the guarantee of freedom of contract against impairment by the states and the federal government. See *infra* note 39 and accompanying text. For a discussion of the reasons for this shift, see James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J. L. & LIBERTY 370, 395–400 (2005) (noting the broader reach of the Due Process Clauses as well as their emphasis on economic opportunity rather than vested rights).

²⁴ ARTICLES OF CONFEDERATION, art. IV (“[T]he people of each State shall have free ingress and regress to and from any other State . . .”).

²⁵ See U.S. CONST. art. IV, § 2; *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (prohibiting taxation on persons traveling interstate).

Even an express right or prohibition can cause difficulty for the enumerator of constitutional rights, as the jurisprudence of due process amply illustrates. In the days before the incorporation of most of the Bill of Rights in the Fourteenth Amendment, for example, the U.S. Supreme Court held that due process required more than mere formal compliance with proper procedure. The defendant in a state criminal prosecution had a federal constitutional right to a real trial and not a mob-dominated one.²⁶ Were it not for the subsequent history of the phrase, it would be tempting to describe this as an example of “substantive due process,” in the sense of adding substance (an impartial jury) to the bare procedural requirement of a trial. How is this right to be counted? As a separate right? As a lesser included right in the general right to due process? Or simply as a specific application of the general right?

Due process has also been held to imply the right to be tried by an impartial judge, one with no “direct, personal, substantial, pecuniary interest” in the outcome of the case.²⁷ It is not inconceivable that the recognition of this right is mistaken and that the drafters of the original Due Process Clause, well aware of the partiality of royal judges in colonial days, deliberately left this right off their list, reasoning that if the judiciary were corrupted, a judicially administered remedy would be useless. They certainly put their faith in the jury as a shield against unjust judges, repeatedly guaranteeing the right to trial by jury, a right the abuse of which is more obviously recognizable than biased judicial rulings. The unamended Constitution provides that the “Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,”²⁸ and the Sixth Amendment expressly affirms the right to “an impartial jury.”²⁹ The Fifth Amendment prohibits prosecution “unless on a presentment or indictment of a Grand Jury,” and prohibits a second prosecution for the same offense in case of acquittal.³⁰ The Seventh Amendment prohibits the re-examination by judges of facts found by a jury except “according to the rules of the common law.”³¹ Or, of course, the drafters might have thought the right to an

²⁶ *Moore v. Dempsey*, 261 U.S. 86, 102 (1923) (determining a trial dominated by a mob to be a denial of due process). After incorporation, the right can be located in the Sixth Amendment right to trial “by an impartial jury.” U.S. CONST. amend. VI.

²⁷ *Tumey v. Ohio*, 273 U.S. 510, 523 (1928). The court noted that “[a]ll questions of judicial qualification may not involve constitutional validity,” and instanced “matters of kinship, personal bias, state policy, [and] remoteness of interest.” *Id.* Even after incorporation, it is difficult to locate the right to an impartial judge anywhere other than in the Due Process Clause of the Fourteenth Amendment, since there is no express right to trial by an impartial judge in the Bill of Rights.

²⁸ U.S. CONST. art. III, § 2.

²⁹ *Id.* amend. VI.

³⁰ *Id.* amend. V.

³¹ *Id.* amend. VII.

impartial judge so obvious a requirement of due process that it did not require express mention.³² How is this right to be counted? Is it a distinct right, like the right to trial by an impartial jury? Or is it another aspect of the general right to due process?

Further complicating the question is the fact that state constitutions may include, in addition to an express right to due process, a specific prohibition of trial by a judge with a pecuniary interest in the outcome of the case. The North Carolina Constitution, for example, provides—not in the Declaration of Rights, but in the Judiciary Article—“[i]n no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.”³³ Since the prohibition implies a right to an impartial judge, it would count as an enumerated right in the state constitution, but as a right not separately listed in the Federal Bill of Rights or the Fourteenth Amendment.

Is the right to equal protection a right enumerated in the Constitution? It appears in the form of a prohibition in the Fourteenth Amendment, applicable to the states—“no state shall . . . deny to any person within its jurisdiction the equal protection of the laws”³⁴—but is not separately enumerated in the Bill of Rights, applicable to the federal government. Yet in *Bolling v. Sharpe*,³⁵ a companion case to *Brown v. Board of Education*,³⁶ in which the Supreme Court held that racial segregation of public schools by the states is a violation of equal protection, the same Court held racial segregation in public schools in the District of Columbia a violation of due process. If this decision is correct, it must be for some reason other than that it would be anomalous for racial discrimination to be unconstitutional in the states, while being constitutional in federal territories. The right to equal protection, then, is enumerated in the Fourteenth Amendment but subsumed in the general right to due process in the Fifth Amendment. State constitutions may, like the Fourteenth Amendment, list both rights side-by-side.³⁷

³² See JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 38–39 (2003) (noting the absence of a constitutional text to support this proposition in *Calder v. Bull*).

³³ N.C. CONST. art. IV, § 21; see JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 117–18 (1993) (noting that “payment by results” is now viewed as a violation of due process).

³⁴ U.S. CONST. amend. XIV, § 1.

³⁵ 347 U.S. 497 (1954).

³⁶ 347 U.S. 483 (1954).

