

---

---

## NOTES

# INKBLOTS: HOW THE NINTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE PROTECT UNENUMERATED CONSTITUTIONAL RIGHTS

KYLE ALEXANDER CASAZZA \*

### I. INTRODUCTION

One commentator has rightly noted that “principles of natural justice are summoned to highlight moral requirements of the legal and political order, to defend individual rights against the utilitarian interests of a political majority, or to guide the adjudication of hard cases which fall into *textual gaps or open ended clauses* of the Constitution.”<sup>1</sup> Despite the presence of these open-ended clauses, our Framers “understood and observed a distinction between ‘natural’ rights and . . . ‘positive’ rights.”<sup>2</sup> The former are comprised of “Lockean notions concerning the ‘unalienable’ rights of the people,” while the latter look to “common, constitutional, and statutory law.”<sup>3</sup>

---

\* Class of 2007, University of Southern California Gould School of Law; B.S. Jazz Studies 2003, University of Southern California. The author would like to thank Professor David Cruz, the editors of the Southern California Law Review, and Jaren Elizabeth Casazza for their help with the Note, and Catie Lee for her help with everything else.

1. Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purposes*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 42, 42 (Robert George ed., 1992) (emphasis added).

2. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 321 (1987).

3. *Id.*

The Framers' enumeration of some rights did not distinguish between the two—the Bill of Rights enumerated traditionally natural *and* positive rights because both are “essential to secure the liberty of the people.”<sup>4</sup> The Ninth Amendment and the Privileges or Immunities Clause can be read to protect distinct classes of *unenumerated* rights across these two categories. Under such an approach, the Ninth protects unenumerated rights inherent in all persons, while the Privileges or Immunities Clause protects a unique class of unenumerated rights born in both civil government and the Constitution itself.

General attitudes toward the Ninth Amendment are perhaps best exemplified by the statement of then-Judge Robert Bork during his 1987 confirmation hearings, in which he stated that the Ninth Amendment should be viewed as “an amendment that says “Congress shall make no” and then there is an inkblot, and you can't read the rest of it, and that is the only copy you have.”<sup>5</sup> Interestingly enough, Robert Bork has referred to both the Ninth Amendment and the Privileges or Immunities Clause as inkblots.<sup>6</sup>

Debate surrounding both amendments can be viewed as “an ongoing dialogue concerning the proper role of the judiciary, and the extent to which judges should infuse legal decisions with their own senses of right and wrong.”<sup>7</sup> Any discussion of unenumerated rights runs the risk of stigmatizing them with an “inferior relative status” to enumerated rights, notwithstanding the judicial recognition of constitutional protection for each.<sup>8</sup> This Note explores how the combination of these two provisions can protect unenumerated rights while eliminating the awkward inquiry into the historical pedigree of a “fundamental” right. A justiciable Ninth Amendment, read alongside the Privileges or Immunities Clause, has the potential to offer a textual basis for a right to privacy consistent with the

---

4. *Id.* (quoting 1 ANNALS OF CONG. 454 (J. Gales & W. Seaton eds., 1836) (remarks of James Madison)).

5. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 97–98 (2000) (quoting *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 101st Cong. 117 (1989) (testimony of Robert Bork), reprinted in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 441 (Randy E. Barnett ed., 1993)).

6. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990). See *infra* note 23 and accompanying text.

7. See Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597 (1991); Massey, *supra* note 2, at 312–13.

8. See Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 183 (1988).

natural law intentions of the Amendment's framers. When reconsidered in light of the changed relationship between the states and the federal government after the Fourteenth Amendment, the Ninth Amendment may offer individuals protection against majoritarian efforts to impose conventional morality outside of the federal *or state* governments' legitimate authorities.

While "rights-limiting conception[s]" of substantive due process are generally "ascribed to conservative jurists," any approach under the current model invites judicial restraint and reliance on tradition in evaluating whether a certain positive right deserves protection.<sup>9</sup> Thus, even expansive conceptions of substantive due process can perpetuate long accepted "illegitimate exertions of government power."<sup>10</sup> This Note discusses a different framework for constitutional protection of judicially enforceable, unenumerated rights. The proposed methodology is a hybrid of unenumerated rights theories grounded in two enigmatic corners of our Constitution: the Ninth Amendment<sup>11</sup> and the Fourteenth Amendment's Privileges or Immunities Clause.<sup>12</sup> I outline how the provisions work as textual counterparts that together comprise a judicially enforceable Lockean contract<sup>13</sup> protecting the rights retained by the people and the privileges and immunities of citizenship for which the rights not retained were surrendered.

Part II examines the text and history of both provisions. Additionally, Part II explores proposed models for judicial enforcement of unenumerated rights from Supreme Court cases and contemporary scholarship. Scholars and judges have by and large ignored the plain language of the Ninth Amendment, and, in so doing, have eliminated a mechanism designed to protect natural rights. Conflicting historical accounts of ratification, as well as efforts to pair the Ninth Amendment as a rule of construction alongside the Tenth, have further frustrated efforts to give the Ninth Amendment much substance. The Privileges or Immunities Clause has suffered a similar fate. Nearly rendered a nullity immediately following its enactment,<sup>14</sup> the

---

9. *See id.* at 138–39.

10. *Id.* at 141. Professor Niles points to *Bowers v. Hardwick*, 478 U.S. 186 (1986), as one example. Niles, *supra* note 5, at 141. *Bowers* has since been overturned. *Lawrence v. Texas*, 539 U.S. 558 (2003).

11. U.S. CONST. amend. IX.

12. U.S. CONST. amend. XIV, § 1.

13. For more on the Ninth Amendment and the social contract, see Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, And The Rights "Retained" By The People*, 16 S. ILL. U. L.J. 267 (1991–92).

14. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

Clause has shown recent signs of life in Supreme Court jurisprudence.<sup>15</sup> Part II considers a number of Constitutional theorists' ideas of what is meant by the Ninth Amendment and the Privileges or Immunities Clause, and how, if at all, the two provisions are judicially enforceable.

Part III discusses the relationship between the Privileges or Immunities Clause and the Ninth Amendment. From there, I examine how the Reconstruction Amendments changed understandings about the original Bill of Rights in general, and how the incorporation debate<sup>16</sup> has further frustrated Constitutional protection of unenumerated rights. The framers of the Reconstruction Amendments may have believed in the Ninth Amendment as a protection for natural rights to a greater degree than the founders, and may have contemplated its enforceability against the states. The incorporation debates have clouded this by largely ignoring the Ninth Amendment, and focusing primarily on parts of the first eight amendments despite the Ninth's inclusion in the Bill of Rights itself.

Part IV explains how the Ninth Amendment and the Privileges or Immunities Clause ought to be viewed as complimentary protections of individual, unenumerated rights. The Ninth Amendment protects natural rights in the areas of privacy and autonomy. The Privileges or Immunities Clause protects unenumerated guarantees stemming from the Constitution itself, such as the right to travel and other rights more closely associated with the polity and republican self-governance. Viewing unenumerated rights in this bifurcated manner can avoid certain problems courts and commentators run into under the current substantive due process regime, while offering more substantial protection for unenumerated rights themselves.

Any re-examination of our fundamental rights jurisprudence, whether it "augment[s]" or "displace[s]"<sup>17</sup> the current regime, still needs to respond to concerns that the "new boss" will be "the same as the old boss."<sup>18</sup> Opponents of abortion rights may "be no more persuaded by references to the ninth amendment," for example, "than they were by the invocation of the due process clause."<sup>19</sup> While this new approach does not keep a court from having to answer tough questions about whether a right is retained by the people, or a privilege of citizenship, it eliminates the traditional (and

---

15. See *Saenz v. Roe*, 526 U.S. 489 (1999).

16. See sources cited *infra* notes 177–87.

17. *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).

18. THE WHO, *Won't Get Fooled Again, on WHO'S NEXT* (MCA Records 1971).

19. Rapaczynski, *supra* note 8, at 209–10.

circular) approach of querying whether an activity (at varying levels of generality) is “fundamental.” Reading these two provisions in the proposed manner provides a clear, textual protection for these two kinds of unenumerated rights.

## II. THE NINTH AND FOURTEENTH AMENDMENTS AS SOURCES FOR UNENUMERATED RIGHTS

### A. THE NINTH AMENDMENT

A number of originalist scholars believe the Ninth Amendment’s plain declaration that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”<sup>20</sup> authorizes judges to protect unenumerated rights.<sup>21</sup> The “uncontroversial character” of the amendment’s plain text disappears upon a more detailed look at what it protects.<sup>22</sup> “[C]ommon sense indicates that judicial enforcement is a necessary concomitant of a meaningful right, not an extra governmental power.”<sup>23</sup> Recent academic interest in the Ninth Amendment has yet to translate over to the “practicing legal community,”<sup>24</sup> likely because federal courts “have almost exclusively held that it does not confer any substantive rights.”<sup>25</sup> The challenge in interpreting the Ninth Amendment, however, should not be an excuse for ignoring it.<sup>26</sup> Its inclusion in the Bill of Rights may be the “surest indication” that it is a constitutional protection of rights.<sup>27</sup>

---

20. U.S. CONST. amend. IX. The amendment’s “terse announcement . . . certainly looks like news, and begs for an explanation.” Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 239 (1988).

21. E.g., Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) [hereinafter *Reconceiving*]. See also Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 179–80 (“Allowing the Ninth Amendment to be the sole arbiter of unenumerated rights issues is not legislating from the bench, it is the constitutional commandment of its text.”).

22. See Rapaczynski, *supra* note 8, at 178–79.

23. Schmidt, *supra* note 21, at 197. For example, judicial determinations are necessary for enforcement of the First, Fourth, and Fifth Amendments. *Id.*

24. Niles, *supra* note 5, at 85, 88–89. “Mention the Ninth Amendment to an attorney and you are bound to elicit a confused and somewhat embarrassed frown.” *Id.* at 87.

25. *Id.* at 90.

26. See *id.* at 98–99. Other amendments present similar challenges, but they “play a major role in resolving real legal disputes while the Ninth Amendment does not.” *Id.* at 101.

27. Massey, *supra* note 2, at 319.

Prior to *Griswold v. Connecticut*,<sup>28</sup> the Ninth Amendment “was mostly a source of intermittent curiosity.”<sup>29</sup> While Justice Douglas’s majority opinion famously mentioned the Ninth Amendment in his oft criticized listing of penumbras,<sup>30</sup> Justice Goldberg’s concurrence also referenced the Ninth; Justice Goldberg remarked that “[t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”<sup>31</sup> These simple words, in the words of one scholar, “catapulted the ninth into sudden respectability.”<sup>32</sup>

### 1. History and the Ninth Amendment<sup>33</sup>

The writings of the Framers, specifically James Madison, have played a large role in scholarly interpretation of the Ninth Amendment.<sup>34</sup> While Madison’s views may not represent those of his contemporaries, or even appear free of conflict themselves,<sup>35</sup> objecting to theories relying on Madison’s views *solely* on the basis of their violating original intent would be “difficult.”<sup>36</sup> Madison’s statements “make clear” that the rights retained are the “Lockean rights to self-determination that are retained by the people when they agree to the formation of civil government.”<sup>37</sup>

In any event, the arguments of the Federalists may not be inconsistent with judicial review of unenumerated rights.<sup>38</sup> The Federalists’ fear that

---

28. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

29. Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 224 (1983).

30. *Griswold*, 381 U.S. at 484.

31. *Id.* at 488 (Goldberg, J., concurring).

32. Caplan, *supra* note 29, at 225.

33. For a detailed survey of historical evidence and the meaning of the Ninth Amendment, see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 21–76 (2006) [hereinafter *It Means What It Says*] (reviewing thirteen founding era sources for insight on the meaning of the Ninth Amendment’s plain text).

34. See *Reconceiving*, *supra* note 21, at 2 (“As the Framers who first conceived of the Ninth Amendment, Madison’s conception of constitutional rights is the most pertinent to an understanding of the Ninth Amendment’s intended function.”). See also Niles, *supra* note 5, at 117–23.

35. See, e.g., Schmidt, *supra* note 21, at 203 (“Scholars . . . unsurprisingly reach conflicting historical conclusions surrounding the proposal and ratification of the Ninth Amendment.”).

36. *Reconceiving*, *supra* note 21, at 3. See also Schmidt, *supra* note 21, at 199 (“[S]ince the amendment is the work of Madison, his explanation of its intent and meaning should control.”).

37. Niles, *supra* note 5, at 117. For more background on these writings of Locke and their influence on the Ninth Amendment’s framers, see *id.* at 108–71; Caplan, *supra* note 29, at 230–38.

38. See *Reconceiving*, *supra* note 21, at 17.

enumerating some rights would diminish others suggests they sought the same protections for both enumerated and unenumerated rights.<sup>39</sup> Professor Randy Barnett proposes that in the absence of a bill of rights, a Federalist would have envisioned judicial enforcement of *only* those “unenumerated rights retained by the people.”<sup>40</sup> Some historical evidence shows Madison articulating his concern that the legislature was the greatest threat to liberty and rights.<sup>41</sup> Madison expressed similar concerns about the democratic majority.<sup>42</sup> In light of this, it seems unlikely that Madison would be comfortable with the political process as the sole protection for unenumerated rights.<sup>43</sup>

Further, originalists may be hastily jumping to this evidence as a basis for understanding the Ninth Amendment while ignoring the amendment’s plain text.<sup>44</sup> Professor Christopher Schmidt argues that “historical understanding and practice,” as well as other extrinsic evidence, are only properly “invoked to answer a constitutional question when there is ‘no constitutional text speaking to [the] precise question.’”<sup>45</sup> Originalists that deny a textual foundation for judicial protection of unenumerated rights are not first looking at the plain text of the Ninth Amendment.<sup>46</sup> Robert Bork’s “inkblot” analogy is one example of this.<sup>47</sup> The text itself—and not the “views of a precious few”—should only be the focus in understanding the amendment’s protections.<sup>48</sup> As Justice Goldberg wrote in *Griswold*, “[i]n interpreting the Constitution, ‘real effect should be given to all the words it uses.’”<sup>49</sup> So long as courts continue to ignore the Ninth Amendment as a

---

39. *Id.* at 3.

40. *Id.*

41. *Id.* “In [Madison’s] speech to the House, he states that ‘the legislative [branch] . . . is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper.’” *Id.* (quoting 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 454 (J. Gales & W. Seaton eds., 1834) (speech of Rep. J. Madison)).

42. See *Reconceiving*, *supra* note 21, at 17–19.

43. See *id.*

44. See, e.g., Schmidt, *supra* note 21, at 192 (originalists “skip the text of [the Ninth Amendment] and jump to the secondary components of legal analysis to find their answer”).

45. *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)).

46. Schmidt, *supra* note 21, at 192–93.

47. *Id.* at 193–94.

48. *Id.* at 206. For a detailed look at the history of the Ninth Amendment see Caplan, *supra* note 29.

49. *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 151 (1926) (emphasis added). See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”).

judicially enforceable mechanism for protecting Constitutional rights, the “rights retained” are not getting any “real effect.”

## 2. The Relationship Between the Ninth and Tenth Amendments

Much confusion in interpreting the text of the Ninth Amendment stems from the history of both judges and scholars linking it with the Tenth Amendment.<sup>50</sup> This approach, employed by Justice Reed in *United Public Workers v. Mitchell*<sup>51</sup> is what Professor Barnett calls the “rights-powers conception of the Ninth Amendment.”<sup>52</sup> Under the rights-powers conception, a court should look to the Constitution for an enumerated grant of federal power to determine whether rights are infringed. Justice Reed writes:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.<sup>53</sup>

Delegated powers and constitutional rights are, in this model, “logically complementary.”<sup>54</sup>

Barnett identifies two advantages in this model. First, because unenumerated rights are treated strictly as the complement of delegated powers, one must look only to the delegated powers to determine which unenumerated rights are protected by the Constitution.<sup>55</sup> This serves as a practical limit on seemingly open-ended judicial interpretation of the Ninth Amendment.<sup>56</sup> Second, this logical approach to rights and powers creates the appearance of internal consistency, attracting proponents as a result.<sup>57</sup>

---

50. See, e.g., *Reconceiving*, *supra* note 21, at 4–9 (describing the Ninth and Tenth Amendments under a “rights-powers conception of constitutional rights”); Rapaczynski, *supra* note 8, at 188–90; Sager, *supra* note 20, at 242–43 (“There is symmetry here.”). For an application of the Tenth Amendment as a fundamental rights guarantee, see Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment’s Spreading Confusion*, 1996 B.Y.U. L. REV. 351, 356–58.

51. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95–96 (1947).

52. *Reconceiving*, *supra* note 21, at 5. See also Massey, *supra* note 2, at 310–11.

53. *United Pub. Workers*, 330 U.S. at 95–96.

54. *Reconceiving*, *supra* note 21, at 5.

55. *Id.*

56. *Id.*

57. *Id.*

Also, this “federalist” reading of both the Ninth and Tenth Amendments mirrors the original intent of *some* Framers of the Constitution.<sup>58</sup>

This interpretation is not without its problems. The idea “that powers not delegated are reserved,” is clearly expressed in the Tenth Amendment,<sup>59</sup> so requiring both amendments to reach this conclusion renders the Ninth Amendment redundant,<sup>60</sup> and does not address why the Ninth refers to “rights” and “people.”<sup>61</sup> The rights-powers “conception renders the Ninth Amendment effectively inapplicable to any conceivable case or controversy.”<sup>62</sup> The approach looks only at whether the government has an enumerated power that is not “delegated” within the meaning of the Tenth Amendment,<sup>63</sup> so “[t]he Ninth Amendment has absolutely no role to play in the analysis.”<sup>64</sup> While the pragmatism and coherence of the approach are appealing, the rights-powers conception renders the Ninth Amendment a nullity.<sup>65</sup>

### 3. The Ninth Amendment and Unenumerated Rights

Once we look to the Ninth Amendment as a constitutional protection of unenumerated rights, actual identification of these rights “is an entirely different area of ninth amendment scholarship.”<sup>66</sup> Identifying the judicial mechanisms for protecting these unenumerated rights presents another hurdle.<sup>67</sup> Engaging in either inquiry may require value judgments that have

---

58. *Id.* at 4. See also Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 394–401 (2004).

59. *Reconceiving*, *supra* note 21, at 6.

60. Under this theory, the Ninth Amendment does no more than the Tenth and “thus requires us to treat the ninth amendment as a colossally bad first draft of the tenth.” See Sager, *supra* note 20, at 246. Sager notes that “[t]his point, of course, has been made before.” *Id.* at 246 n.13 (citations omitted).

61. *Reconceiving*, *supra* note 21, at 6. The opinion in *United Public Workers* illustrates this confusion. *Id.* While Justice Reed uses the phrase “rights reserved by the Ninth and Tenth Amendments,” *United Public Workers v. Mitchell*, 330 U.S. 75, 96 (1947), “[t]he Tenth Amendment does not speak of *rights*, of course, but of reserved ‘powers.’” Barnett, *supra* note 21, at 6. *Accord* Caplan, *supra* note 29, at 262 (“The ninth amendment is not redundant with the tenth amendment.”).

62. *Reconceiving*, *supra* note 21, at 6.

63. *Id.*

64. *Id.*

65. See *id.* at 8. The rights-powers conception is also inconsistent with other constitutional guarantees. See *id.* at 9–11.

66. Wachtler, *supra* note 7, at 611. In a recent article, Professor Barnett engages in a much more detailed classification of originalist Ninth Amendment theories in circulation. See *It Means What It Says*, *supra* note 33, at 10–21. He identifies (1) “the state law rights model,” (2) the “Residual Rights Model,” (3) the “Individual Natural Rights Model,” (4) the “Collective Rights Model,” and (5) the “Federalism Model.” *Id.* His classifications are not necessary for the scope of this Note, but should be a must-read for anyone interested in the topic.

67. Wachtler, *supra* note 7, at 612.

led some scholars to consider “whether judges should [even] be involved in such an undertaking,”<sup>68</sup> and also potentially presents the same basic problems associated with the fundamental rights framework. Professor Massey suggests we look at two very broad conceptions of the content of the amendment to understand the diverging theories: (1) The Ninth Amendment “is a bottomless well” which can sustain any private right and (2) “[T]he amendment is merely declaratory of a truth that the people possess unspecified rights.”<sup>69</sup> There is, of course, much variation between these two poles; the remainder of this Subsection explains some of the theories regarding sources of Ninth Amendment rights, as well as theories of Ninth Amendment adjudication.

Many scholars have reached the conclusion that to the extent the Ninth Amendment protects unenumerated rights, these rights are to come from the statutory and common law of the states at the time of ratification.<sup>70</sup> Another author has even suggested the Amendment references the rights enjoyed by colonists under the English Constitution as of ratification of the *United States Constitution*.<sup>71</sup>

Versions of this state law approach are criticized as being both over-<sup>72</sup> and under-inclusive.<sup>73</sup> Under this line of reasoning, if the Ninth Amendment was incorporated against the states, doing so would merely

---

68. *Id.* at 615. See also Massey, *supra* note 2, at 317–18 (discussing Raoul Berger’s “conten[tion] that ninth amendment rights are not judicially enforceable because they do not arise under the Constitution but find their source wholly outside the Constitution”); Sager, *supra* note 20, at 251–52 (summarizing what he calls the “Judicial Unenforceability Thesis”).

69. See Massey, *supra* note 2, at 312. There is much variation within these basic categorizations, and in their most extreme reading, “[e]ach of these conceptions of the amendment’s content is flawed.” See *id.* at 312–13.

70. *E.g.*, Caplan, *supra* note 29, at 259–65; Massey, *supra* note 2, at 323–29. “A second, and more radical, alternative is to conclude that the framers intended to permit the states to continue to develop sources of ninth amendment rights *after the Constitution’s adoption*.” *Id.* at 325 (emphasis added).

71. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-examined*, 31 EMORY L.J. 785, 789 (1982).

72. See McAfee, *supra* note 50, at 373–74 (“[L]inking the federal system to fundamental rights is the most novel and perhaps least plausible of [Ninth Amendment theories].”). “[T]he First Congress would have viewed a ‘reverse preemption’ purpose [of the Ninth Amendment] . . . as a rule lacking any sort of meaningful limits.” *Id.* at 384. Massey identifies this Supremacy Clause problem, but insists the Ninth Amendment would transform these state rights into federal rights. See Massey, *supra* note 2, at 323. Further, limiting the protections to those laws “in existence at the time of the Constitution’s adoption avoids the mischief inherent in splitting supremacy clause hairs.” *Id.* at 327.