³⁷ See, e.g., N.C. CONST. art. I, § 19 (“No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”). The law-of-the-land clause traces its antecedents back to

At one time, it was a question of serious concern whether to list a right to freedom of contract as an aspect of liberty (or property) protected by the general right to due process.³⁸ Today the same question arises concerning the right to privacy,³⁹ which itself has been held to include the right of parents to direct the upbringing of their children,⁴⁰ the right of couples to practice birth control,⁴¹ the right of a woman to an abortion,⁴² and the right of adult homosexuals to commit consensual sodomy.⁴³ Both the outmoded freedom of contract and the still-current right to privacy have been described as rights to “substantive due process,” rights respectively economic and non-economic. The phrase “substantive due process,” an oxymoron linking substance and procedure, first appeared in a Supreme Court opinion in 1948—in a dissenting opinion using it as a bad name to

the Magna Carta (1215) and is equivalent to the later phrase “due process of law.” ORTH, *supra* note 33, at 55–59.

³⁸ For a classic analysis of the question, see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

³⁹ Phrased as the “right to be let alone,” the right to privacy first appeared in a Supreme Court opinion in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), but seems to have originated in THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 26 (1880).

⁴⁰ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming the right of parents to direct the education of children by, in this case, sending them to private rather than public schools); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (finding that the Fourteenth Amendment prevents the state from interfering with the right of parents to direct the education of their children, or with the right of teachers to provide such instruction—in this case, foreign-language instruction); see also ORTH, *supra* note 32, at 79–80 (arguing that “[i]n the heyday of economic substantive due process” these cases were addressed, “albeit with some difficulty, as impermissible commercial regulation” of a teacher’s “right to teach” and parents’ right to contract for teaching).

⁴¹ See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the constitutional right to privacy protects the use of birth control by married couples); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (extending the right recognized in *Griswold* to unmarried couples). Both cases were originally decided on grounds other than due process, *Griswold* on a complicated theory of privacy protected by the “penumbras” of a variety of rights enumerated in the Bill of Rights, 381 U.S. at 484, and *Eisenstadt* on grounds of equal protection, 405 U.S. at 437–38, but both are now generally understood as aspects of due process.

⁴² See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“[T]he right to privacy . . . is broad enough to cover the abortion decision . . .”).

⁴³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning a law criminalizing “private sexual conduct”). One state court has found a due process right to same-sex marriage. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding that the state policy prohibiting same-sex marriage licenses lacks a rational basis); see also *Opinion of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (finding that a bill allowing same-sex couples to form civil unions but prohibiting them from entering into marriage would violate the equal protection and due process guarantees of the Massachusetts Constitution); John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEVADA L.J. 560, 565 (2003) (illustrating different applications of equal protection and due process guarantees to the issue of same-sex marriage).

describe the excesses of its economic aspect.⁴⁴ As has sometimes happened to labels in fields other than law—"baroque" in music, "Gothic" in architecture, and "impressionism" in art—a word that began as a reproach has gradually shed its negative connotations and developed a neutral, even a positive, meaning.

Part of the problem is terminological. The penultimate clause of the Fifth Amendment—"nor be deprived of life, liberty, or property, without due process of law"⁴⁵—could have become known as the Deprivation Clause, rather than the Due Process Clause, just as the last clause in the Fifth Amendment—"nor shall private property be taken for public use, without just compensation"⁴⁶—is known as the Takings Clause, rather than the Private Property, Public Use, or Just Compensation Clause. Thought of as the Deprivation Clause, the prohibition would have been seen as imposing a duty on the government (the federal government in the case of the Fifth Amendment, state governments in the case of the Fourteenth Amendment) not to deprive a person of fundamental rights—rights Blackstone had comprehensively catalogued in 1765 as the "absolute rights of every Englishman": life, liberty, and property⁴⁷—without due process of law. The focus, in other words, would have been on the end to be avoided as much as, or more than, on the means to that end. This would, in fact, be in keeping with the history of judicial interpretation of the Clause, with its emphasis on what is taken as well as on why and how it is taken.⁴⁸

A similar terminological trap lies concealed in the phrase "unenumerated rights." Contrasted with those rights listed (one way or another) in the Constitution and obviously appropriate for judicial enforcement, the term implies an addition to the constitutional text without compliance with the amendment process spelled out in Article V. Just as labeling some elements of due process "substantive" serves to emphasize the procedural aspects of due process while delegitimizing the non-procedural aspects, so qualifying some rights as "unenumerated" concedes constitutional status to rights that made the list (one way or another) while delegitimizing rights not found on the list.

⁴⁴ Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (Rutledge, J., dissenting) (using the phrase with regards to a company's claimed right to natural gas in the "common reservoir").

⁴⁵ U.S. CONST. amend. V.

⁴⁶ *Id.*

⁴⁷ WILLIAM BLACKSTONE, 1 COMMENTARIES *116, *123–36. Blackstone used the word "absolute," not in the sense of "not subject to qualification," but rather in the sense of a right inhering in the person, not based on contract, "good against all the world." *Id.*

⁴⁸ See ORTH, *supra* note 32, at 74–75 (explaining how the focus on "taking," developed in early economic substantive due process cases, remained influential in later "individual privacy" cases).

Only a relative handful of “rights” expressly so called are enumerated in the Constitution. Many others, widely accepted and noncontroversial, appear in the text under other names, often but not always in the form of prohibitions on legislation or government action. The resolution of difficult questions concerning when to recognize that government has exceeded its constitutional powers, violated prohibitions placed on it by the Constitution, or transgressed rights enumerated in the Constitution is not aided by the use of non-constitutional concepts like “substantive due process” and “unenumerated rights.” The recognition of constitutional rights should not be a game of pin-the-label-on-the-right.