73. See Massey, *supra* note 2, at 322 (“[T]he ninth amendment was intended to do more than secure state-based unenumerated rights from federal invasion; it was also to serve as a barrier to encroachment upon natural rights retained by the people.”).

preserve and “protect the enactments of the states.”<sup>74</sup> While this is seemingly a finite pool of guaranties, the presence of “baby Ninths”<sup>75</sup> in state constitutions presents the same “bottomless pool” problem as the Ninth Amendment itself.<sup>76</sup>

Other Ninth Amendment theories look to natural law as a source of unenumerated rights.<sup>77</sup> While such theories have been criticized as “sufficiently indeterminate”<sup>78</sup> regarding which rights are protected, they do have historical pedigree. The Framers “clearly relied upon natural law principles in formulating constitutional guarantees,” and both the Ninth Amendment and the American Revolution itself had their “foundation in Lockean political theory.”<sup>79</sup> The Amendment’s use of the phrase “rights retained by the people”<sup>80</sup> evokes the rights not surrendered to the government in the Lockean social compact.<sup>81</sup> Whereas “[p]ositive rights acquired substance by the social compact . . . [n]atural rights could not . . . be so ceded.”<sup>82</sup> The challenge in this approach is defining the substance of the “amorphous goblin of natural law.”<sup>83</sup>

For lack of a clearer comparison in modern case law, the protected rights would most closely resemble those protected by current fundamental rights jurisprudence, but more specifically, “be precisely coterminous with

---

74. Caplan, *supra* note 29, at 262. See Massey, *supra* note 2, at 327.

75. Baby Ninths are “Ninth Amendment analogues in state constitutions.” John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 968 (1993). Professor Yoo concludes that their “mere presence . . . in state constitutions shows an understanding of the [Ninth] Amendment’s language as a declaration in favor of rights against the government.” *Id.* at 1009. While not all states had these provisions, one commentator has suggested that federal Ninth Amendment positive rights “are defined by the pre-1788 organic law of all the original states, taken together,” and would be “identical for all citizens, whatever their state citizenship.” Massey, *supra* note 2, at 327. With this in mind, we could consider the Ninth Amendment as a counterpart to the Privileges and Immunities Clause—a suggestion beyond the scope of this Note.

76. Robert Bork’s views on the Ninth Amendment might even be subject to this problem. See Wachtler, *supra* note 7, at 607. See also Massey, *supra* note 2, at 323 (noting that “judicial enforcement of reserved natural rights [as opposed to positive rights] implicates precisely these concerns [of amorphousness and value judgments]”).

77. Massey, *supra* note 2, at 312–15. For some of these theories, see *id.* at 312 n.32.

78. *Id.* at 313–14.

79. See *id.* at 314–15. “Lockean thought was the dominant political theory at the time of the Constitution’s adoption.” *Id.* at 316.

80. U.S. CONST. amend. IX.

81. See, e.g., Massey, *supra* note 2, at 329–31.

82. *Id.* at 330. See also Niles, *supra* note 5, at 117 (“The relevant statements of James Madison . . . make clear that the retained rights . . . are the same Lockean rights to self-determination that are retained by the people when they agree to the formation of civil government.”).

83. See Massey, *supra* note 2, at 329–31.

private rights not subject to invasion by legitimate private action.”<sup>84</sup> Acts that “pose some real threat to another person,” would not be among these unenumerated rights.<sup>85</sup> Government interference with “essentially private activit[ies],” or “private choice[s],” would amount to illegitimate exercises of governmental authority.<sup>86</sup> Privacy “is not manufactured by the social compact,” and “seem[s] to exist independently of the acts of civil authorities.”<sup>87</sup>

As one example of this Lockean theme for interpretation of the Ninth Amendment, Professor Mark Niles has developed a detailed theory of Ninth Amendment adjudication involving “conflict[s] between a private activity and some restrictive governmental regulation.”<sup>88</sup> Similar to Equal Protection claims, the central inquiry will include the government’s motivation for the challenged legislation.<sup>89</sup> Under a Ninth Amendment claim, “any motive that is not based on protecting or enhancing the public welfare – should be struck down.”<sup>90</sup> “[G]overnment action that imposes substantial restrictions on private activities [would raise] the presumption that the action is motivated . . . by an illegitimate objective to regulate activity not within the proper scope of governmental power.”<sup>91</sup>

While ultimately determining whether a particular activity is private may be difficult, the central inquiry is simple: “Does the action pose a threat of harm to another individual or to the public welfare?”<sup>92</sup> In the First

---

84. *Id.* at 330. “Since individuals lack private-law means of prohibiting private behavior that is not forcibly or deceitfully intrusive upon others, the state is similarly lacking in power.” *Id.* at 343.

85. Niles, *supra* note 2, at 123. This does not necessarily cut one way or the other in the abortion debate. For example, Blackstone suggests that “[a]n infant in ventre statute mere, or in the mother’s womb, is supposed in law to be born for many purposes.” WILLIAM BLACKSTONE, 1 COMMENTARIES 126, available at <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch1.htm> (emphasis added) (“f” changed to “s” for easier reading throughout). The precise point at which private rights intersect with public interests will often not be easy, but this alone should not provide an excuse for reexamination of unenumerated rights jurisprudence. For a brief discussion of the Court’s handling of the public/private distinction in the First Amendment context, see sources accompanying note 94, *infra*.

86. Niles, *supra* note 5, at 123–24.

87. Massey, *supra* note 2, at 331. See also *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (“[T]he concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’”) (quoting Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288–89 (1977)).

88. Niles, *supra* note 5, at 123. For a look at how *Lochner* and *Bowers* might have been decided under Niles’s framework see *id.* at 144–56.

89. *Id.* at 123.

90. *Id.*

91. *Id.* at 124.

92. Niles, *supra* note 5, at 128. *But see* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 758 (1989) (“The minute someone starts defending her actions against a storm of protest with the claim she is only affecting herself, we may be certain that the opposite is true.”). For Rubenfeld’s

Amendment context, the Court has demonstrated the ability to distinguish public and private activity.<sup>93</sup> “For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>94</sup> The Court in *Stanley v. Georgia* “identified two crucial aspects of a reasoned definition of privacy.”<sup>95</sup> First, the Court afforded a privileged treatment to activity in the home not involving contact with the community.<sup>96</sup> More importantly for Ninth Amendment purposes, the Court recognized a sphere of privacy that encompasses one’s beliefs, values, preferences, and morality.<sup>97</sup> Under Niles’s Ninth Amendment framework, actions directly impacting only one person in the privacy of his home would be considered private.<sup>98</sup> Actions involving two or more consenting persons would presumably, albeit more controversially, be protected for want of threat to others.<sup>99</sup> The Ninth Amendment would invalidate government actions “that do not serve to protect the public good,” such as those that impose any sort of moral code.<sup>100</sup>

---

discussion on John Stuart Mill’s “self-regarding act” and “the harm principle” see *id.* at 756–61.

93. Niles, *supra* note 5, at 128. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court invalidated a law against private possession of obscene materials. See Niles, *supra* note 5, at 128–31. “Though *Stanley* and similar cases are insufficient to conclusively resolve the difficulties in determining at exactly what point the public/private line should be drawn in every case, this realization is not fatal to the development of this jurisprudence.” Niles, *supra* note 5, at 132. Further, it is unclear whether, under Niles’s approach, the facts of *Stanley* itself would be more properly handled under a First or Ninth Amendment analysis. As the case involved possession, as opposed to expression, perhaps Ninth Amendment adjudication would be proper.

94. *Stanley*, 394 U.S. at 564. Niles’s examination of *Stanley*, *Lochner*, and *Bowers*, under his framework assumes that the Ninth Amendment would be incorporated against the states. This is a matter of some controversy. See *infra* text accompanying notes 310–14.

95. Niles, *supra* note 5, at 130.

96. *Id.*

97. *Id.* In *Stanley*, infringement of this zone was “the real violation of the First Amendment and ‘our whole constitutional heritage’ . . .” *Id.* (quoting *Stanley*, 394 U.S. at 565).

98. *Id.* at 131.

99. *Id.* “The right to engage freely in private, consensual sex is a paradigmatic natural right.” Massey, *supra* note 2, at 340. Privacy cases have largely “gravitate[d] around sexuality.” Rubinfeld, *supra* note 92, at 744.

100. Niles, *supra* note 5, at 134. The Government’s ability to impose moral codes has been more recently called into question under the current unenumerated rights framework. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (“This effectively decrees the end of all morals legislation.”). But see *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 819 n.17 (11th Cir. 2004) (noting the Supreme Court’s pre-*Lawrence* conclusion that “there is not only a legitimate interest, but ‘a substantial government interest in protecting order and morality,’” and that their “own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest”) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991)); *Kansas v. Limon*, 83 P.3d 229, 236–37 (Kan. Ct. App. 2004) (noting the [sex-based] “classification [in Kansas’s Romeo and Juliet law] is proper because it is rationally related to the purpose of protecting and

Professor Randy Barnett has famously outlined a similar approach in his book *RESTORING THE LOST CONSTITUTION*. Under his “Presumption of Liberty[.]” the burden is placed “on the government to establish the necessity and propriety of any infringement on individual freedom.”<sup>101</sup> The Presumption of Liberty falls squarely within Barnett’s “Individual Natural Rights Model” of Ninth Amendment originalism.<sup>102</sup> Judges need not identify particular rights: “this presumption may be rebutted by a showing that a particular law was a necessary regulation of a rightful act or a prohibition of a wrongful act.”<sup>103</sup> Barnett emphasizes that these rights are entitled to no less protection than the enumerated rights.<sup>104</sup>

A particularly appealing feature of both approaches is that litigants will not have to go through the difficult step of establishing a “specific positive right” to engage in a particular activity, unlike the current substantive due process and equal protection frameworks.<sup>105</sup> Ninth Amendment protection for unenumerated rights is grounded in the amendment’s text, so courts will not have to rely on historical analysis.<sup>106</sup> Both the privacy of an act and the government’s interest in regulating it will be unrelated to historical pedigree.<sup>107</sup> Niles’s approach also avoids the awkward inquiry into “fundamentality.”<sup>108</sup>

Not all unenumerated rights approaches are so closely tied to natural law. Jed Rubenfeld has proposed a somewhat similar approach that looks at traditional “privacy rights,”<sup>109</sup> not in terms of “what the law would keep us from doing, [but] instead . . . what the law would have us do.”<sup>110</sup> According to Rubenfeld, the common threads in the Supreme Court’s privacy case law are the “*productive or affirmative consequences*” of the

---

preserving the traditional sexual mores of society”), *rev’d*, 122 P.3d 22 (Kan. 2005).

101. RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY*, 259–60 (2004) [hereinafter *RESTORING THE LOST CONSTITUTION*]; *It Means What It Says*, *supra* note 33, at 13–15.

102. *It Means What It Says*, *supra* note 33, at 13–15.

103. *Id.* at 15.

104. *See id.*

105. *See* Niles, *supra* note 5, at 126.

106. *Id.* at 142. Note that Professor Schmidt’s proposal appears vulnerable to this charge. *See infra* text accompanying notes 122–33.

107. *See* Niles, *supra* note 5, at 142.

108. *See id.* This process can be “futile” and “counterproductive” for courts. *Id.* For more information on what makes a right “fundamental,” see the material on *Corfield*, text accompanying *infra* notes 230–39.

109. For a brief survey of the Supreme Court’s privacy cases see Rubenfeld, *supra* note 92, at 744–47.

110. *Id.* at 783.

laws at issue.<sup>111</sup> The Court has struck down laws that, while challenged in the negative, would have the substantive effect of forcing West Virginia schoolchildren to salute the flag,<sup>112</sup> forcing Oregon children into public schools,<sup>113</sup> and “taking diverse women with every variety of career, life-plan, and so on, and mak[ing] mothers of them all.”<sup>114</sup> Rubenfeld notes that “laws against abortion, interracial marriage, non-nuclear family residences and private education all involve a peculiar form of obedience that reaches far beyond abstention from the particular proscribed act.”<sup>115</sup> Forced flag-salutes and the eugenic undertones of a ban on interracial marriage are totalitarian practices wholly inconsistent with our constitutional jurisprudence.<sup>116</sup>

Most surprisingly, Rubenfeld does not rest any of his analysis on the Ninth Amendment itself. In fact, he refutes the notion that this freedom from totalitarianism “does not purport to antedate the Constitution or . . . arise from . . . the ‘social contract.’”<sup>117</sup> According to Rubenfeld, “[t]he right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.”<sup>118</sup> While his article does not purport to solve any mysteries about the Ninth Amendment, it provides a nice starting point for exploring the extent to which the state or federal government should be able to democratically impose codes of conduct on people’s private lives. The Ninth Amendment may suggest that the Constitution should not be construed to allow this very danger. When the government aims to regulate private conduct of individuals that does not meaningfully interfere with others, it runs the risk of imposing impermissible totalitarian control. Professor Tribe criticized the Court along these same lines regarding *Bowers v. Hardwick*.<sup>119</sup> While Rubenfeld rejects “autonomy” and “personhood” approaches in favor of his own, the actual conduct prevented under his approach does not appear to differ radically from the natural

---

111. *Id.* at 784.

112. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 649 (1943).

113. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

114. Rubenfeld, *supra* note 92, at 788 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

115. *Id.* at 792–93.

116. *See id.* at 784–85, 792.

117. *Id.* at 804.

118. *Id.* at 805.

119. Laurence Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 107 (1987) (referring to the decision as “reduc[ing] the ninth amendment to a poor excuse for judicial legitimation of majoritarian morality”).

rights and privacy approaches.<sup>120</sup>

Professor Schmidt has proposed a different detailed, procedural framework for adjudication of Ninth Amendment claims that combines the aforementioned statutory, common law, and natural law/privacy approaches.<sup>121</sup> Under his three-step inquiry, a court must first determine whether an alleged right is governed by another textual provision of the Constitution.<sup>122</sup> Next, a court must determine whether an unenumerated right falls within the category of “right[s] retained by the people,” within the meaning of the Ninth Amendment.<sup>123</sup> This determination requires a preponderance of the evidence that the unenumerated right in question was understood to be retained either at the time of our nation’s founding or that “it has evolved into a right that is currently retained by the people.”<sup>124</sup> If a litigant cannot prove this, rational basis review will apply to the challenged legislation or practice.<sup>125</sup> If, however, a litigant is successful, the government must pass a strict scrutiny test.<sup>126</sup>

At first glance, Schmidt’s preponderance of the evidence standard seems exceptionally broad in that it provides litigants the opportunity to at least allege constitutional protection for *any* unenumerated right. This does little to allay concerns that, as Professor Akhil Amar puts it, “a wide-open hunt for natural law would allow judges too much discretion—freedom to make, rather than find, natural law.”<sup>127</sup> Schmidt tries to narrow this field by first directing would-be litigants to documentation of “fundamental rights” that “the American people have formally or informally ratified.”<sup>128</sup> Judges would look to “non-judicial legal sources, state and federal law, state

---

120. See also Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 337 (1997) (questioning the “constitutional legitimacy of a state interest in coercing sexual orthodoxy” in light of the Ninth Amendment); Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 527 (2004) (noting that the Ninth Amendment left individuals “free to pursue happiness in ways that did not interfere with the rights of their neighbors”).

121. See Schmidt, *supra* note 21, at 215–21.

122. *Id.* at 215. Obviously, existing substantive due process jurisprudence creates a large, practical hurdle. See *id.*

123. *Id.*

124. *Id.* If this can be shown, Schmidt refers to the once-unenumerated right as “enumerated,” in the sense that it is protected by the *text* of the Ninth Amendment. See *id.*

125. *Id.*

126. *Id.* Under strict scrutiny, “the government has the burden of proving that the law in question is narrowly tailored to meet a compelling interest.” *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

127. AKHIL REED AMAR, *THE BILL OF RIGHTS* 155 (1998).

128. Schmidt, *supra* note 21, at 217. Schmidt mentions “fundamental rights” in this context because he believes the Privileges or Immunities Clause incorporates *Ninth* Amendment rights against the states. See *id.* at 217 n.348.

constitutions, and other related sources for epistemic guidance.”<sup>129</sup> Courts would also consider the enforcement of laws pertaining to the claimed right, views of the right in scholarly sources, international views of the right, and the right’s congruence with natural law.<sup>130</sup> Schmidt’s proposal is a “more document-supported approach,” and examines unenumerated rights from the perspective of all three branches of government.<sup>131</sup> The approach purports to increase protections when important liberty interests are threatened by laws, while decreasing the likelihood of recognizing unenumerated rights which threaten a “substantial risk of harm to others.”<sup>132</sup>

Upon considering these specific approaches, it becomes clear that Ninth Amendment adjudication is neither an impossibility nor a wide-open inquiry into an endless source of rights. All of these approaches are uniquely centered on a sphere of individual activity that exists outside *any* permissible scope of governmental regulation. The approaches of Niles and Rubinfeld best solve the problem of looking for historical pedigree of a positive right, and the problem of defining that right itself at an appropriate level of generality. At the same time, the approaches provide an absolute protection for this class of rights which is clearly articulated in the text of the Bill of Rights. The next Section considers a possible source of a different set of Constitutionally protected unenumerated rights: the Privileges or Immunities Clause of the Fourteenth Amendment.

#### B. THE PRIVILEGES OR IMMUNITIES CLAUSE

At first glance, the language of the Fourteenth Amendment’s Privileges or Immunities Clause<sup>133</sup> seems much less open-ended than that of the Ninth: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>134</sup> The wide

---

129. *Id.* at 217. For commentary on the use of texts other than the Constitution in Ninth Amendment analysis, see Rapaczynski, *supra* note 8, at 198–204; Wachtler, *supra* note 7, at 610–11. “[I]f judges can look to these sources, is there something that constrains them in the outcomes with which they should come up?” Rapaczynski, *supra* note 8, at 203.

130. Schmidt, *supra* note 21, at 217–18.

131. *Id.* at 217.

132. *Id.*

133. “There is a ‘Privileges or Immunities’ Clauses and there is a ‘Privileges and Immunities’ Clause.” J. Harvie Wilkinson III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL’Y 43 (1989). See also U.S. CONST. art. IV, § 2, cl. 1. Scholarly discussion often ignores the importance of the conjunction distinguishing the two.

134. U.S. CONST. amend. XIV, § 1. Oddly enough, while the Privileges or Immunities Clause is perhaps “the most explicit and potent substantive limitation on state legislative powers,” it has generally

range of inconsistent and inconclusive historical evidence,<sup>135</sup> and the clause's severe and rapid limitation in *The Slaughter-House Cases*<sup>136</sup> and their sequelae,<sup>137</sup> further frustrate efforts to definitively identify the meaning of the clause. In any event, as with the Ninth Amendment, many scholars have looked to the Privileges or Immunities Clause as a guarantee of an as-yet-unspecified set of substantive rights.

### 1. A Brief History of "Privileges" and "Immunities"

The Privileges *and* Immunities Clause of Article IV<sup>138</sup> is probably the most logical starting point for any discussion of the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>139</sup> Article IV, Section Two states that "[t]he citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Known as the Comity Clause,<sup>140</sup> its "primary purpose . . . was to help fuse into one Nation a collection of independent, sovereign States."<sup>141</sup> Under Comity Clause doctrine, states need a "substantial reason" to justify discrimination against citizens of other states.<sup>142</sup> As it is presently interpreted by the Court, the Clause *does not* govern how a state treats its own citizens,<sup>143</sup> and does not benefit United States citizens as a class.<sup>144</sup> The case law is not

---

"proved too much for the Court to swallow." Rubenfeld, *supra* note 92, at 742.

135. "In no part of the congressional debates on the Amendment is there greater evidence of vagueness and inconsistencies . . ." Wilkinson, *supra* note 133, at 44 (quoting G. GUNTHER, CONSTITUTIONAL LAW 417 (11th ed. 1985)). See also Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1146 (2000) [hereinafter *Historical Linguistics*].

136. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See also Bryan H. Wildenthal, *Perspective: How I Learned to Stop Worrying and Love the Slaughter-House Cases: An Essay in Constitutional-Historical Revisionism*, 23 T. JEFFERSON L. REV. 241, 241 (2001) [hereinafter *How I Learned*] (stating that modern criticisms of the case "have condemned it for so narrowly construing the Privileges and Immunities Clause of the Fourteenth Amendment as to render that provision a nullity").

137. E.g., *How I Learned*, *supra* note 136, at 246–48.

138. U.S. CONST. art. IV, § 2, cl. 1.

139. The Clause was often referenced during congressional debate about the Fourteenth Amendment. See *infra* text accompanying notes 225–65.

140. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398 (1992) (quoting U.S. CONST. art. IV § 2, cl. 1).

141. *Toomer v. Witsell*, 334 U.S. 385, 395–96 (1948). See also DE ROSA, THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE 32–35 (1996).

142. *Toomer*, 334 U.S. at 396. See also Harrison, *supra* note 140, at 1398–400; Wilkinson, *supra* note 133, at 43–44.

143. See Harrison, *supra* note 140, at 1398.

144. Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 370 (1995).

particularly helpful in defining “privileges” and “immunities,”<sup>145</sup> and references to the clause prior to the Fourteenth Amendment’s adoption “fell short of establishing a single, coherent meaning for [those terms].”<sup>146</sup>

The first judicial examination of the Privileges or Immunities Clause took place in the *Slaughter-House Cases*.<sup>147</sup> At issue in *Slaughter-House* was a challenge to the Louisiana legislature’s allegedly granting monopoly status to the Crescent City Live-Stock Landing and Slaughter-House Company.<sup>148</sup> The grant was challenged on Thirteenth Amendment grounds, as well as three Fourteenth Amendment challenges—among them a Privileges or Immunities Clause challenge.<sup>149</sup> The Court was “thus called upon for the first time to give construction to these articles.”<sup>150</sup> The Privileges or Immunities Clause challenge was unsuccessful because the Court engaged in a restricted reading of the Clause, one that only preserves privileges or immunities associated with national, and not state, citizenship.<sup>151</sup> The rights associated with freely choosing one’s occupation in *Slaughter-House* were not “privileges and immunities of citizens of the *United States* within the meaning of the clause of the fourteenth amendment under consideration.”<sup>152</sup>

In the majority opinion, Justice Miller provides us with a better idea of what *is* a privilege or immunity of United States citizenship by “suggest[ing] some [privileges and immunities] which owe their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>153</sup> These included the rights outlined in *Crandall v. Nevada*.<sup>154</sup> All

---

145. See, e.g., William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235, 249 (2001) [hereinafter *Missing Link*] (“The line distinguishing rights of state citizens from rights of those who lacked state citizenship but whose privileges and immunities were protected was rarely discussed and remained amorphous.”); Laurence Tribe, *Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 142–43 (1999); Harrison, *supra* note 140, at 1454 (“[T]he case law is sketchy at best.”); Wilkinson, *supra* note 133, at 44.

146. *Missing Link*, *supra* note 145, at 249.

147. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *Slaughter-House* is treated in more detail in Part III, *infra*.

148. *Id.* at 57–59.

149. *Id.* at 66. The other Fourteenth Amendment challenges were under the Equal Protection and Due Process Clauses. *Id.*

150. *Id.* at 67.

151. *Id.* at 74.

152. *Id.* at 80 (emphasis added).

153. *Id.* at 79. The explicit text of Justice Miller’s opinion might even support an expanded reading of the Privileges or Immunities Clause. See William J. Rich, *Taking Privileges or Immunities Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 174–84 (2002)

of these rights “depend[] upon [one’s] character as a citizen of the United States,” and “are rights of the citizen guaranteed by the Federal Constitution.”<sup>155</sup> This reading of Privileges or Immunities—encompassing federal statutes—may only benefit citizens, as opposed to resident aliens.<sup>156</sup> In any event, *even under this severely limited construction*, *Slaughter-House* supported a reading of the Privileges or Immunities Clause that protected unenumerated Constitutional rights largely associated with self-government. Indeed, as one commentator has observed, perhaps “[i]t was only AFTER *Slaughter-House* that things started going off the rails.”<sup>157</sup> Since *Slaughter-House*, numerous litigants have tried, and failed, to use the clause as a source of protection for unenumerated rights outside of those pertaining “to federal structure, constitution, or legislation.”<sup>158</sup>

Arriving over 125 years after *Slaughter-House*, the Court’s decision in *Saenz v. Roe*<sup>159</sup> showed “signs that [the Privileges or Immunities Clause] is not yet a dead letter.”<sup>160</sup> In a majority opinion by Justice Stevens,<sup>161</sup> the Court held that the Privileges or Immunities Clause protects a component of the unenumerated “right to travel.”<sup>162</sup> Some observers saw this “revival

---

[hereinafter *Taking Privileges or Immunities Seriously*].

154. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). *Crandall* identified a series of Constitutionally protected unenumerated rights of a United States citizen, including the rights to come to the seat of government to assert any claim he may have . . . to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. . . . a right of free access to [United States] sea-ports . . . sub-treasuries . . . land offices . . . and the courts of justice in the several states . . . .  
*Id.* at 44.

155. *Slaughter-House*, 83 U.S. at 79. For an interesting comparison between the majority opinion and Justice Bradley’s dissent see RESTORING THE LOST CONSTITUTION, *supra* note 101, at 196–203.

156. See *Taking Privileges or Immunities Seriously*, *supra* note 153, at 195–96.

157. *How I Learned*, *supra* note 136, at 246. Much of this trouble had to do with the struggle over incorporating the Bill of Rights. See *id.* at 247–48.

158. *Taking Privileges or Immunities Seriously*, *supra* note 153, at 188. For a more detailed summary of these, see *id.* at 188–90.

159. *Saenz v. Roe*, 526 U.S. 489 (1999).

160. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 320.

161. Professor John Eastman is among those “surprise[d] . . . that this revival of a long-dead constitutional provision came from . . . Justice John Paul Stevens . . . rather than Justice Thomas, whose trademark on the Court has been to revive the original understanding of long overlooked or misinterpreted clauses of the Constitution.” John C. Eastman, *Re-evaluating the Privileges or Immunities Clause*, 6 CHAP. L. REV. 123, 123 (2003). Professor Erwin Chemerinsky “note[s] that Justice Scalia, one of the Court’s foremost opponents to protecting nontextual constitutional rights, voted with the majority.” ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 478 (2002).

162. *Saenz*, 526 U.S. at 503. As a result of this, a California statute imposing durational residency requirements for obtaining the state’s higher welfare benefits was unconstitutional, notwithstanding the fact it had been enacted pursuant to a federal program. *Id.* at 504–11. For a look at how the Court’s treatment of the issue in *Saenz* compares with the factually similar *Shapiro v. Thompson*, 394 U.S. 618

of the . . . Privileges or Immunities Clause . . . as heralding a shining new era of fundamental rights predicated on the constitutional clause that ought to have been the basis for such a jurisprudence for more than a century.”<sup>163</sup> While “it is uncertain what *Saenz v. Roe* will mean in the future,” the Court’s “use of the long-buried privileges or immunities clause opens [the] possibility” of using the clause to incorporate the Bill of Rights against the states, or protect the right to privacy.<sup>164</sup> Standing alongside each other, *Slaughter-House* and *Saenz* “set the stage” for a reconsideration of the Privileges or Immunities Clause’s relationship to positive law.<sup>165</sup>

In another surprising twist of *Saenz*, Justice Thomas wrote a separate dissent to note his “open[ness] to reevaluating [the Privilege or Immunities Clause’s] meaning in an appropriate case,” because of his “belie[f] that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence.”<sup>166</sup> Justice Thomas dispelled any idea that such reconsideration would contribute to a grand expansion of constitutional protection for unenumerated rights:

We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority’s failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the “predilections of those who happen at the time to be Members of this Court.”<sup>167</sup>

Justice Thomas was concerned that the Clause would be construed, in direct contravention of *Corfield*, to “guarantee[] equal access to all public benefits . . . that a State chooses to make available.”<sup>168</sup>

*Saenz* itself announced a constitutional guarantee for an unenumerated right: the right to travel. “The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to

---

(1969), see Tribe, *supra* note 145, at 113–25.

163. Tribe, *supra* note 145, at 110.

164. CHEMERINSKY, *supra* note 161, at 478. No decision has relied on the clause since *Saenz*.

165. *Taking Privileges or Immunities Seriously*, *supra* note 153, at 157.

166. *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

167. *Id.* at 528 (Thomas, J., dissenting) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)).

168. *Id.* at 525 (Thomas, J., dissenting). Professor Laurence Tribe thinks “Justice Thomas was attacking a straw man,” because the Court’s holding was much narrower than this. Tribe, *supra* note 145, at 134.

another' is firmly embedded in our jurisprudence."<sup>169</sup> Professor Tribe suggests that this unenumerated right "might even be understood as an outgrowth of, the grand architecture of federal-state relations that the Court has been mapping out for the past two decades . . . ."<sup>170</sup> Tribe observes the Court's heavy reliance "upon structural reasoning when defining the prerogatives of the distinct institutions of government," stands in stark contrast to "eschew[ing] this methodological approach when deriving the citizenry's rights against that government."<sup>171</sup> "[I]t seems both ironic and regrettable" that the Court would recognize the unenumerated rights of "state governments, the national legislature, and the nation's executive branch," while failing to infer unenumerated "rights or privileges of individuals," from the "logic of the constitutional plan."<sup>172</sup> With this in mind, it is sensible to predict that the current Court would be most likely to extend the protection of the Privileges or Immunities Clause to protect rights associated with participation in the democratic process, as envisioned in the architecture of the Constitution itself.

This notion of self-governance is also present in Justice Harlan's *United States v. Guest*<sup>173</sup> concurrence, in which he explained the fundamentality of the right to travel. He described this Privilege or Immunity of United States citizenship<sup>174</sup> "as a method of . . . facilitating the creation of a true federal union." Professor Tribe identifies one significant hurdle in this self-governance approach: that many "other constitutive choices," such as "choosing a marital partner . . . whether to care for a child . . . [and] whether to have one's own biological baby," determine how we "govern ourselves as individuals."<sup>175</sup> As this Note explains below, the Privileges or Immunities Clause can easily be read in conjunction with the Ninth Amendment to broadly protect unenumerated rights in accordance with Tribe's broader principle, but that the Privileges or Immunities Clause *by itself* may be better associated with rights pertaining to citizens' roles in the project of governance itself.

---

169. *Saenz*, 526 U.S. at 498 (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

170. Tribe, *supra* note 145, at 157.

171. *Id.* at 159–60. The Ninth Amendment, however, "draws no distinction at all between such personal rights . . . and such relatively impersonal rights . . . which ha[ve] meaning only as a corollary of the interstate organization of constitutional power." *Id.* at 162.

172. *Id.* at 167–68 (quoting *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting)).

173. *United States v. Guest*, 383 U.S. 745 (1966).

174. *Saenz*, 526 U.S. at 503 (identifying a component of the right to travel as a Fourteenth Amendment privilege or immunity of United States citizenship).

175. Tribe, *supra* note 145, at 187–88.

## 2. The Privileges or Immunities Clause and Unenumerated Rights

Many scholars have concluded that the Privileges or Immunities Clause incorporates some combination of the Bill of Rights and various other constitutional guarantees against the states.<sup>176</sup> Theories incorporating the Bill have largely limited incorporation to its first eight amendments.<sup>177</sup> Other constitutional rights protected by the clause might include “the privilege of the writ of habeas corpus, the immunity against ex post facto laws, the [Privileges and Immunities Clause], as well as privileges added later such as equal protection.”<sup>178</sup> Unenumerated rights, “such as the right to travel and to immunity from conviction unless the proof satisfies the jury beyond a reasonable doubt,” might share the same protection as the enumerated rights.<sup>179</sup> Treating the incorporation debate in any great detail is beyond the scope of this Note.<sup>180</sup> What matters is that many view the Privileges or Immunities clause as incorporating *positive*, and *elsewhere-enumerated*, Constitutional rights against the states.

Other scholars have promulgated natural rights interpretations of the Privileges or Immunities Clause.<sup>181</sup> As with the Ninth Amendment, there is concern that a natural law approach would enable the Court to “support any expansion of the Clause that may strike [its] fancy.”<sup>182</sup> Professor Olson, after a detailed historical survey of nineteenth century naturalist thinking, concludes the Fourteenth Amendment’s framers “declaratory vision” supports the “exist[ence] [of some rights] notwithstanding that the

---

176. See, e.g., RESTORING THE LOST CONSTITUTION, *supra* note 101, at 192–203; Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000) [hereinafter *The Lost Compromise*].

177. E.g., AMAR, *supra* note 127, at xiv–xv.

178. *Historical Linguistics*, *supra* note 135, at 1145. While a detailed examination is beyond the scope of this Note, I might suggest that bankruptcy might be one of these privileges or immunities. See U.S. CONST. art. I, § 8, cl. 4. This may help reconcile the Supreme Court’s decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (abrogating state sovereign immunity for a preferential transfer under the Bankruptcy Code), with other Eleventh Amendment case law. See *infra* note 207. Courthouse access might present similar issues. See *Tennessee v. Lane*, 541 U.S. 509 (2004). *But cf.* *United States v. Kras*, 409 U.S. 434, 446 (1973) (“There is no constitutional right to obtain a discharge of one’s debts in bankruptcy.”). For an interesting look at related Eleventh Amendment issues see Christopher Cowan, Note, *An Unworkable Rule of Law: The ADA, Education, and Sovereign Immunity; An Argument for Overruling Seminole Tribe of Florida v. Florida Consistent with Stare Decisis*, 80 S. CAL. L. REV. 347 (2007).

179. *Historical Linguistics*, *supra* note 135, at 1146.

180. One commentator has lamented that our existing incorporation doctrine is a “chronic conceptual embarrassment to constitutional analysts.” Sager, *supra* note 20, at 262.

181. See, e.g., Eastman, *supra* note 161; Olson, *supra* note 144.

182. Olson, *supra* note 144, at 348.

sovereign will had not embodied [them] within a legal document.”<sup>183</sup> The framers of the Fourteenth Amendment shared the view of the Constitution’s Framers; the Privileges or Immunities Clause “was meant to protect the fundamental natural rights that every legitimate government was bound to respect,” including a Lockean freedom of contract.<sup>184</sup> While the Clause has been largely nonjusticiable, it is a clear command of positive law protection.<sup>185</sup> By “rejecting natural rights jurisprudence altogether,” conservative jurists have eliminated their best mode of identifying Constitutionally-protected unenumerated rights.<sup>186</sup>

Under Harrison’s equality-based approach, “[t]he privileges and immunities of state citizenship include those rights of state *positive* law that come within the category of privileges or immunities,” and abridgment takes place when a state “withdraws them from certain citizens, but not when it alters their content equally for all.”<sup>187</sup> Harrison also notes that the clause protects the privileges or immunities of citizens *of the United States*, and that the *Slaughter-House* dissent “was therefore correct in saying that the clause [also] forbids the abridgment of rights created or protected by *national* law.”<sup>188</sup> Even prior to the Fourteenth Amendment, it would have “be[en] quite natural to refer to federal rights as privileges or immunities of citizens of the United States.”<sup>189</sup> This equality-based reading of the clause would significantly alter the current equal protection framework,<sup>190</sup> and

---

183. *Id.* at 408–09. The Constitution should be given an interpretation “which is approved of [by] justice, humanity, and God.” *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1837 (1866)).

184. Eastman, *supra* note 161, at 126.

185. *Id.* at 128. Compare this with Eastman’s view of the Ninth Amendment as a “vague, philosopher’s ideal of higher justice.” *Id.*

186. *Id.* at 136. *See also* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989) (disputing the notion that natural rights arguments are “a license for unlimited government involvement and a roving judiciary”).

187. Harrison, *supra* note 140, at 1422. *See also* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 44–65 (1996) (exploring various equality readings of the clause).

188. Harrison, *supra* note 140, at 1424 (emphasis added). With respect to the Contracts Clause, this protection is redundant. *Id.* Additional concerns arise if we read the clause as incorporating the first eight amendments against the states. *See id.* at 1424–25. *See also* Curtis, *supra* note 187, at 25 (noting that “many Bill of Rights guarantees are also protected from state action by the Due Process Clause”).

189. *Historical Linguistics*, *supra* note 135, at 1127.

190. *See* Harrison, *supra* note 140, at 1433–51. “In short, the Equal Protection Clause is mainly about protection, even though it is about equality too.” *Id.* at 1433. *See also* Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (“We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.”). Professor Rich believes an equality reading of the clause “adds little to what we currently understand to

“banishes most of the baffling uncertainty that has for so long surrounded [the Privileges or Immunities clause] for students of the Fourteenth Amendment.”<sup>191</sup> The primary inquiry in Harrison’s “positive law understanding” of the clause “is distinguishing between those aspects of the positive law that constitute citizenship rights and those that do not.”<sup>192</sup> While this inquiry would not be easy, “it is not as difficult as an inquiry into natural rights.”<sup>193</sup>

In an article pre-dating his term on the Court, Justice Thomas explored how the Privileges or Immunities Clause should be read against the higher law backdrop of the Constitution.<sup>194</sup> Interestingly enough, some of his higher law arguments support Harrison’s reading of the Clause as an equality provision. Justice Thomas points to Justice Harlan’s apparent reliance on the Clause in his famous dissent in *Plessy v. Ferguson*.<sup>195</sup> Justice Harlan’s frequent references to “‘citizens’ rather than ‘persons’” shows that he relied on the Privileges or Immunities Clause rather than on either the Equal Protection or the Due Process Clause, both of which refer to persons.<sup>196</sup> Thomas claims that *Brown v. Board of Education*,<sup>197</sup> a cornerstone of our equal protection jurisprudence, presented “an opportunity to revive the Privileges or Immunities Clause as the core of the Fourteenth Amendment.”<sup>198</sup> Similarly, he criticizes Bob Jones University

---

be the meaning of the Equal Protection Clause of the Fourteenth Amendment.” *Missing Link*, *supra* note 145, at 257.

191. Harrison, *supra* note 140, at 1452. *But see* Curtis, *supra* note 187, at 64 (“A mere equality approach replaces substantial liberty with formalism.”).

192. Harrison, *supra* note 140, at 1452.

193. *Id.* For applications of this theory see Harrison, *supra* note 140, at 1462–69. For example, “Slaughter-House would be a difficult case today,” but it “was probably wrong.” *Id.* at 1468–69. *See also* AMAR, *supra* note 127, at 178–179 n.\* (discussing Harrison’s theory); Curtis, *supra* note 187, at 82–85 (discussing same).

194. *See generally* Thomas, *supra* note 186.

195. *Id.* at 66–67.

196. Thomas, *supra* note 186, at 67. One passage from *Plessy* is particularly striking in this regard:

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.

*Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

197. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

198. Thomas, *supra* note 186, at 68. Indeed, “[*Brown*] would have had the strength of the American political tradition behind it if it had relied on Justice Harlan’s arguments instead of relying on dubious social science.” *Id.* Thomas hardly stands alone in criticizing the use of social science in *Brown*. *See, e.g.*, PAUL BREST ET. AL., *PROCESS OF CONSTITUTIONAL DECISIONMAKING* 764–65 (2000).

for ignoring “higher-law thinking” in arguing on behalf of their racial policies in *Bob Jones University v. United States*.<sup>199</sup>

Other scholars combine the natural rights and equality approaches into a “two-tiered approach to understanding privileges or immunities.”<sup>200</sup> Professor Amar cites earlier scholarship identifying both “a fundamental-rights core and an equal rights outer layer,” in both the Civil Rights Act of 1866 and antebellum jurisprudence.<sup>201</sup> State law rights are entitled to a kind of antidiscrimination provision, while rights “inscribed in an enduring bill of rights” are entitled to “fundamental rights (‘full’) protection.”<sup>202</sup> According to this view “[t]he best understanding of *abridge* in section I surely comes from its fundamental-rights counterpart in the First Amendment.”<sup>203</sup> For example, a limited anti-discrimination reading of the Privileges or Immunities Clause would be inadequate in light of the framers’ goal of preventing “state[s] ‘evenhandedly’ abridg[ing] the rights of all speakers [critical of the Black Codes], white and black, southern and northern.”<sup>204</sup>

Professor Rich modifies this “traditional” two-tiered approach, using the Privileges or Immunities Clause to protect not only “fundamental rights included within the Bill of Rights,” but also “rights established by federal statutory law that are of the same nature as those *traditionally* recognized as privileges or immunities derived from common law, statutes, or treaties.”<sup>205</sup> This “federal statutory law” is limited on Rich’s approach to “federal government acts to establish contract rights, property rights, or employment rights,”<sup>206</sup> and is accordingly consistent with both the Privileges or Immunities Clause’s application only to citizens (as opposed to aliens or corporations) and the Framers’ concern about overly-expansive

---

199. Thomas, *supra* note 186, at 68. *Bob Jones University* denied tax-exempt status to racially discriminating religious schools. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

200. *Missing Link*, *supra* note 145, at 256. See AMAR, *supra* note 127, at 178–79 n.\*.

201. AMAR, *supra* note 127, at 178 n.\*.

202. *Id.* at 179.

203. *Id.*

204. *Id.* See also *Live-Stock Dealers’ & Butchers’ Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 653 (C.C.D. La. 1870) (“[T]he fourteenth amendment of the constitution was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character.”). I am not sure whether a law singling out speech of this kind would be constitutionally permissible under equality readings of the clause. Such a law might be impermissible discrimination against the class of persons wishing to criticize the black codes.

205. *Missing Link*, *supra* note 145, at 257 (emphasis added).

206. *Id.*

federal power.<sup>207</sup> Rich recognizes “the basic reasonableness of the [*Slaughter-House*] majority’s decision to avoid wholly open-ended interpretations of the Privileges or Immunities Clause that would have invited unbounded federal interference with traditional state police powers.”<sup>208</sup> The Eleventh Amendment would not bar the enforceability of Rich’s category of federal law against the states.<sup>209</sup>

### III. RECONSTRUCTION AND THE RELATIONSHIP BETWEEN THE TWO PROVISIONS

Reconstruction provides an opportunity to examine what relationship, if any, the Ninth Amendment has to the Privileges or Immunities Clause (or any part of the Fourteenth Amendment). Legislative debates about both Civil Rights Acts, and the Fourteenth Amendment itself, at the very least, provide *some* insight into what the framers of the Fourteenth Amendment thought about both the Ninth Amendment and the Privileges or Immunities Clause. Reconstruction is also a good point to start exploring the applicability of the Ninth Amendment to the states, and how, if at all, the Privileges or Immunities Clause is related to the Ninth Amendment’s possible incorporation. In this Section, I explain my proposal that without somehow incorporating the Ninth Amendment, the Fourteenth Amendment is not an independent source of unenumerated natural or privacy rights. This Section concludes by looking at a variety of historical materials and scholarship to better illustrate this conclusion.

Professor Akhil Amar wisely laments that despite the volumes of scholarship on the issue, “we still lack a fully satisfying account of the relation between [any of] the first ten amendments and the Fourteenth.”<sup>210</sup> At the very least, the Ninth Amendment has one nearly unmistakable link to the Fourteenth Amendment Privileges or Immunities Clause: both “arguably were designed to codify the natural rights views of many of our nation’s leading founders . . . .”<sup>211</sup> The framers of the Fourteenth

---

207. *Id.* at 258.

208. *Id.* at 267.

209. *See id.* at 270. Under his approach, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) were wrongly decided. *See Missing Link*, *supra* note 145, at 235–36, 283–93.

210. AMAR, *supra* note 127, at 139.

211. Eastman, *supra* note 161, at 124. *See also* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 5 (1997) (identifying the Declaration of Independence, Ninth Amendment, and Privileges or Immunities Clause as the three “commitments from which we may derive our reasoned constitutional law of human rights”); Yoo, *supra* note 75, at 1024.

Amendment may have even held the “conception of natural rights as liberty rights” to a greater degree than the Founders.<sup>212</sup> *However*, it seems relatively safe to assert that the Constitution’s Founders did not consider the individual rights protections of the Bill of Rights to apply to the states.<sup>213</sup>

Prior to incorporation of any provision of the Bill of Rights, a limited reading of the Ninth Amendment in which state law rights were “retained” and preserved from only federal interference seems more plausible than it would today.<sup>214</sup> While the historical materials regarding the Reconstruction Congress’s intent regarding both the Ninth and Fourteenth Amendments vary,<sup>215</sup> the framers of the Fourteenth Amendment, like the Founders, might not have viewed the Ninth Amendment as being enforceable against the states.<sup>216</sup> Other scholars argue that “[t]he Fourteenth’s framers *did* intend the Privileges and [sic] Immunities Clause to protect rights beyond those contained in the first eight amendments.”<sup>217</sup>

Notwithstanding the existing tensions between state positive law and natural law principles, the Fourteenth Amendment’s application of federal rights to the states increased the chance for conflict between state positive

---

212. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 60. Professor Yoo argues that the Reconstruction Congress had a “reoriented understanding of rights,” in which “rights were to be exercised against majorities in the states by individuals in the minority.” Yoo, *supra* note 75, at 1024.

213. See Laurence Claus, *Protecting Rights From Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 614–16 (2004).

214. See *id.* “The Founders probably understood other rights retained by the people to be . . . other existing rights under state law, including common law.” *Id.* at 614. Accord Yoo, *supra* note 75, at 970.

215. This is an understatement. See Yoo, *supra* note 75, at 1023. Professor Olson also identifies this inconsistency, and criticizes scholars for failing to inquire whether the framers of the Fourteenth Amendment intended the Privileges or Immunities Clause to protect unenumerated rights. Olson, *supra* note 144, at 348.

216. Yoo, *supra* note 75, at 1023–24. Some scholars have concluded that the Fourteenth Amendment’s Privileges or Immunities Clause was an effort to incorporate only the first eight amendments against the states, treating the Ninth and Tenth Amendments as “twin federalism provisions which could not be enforced against the states.” *Id.* “[T]he bulk of historical evidence makes it more likely that the Ninth Amendment, like the Tenth, was not understood to protect individual rights from state action.” Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 646 (2005) [hereinafter *Lost Jurisprudence*]. Professor Amar observes that the Bill of Rights (including the Ninth Amendment) differs from the Fourteenth Amendment’s privileges and immunities in a number of respects. AMAR, *supra* note 127, at 133. Most importantly, the Bill “arose mainly to address the agency problem of government, whereas the [Fourteenth Amendment] arose to address as well the distinct problem of minority rights.” *Id.* at 133.

217. Yoo, *supra* note 75, at 1024 (emphasis added). As another example, Professors Raoul Berger and Charles Fairman believe it guaranteed at least the provisions of the Civil Rights Act of 1866. *Id.* See also Conant, *supra* note 71, at 819 (“These privileges and immunities of citizens of the United States are found in the original Constitution, in the Bill of Rights, and in English constitutional protections of 1791 preserved by the Ninth Amendment.”).

law and the “rights retained.”<sup>218</sup> Constitutional scholars have argued that similar transformations occurred with respect to interpreting other provisions of the Bill of Rights,<sup>219</sup> and have further explained that the Founders’ lack of specific intent regarding the Ninth Amendment’s application to this new class of “rights retained by the people” is not a problem.<sup>220</sup>

A. WHAT THE TERMS THEMSELVES CAN TELL US ABOUT THE MEANING OF THE CLAUSE

Much of the debate on the meaning of the Privileges or Immunities Clause centers on the ordinary meanings of the terms “privilege” and “immunity,” and the significance of their inclusion over alternatives such as “right” and “liberty” in the text of the Fourteenth Amendment. Many scholars that have considered the question have concluded that up to and including Reconstruction, use of the terms was virtually interchangeable.<sup>221</sup> On the other hand, Professors Curtis and Barnett point to Blackstone’s usage of the terms in his *Commentaries*, which may establish separate meanings for the two terms:

The rights themselves thus defined by these several statutes, consist in a number of *private immunities*; which will appear, from what has been premised, to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those *civil privileges*, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.<sup>222</sup>

Upon first reading this, it is hard to ignore the striking similarity

---

218. Claus, *supra* note 213, at 815.

219. *Lost Jurisprudence*, *supra* note 216, at 645. Michael Kent Curtis, Akhil Amar, and Lash himself have identified the Fourteenth Amendment’s framers’ concerns regarding *state* abridgement of the freedoms of speech, religion, and other rights among the first eight amendments. *See id.* *See also Taking Privileges or Immunities Seriously*, *supra* note 153, at 200–01 (“The Civil War Amendments . . . put[] to rest arguments about the supremacy of state sovereignty.”).

220. Claus, *supra* note 213, at 615–16. The Ninth Amendment’s broad language, according to Claus, has “sufficient generality to cover the case.” *Id.* at 616. The Founders similarly could not have specifically intended the First and Eighth Amendments to apply to “technolog[ies] unimagined at the Founding.” *Id.*

221. *E.g.*, “The words *rights*, *liberties*, *privileges*, and *immunities*, seem to have been used interchangeably.” MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 64–65 (1986). *Accord* AMAR, *supra* note 127, at 166 (describing modern definitions of the words as “roughly synonomous”). “Nor is modern usage [] any different from that of the eighteenth and nineteenth centuries.” *Id.* Professor Amar bases this conclusion on the “powerfully researched” work of Professor Curtis. *Id.* at 166–67.

222. BLACKSTONE, *supra* note 85, at 125.

between the definition of *private immunity*, the “residuum of natural liberty,” and the text of the Ninth Amendment. Professor Barnett points to this as evidence that framers of the Fourteenth Amendment used the term “privileges or immunities” to protect *both* natural and “additional” rights (presumably the sum total of Blackstonian private immunities and civil privileges).<sup>223</sup> The “immunities” of the Fourteenth Amendment must then refer to rights the people retained in securing civil government (as in the Ninth Amendment), and the “privileges” must refer to the political rights the people gained through the Constitution and laws made in pursuance thereof.

If this kind of distinction was intended by the drafters of the Fourteenth Amendment, why would the Privileges or Immunities Clause speak of the “privileges or immunities of citizens of the United States”? The use of a citizenship qualifier seems perfectly reconcilable with Blackstone’s usage of “civil” alongside “privileges,” but a new mystery appears when examining the citizenship qualifier against “*private* (neither public nor civil) immunities.” Blackstone’s own use of term “*civil immunities*” on the very same page of the *Commentaries* does nothing to clear this up.<sup>224</sup>

Throughout the remainder of the Note, I explain my belief that these Blackstonian private immunities, “that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience,” are protected by the Ninth Amendment (which is not restricted to citizens of the United States). The “civil privileges” secured by the surrender of some natural rights are more logically both the Privileges or Immunities of *citizens of the United States*. To borrow language from *Slaughter-House*, the civil privileges are appropriately those “which owe their existence to the Federal Government, its National character, its Constitution, or its laws.”<sup>225</sup> Further, I explore the idea that any protection of privacy or natural rights (not explicitly protected in the first eight amendments) by the Privileges or Immunities Clause requires incorporation of the Ninth Amendment somewhere in the Fourteenth Amendment to be considered one of the Privileges or Immunities of citizens of the United States.

#### B. LEGISLATIVE DEBATE AND THE DISTINCTIONS (IF ANY) BETWEEN PRIVILEGES, IMMUNITIES, AND RIGHTS

223. See RESTORING THE LOST CONSTITUTION, *supra* note 101, at 61.

224. See BLACKSTONE, *supra* note 85, at \*125.

225. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

Debates on the Civil Rights Act of 1866, the Fourteenth Amendment, and the Civil Rights Act of 1875 *all* explore what kind of substantive protection the Privileges or Immunities Clause might provide. Congressmen in all of the discussions employ rhetoric from Justice Bushrod Washington's famous recitation regarding the Privileges *and* Immunities Clause in *Corfield v. Coryell*,<sup>226</sup> arguably the most prominent "antebellum argument that privileges and immunities included natural rights."<sup>227</sup> Scholars point to the references to *Corfield* in the debates as evidence that the Privileges or Immunities Clause may include unenumerated natural rights.<sup>228</sup>

### 1. *Corfield* and the Meaning of Privileges *and* Immunities

The relevant Constitutional issue in *Corfield* was whether New Jersey's restriction on oyster fishing to in-state residents violated the Privileges *and* Immunities Clause in Article IV, Section 2.<sup>229</sup> Before answering this question, Judge Washington proceeded with his famous passage:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The

---

226. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

227. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 62. Professor Barnett notes another scholar's observation "that 'it would be almost impossible to overestimate the importance of the above quotation upon American law.'" *Id.* at 63 (quoting Chester James Antineau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 12 (1967)). Black notes the opinion's references to life, liberty, and the pursuit of happiness unmistakably refer to the Declaration of Independence. BLACK, *supra* note 211, at 50. Justice Washington was fourteen when the Declaration was signed, and at the time of *Corfield*, two of the Declaration's signers (John Adams and Thomas Jefferson) were still alive. *Id.* See also Eastman, *supra* note 166, at 133–36 (discussing the role of *Corfield* in these debates).

228. *E.g.*, BLACK, *supra* note 211, at 50; Eastman, *supra* note 161, at 133–36.

229. *Corfield*, 6 F. Cas. at 551–52.

right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.”<sup>230</sup>

The language of the opinion persisted throughout the Reconstruction debates, and continues to be cited in modern fundamental rights cases.<sup>231</sup>

While the opinion references natural rights, it “unquestionably refers also to such positive civil rights as the ‘protection of [sic] government’ that one receives in exchange for surrendering one’s power of enforcement.”<sup>232</sup> “Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits,” and “endorsed the colonial-era conception of the terms ‘privileges’ and ‘immunities,’ concluding that Article IV encompassed only *fundamental* rights that belong to all citizens of the United States.”<sup>233</sup> Scholars have identified *Corfield*’s emphasis on *fundamental*, as opposed to positive, rights as a

---

230. *Id.* Even under this expansive reading of the Privileges and Immunities Clause, Judge Washington noted that “such a construction,” of the Privileges and Immunities Clause might lead to the oyster beds “be[ing] totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states . . . .” *Id.* at 552.

231. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 758 (1997).

232. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 63 (quoting *Corfield*, 6 F. Cas. at 551). Harrison observes that the Privileges or Immunities Clause protects only “the privileges or immunities of citizens,” and not “other rights, like fishing in oyster beds.” Harrison, *supra* note 140, at 1454 (emphasis added). *See also Taking Privileges or Immunities Seriously*, *supra* note 153, at 162 (claiming Justice Washington’s references to positive and natural rights created confusion about the meaning of “privileges” and “immunities”). *But see* DE ROSA, *supra* note 141, at 37–38 (identifying portions of the opinion suggesting “the origin and application of the privileges and immunities are positive, rather than abstractly universal”).

233. *Saenz v. Roe*, 526 U.S. 489, 525–26 (1999) (Thomas, J., dissenting).

source of confusion in interpreting the Privileges or Immunities Clause,<sup>234</sup> and suggested that its citation for natural law principles in the Reconstruction debates led to confusion and “discourag[ing] the Court from resting any substantive rights in the language of Article IV.”<sup>235</sup>

As used by Justice Washington, privileges and immunities include “other fundamental rights created by state and federal constitutions, such as ‘the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.’”<sup>236</sup> For example, the right to a jury trial—while not a natural right—“was considered a privilege or immunity of citizenship by the authors of the Fourteenth Amendment.”<sup>237</sup> Prior to the Fourteenth Amendment, *Corfield’s* “rights enjoyed under ‘all free governments’” were “a rarified theoretical possibility.”<sup>238</sup>

## 2. Usage of Privileges, Immunities, and Rights Throughout the Reconstruction Debates

The debates surrounding both the Civil Rights Acts and the adoption of the Fourteenth Amendment frequently reference unenumerated rights of all kinds. In setting out to define the content of Privileges or Immunities of United States citizenship, the congressmen employ a variety of approaches. The rhetoric covers the full range from pure natural law, to pure positive law, and everything in between. Nonetheless, some of the passages could be interpreted as requiring incorporation of the Ninth Amendment as a predicate for the Privileges or Immunities Clause’s protection of unenumerated natural or privacy rights.

Efforts to understand exactly which class of rights that amendment’s Framers sought to codify in the Privileges or Immunities Clause are further blurred by references to seemingly paradoxical concepts like “the *natural*

---

234. *Taking Privileges or Immunities Seriously*, *supra* note 153, at 196. *Cf.* Conant, *supra* note 71, at 817 (“Justice Washington was not using the word *fundamental* in its natural law sense but in its positive law sense as a synonym for constitutional.”).

235. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 861 (1988).

236. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 63 (quoting *Corfield*, 6 F. Cas. at 552). Oddly enough, whether the Privileges or Immunities Clause protected the right to vote “later became a matter of some controversy.” *Id.* at 63 n.32. *See also* Harrison, *supra* note 140, at 1416 (noting the similarity between the rights identified in *Corfield* and those protected by the Civil Rights Act of 1866).

237. RESTORING THE LOST CONSTITUTION, *supra* note 101, at 63 n.32.

238. BLACK, *supra* note 211, at 51 (quoting *Corfield*, 6 F. Cas. at 551).

rights which necessarily pertain to *citizenship*.”<sup>239</sup> By pertaining to citizenship, these seem difficult to reconcile with the rights retained. Professor Barnett laments that he “ha[s] seen little in the historical record to suggest exactly how the rights ‘retained by the people’ . . . compared with the ‘privileges or immunities’ protected by the Fourteenth.”<sup>240</sup>

The difficulty in recognizing this distinction between already-existing and constitutionally-conferred rights may stem from our positivist tendency to view the Bill of Rights itself as an independent source of rights.<sup>241</sup> The incorporation debates surrounding the Privileges or Immunities Clause further “ignore[] the distinction between positive and negative rights.”<sup>242</sup>

Interestingly enough, the words “privilege” and “immunity” do not appear in the Bill of Rights.<sup>243</sup> Professor Amar argues that “privileges” and “immunities” are interchangeable with the Bill’s “rights” and “freedoms,”<sup>244</sup> and that the plain meanings of these four words are roughly synonymous.<sup>245</sup> Assuming that the drafters intended rights, privileges, and immunities to be redundant expressions of the same concept seems just as imprudent as looking past the plain language of the Ninth and Fourteenth Amendments themselves.<sup>246</sup>

If Amar is correct in this regard, then there should be little difference

---

239. See RESTORING THE LOST CONSTITUTION, *supra* note 101, at 66 (quoting statements of Frederick Woodbury, CONG. GLOBE, 39th Cong., 1st Sess., 1088 (statement of Frederick Woodbury)) (emphasis removed).

240. *Id.*

241. See AMAR, *supra* note 127, at 148. “To a nineteenth-century believer in natural rights, the Bill was . . . a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed.” *Id.* See also Olson, *supra* note 144, at 425 (arguing that a natural law interpretation “rather than positivism, limits the Privileges or Immunities Clause”).

242. *Taking Privileges or Immunities Seriously*, *supra* note 153, at 212. See also Olson, *supra* note 144, at 347–38 (citing the incorporation debate as a source of misunderstanding surrounding the Clause).

243. AMAR, *supra* note 127, at 166.

244. See *id.* at 166–67. Amar relies on both contemporary and historic usage of the terms for this proposition. *Id.* In a very detailed look at the subject, Professor Michael Kent Curtis reaches a similar conclusion. See Curtis, *supra* note 187, at 20–27; *Historical Linguistics*, *supra* note 135, at 1089–94. Amar claims that interchangeable use of rights and privileges is not threatened by suggestions that the Bill of Rights may at times extend to non-citizens, while the Fourteenth Amendment’s citizenship clause does not. AMAR, *supra* note 127, at 170.

245. *Id.* at 166.

246. Popular sovereignty may provide an additional justification for paying attention to the plain language of Constitutional provisions. See Curtis, *supra* note 187, at 25 (disagreeing with Raoul Berger’s claim “that a plain language argument is meaningless because we deal with legal provisions, not ‘street terms’”) (quoting Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment, A Nine Lived Cat*, 42 OHIO ST. L.J. 435, 436–37 (1981)).

in reading the Ninth Amendment as follows: “The enumeration in the Constitution, of certain *privileges*, shall not be construed to deny or disparage *other privileges* retained by the people.” This presents a problem. Both Constitutional uses of privilege are linked with citizenship, and *Corfield* similarly links privileges with positive, state-created rights. Interchangeable use of rights and privileges ignores the inherent nature of the “rights retained.”<sup>247</sup> While “[t]he use of ‘privilege’ or immunity’ to describe *fundamental rights* was common,” it was “not universal.”<sup>248</sup>

The relationship between the Ninth and Fourteenth Amendments again resurfaced in congressional debates over the Civil Rights Act of 1875.<sup>249</sup> In support of the Act, Senator John Sherman, in language frequently cited by natural rights proponents of the Ninth Amendment, articulated the following:

The Constitution itself amply secures some of the rights of its American citizens, but the ninth amendment expressly provides that “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” There are certain rights enumerated in these articles of amendment, but they are not all the rights of the American citizen; very far from it . . . . What are those privileges and immunities? Are they only those defined in the Constitution, the rights secured by the amendments? Not at all. The great fountain head, the great reservoir of the rights of an American citizen is in the common law . . . .<sup>250</sup>

Sherman clarified his position on the Ninth Amendment in later discussion on the Act:

[T]he ordinary rights of citizenship, which no law has ever attempted to define exactly, the privileges, immunities, and rights, (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common law, such as are ingrafted in the great charters of England, some of them are ingrafted in the Constitution of the United States, some of them in the constitutions of

---

247. See also Curtis, *supra* note 187, at 20 (noting that “[p]rivileges encompass rights and immunities”). Professor Curtis’s “textual analysis” of the clause “assumes the existence of basic Anglo-American liberties,” and that the “Constitution and Bill of Rights . . . as a matter of positive law prohibited government from abridging them.” *Id.* (emphasis added).

248. *Historical Linguistics*, *supra* note 135, at 1102 (emphasis added).

249. Yoo, *supra* note 75, at 1027. The Civil Rights Act of 1875 concerned equality of access to public accommodations. *Id.* Harrison relies on other exchanges from these debates to support the theory that the Privileges or Immunities Clause gave congress the power to pass the Act. See Harrison, *supra* note 140, at 1425–33 (“Republicans in Congress thought that the Privileges or Immunities Clause mandated equality with respect to the rights of state citizenship.”).

250. CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872) (statement of Sen. John Sherman).

the different States, some of them in the Declaration of Independence, our fathers did not attempt to enumerate. They expressly said in the ninth amendment that they would not attempt to enumerate these rights; they were innumerable, depending upon the law and the courts as from time to time administered.<sup>251</sup>

In contrast to Senator Sherman, Senator Allen Thurman, former Chief Justice of the Ohio Supreme Court, questioned whether constitutionally protected unenumerated rights could be derived from the common law.<sup>252</sup> Thurman's natural rights understanding of the Ninth Amendment was arguably more in line with that of the Constitution's Framers; the Amendment "protects those rights not given up to government when the people entered into the state of society."<sup>253</sup> Thurman claimed these unenumerated rights "have not been surrendered to the Government at all," and that the people of the United States "hold them against the Government . . . by as good a title as they hold them against the world. . . . They hold them because they were and are their inherent natural rights which have never been surrendered."<sup>254</sup>

One passage in Senator Thurman's statement draws a clear line between rights resulting from citizenship, and the rights retained by the people: "[T]he power of the government is commensurate with the rights of the citizens of the United States, but these *other rights*<sup>255</sup> that are retained by the people have not been surrendered to the Government at all, *and it has no jurisdiction over them.*"<sup>256</sup> If these rights are truly independent of United States citizenship, as Senator Sherman suggests, one might begin to wonder how they can be Privileges or Immunities of United States citizenship in the absence of some incorporation mechanism. In very much the same vein, Senator Thurman continues: "The people hold them not as *citizens of the United States*,<sup>257</sup> but so to speak, in despite of the United States."

Yoo points to this post-Fourteenth Amendment ratification history as

---

251. *Id.* at 844.

252. Yoo, *supra* note 75, at 1030. *See also* RESTORING THE LOST CONSTITUTION, *supra* note 101, at 67 n.55. "Common law privileges and natural rights are not interchangeable concepts." Olson, *supra* note 144, at 360.

253. Yoo, *supra* note 75, at 1030. In fact, abolitionists' failure to distinguish privileges of citizenship and rights of man was among their significant problems. *See* Olson, *supra* note 144, at 370–71.

254. CONG. GLOBE, 42d Cong., 2d Sess. App. 26.

255. *See* U.S. CONST. amend. IX.

256. CONG. GLOBE, 42d Cong., 2d Sess. App. 26 (emphasis added).

257. *See* U.S. CONST. amend. XIV, § 1.

evidence of what he calls the “declaratory” Ninth Amendment.<sup>258</sup> The Fourteenth’s framers understood the Ninth Amendment to declare both the existence and enforceability of unenumerated rights.<sup>259</sup> The Privileges or Immunities Clause, like the Ninth Amendment, “followed in this tradition of declaring and re-declaring fundamental natural rights.”<sup>260</sup> The Fourteenth Amendment merely guaranteed these rights against the states.<sup>261</sup> This is not far from Justice Goldberg’s reasoning in *Griswold*.<sup>262</sup>

Professor Charles L. Black, Jr. reaches a similar conclusion, arguing that Section One of the Fourteenth Amendment<sup>263</sup> (which includes the Privileges or Immunities Clause) prevents states from abridging “national rights” such as those protected by the Ninth Amendment.<sup>264</sup> Believing otherwise—that Section One “confer[s] a merely titular ‘status’ of state citizenship”—would be a “lame and impotent” interpretation.<sup>265</sup> Without some method of incorporation, the Ninth Amendment itself would be “merely persuasive, and not a dispositive law regarding unenumerated rights issues.”<sup>266</sup>

### C. WHAT CAN AND CANNOT BE LEARNED FROM *SLAUGHTER-HOUSE*

While criticized largely for its failure to recognize the incorporation of any of the Bill of Rights against the states,<sup>267</sup> Justice Miller’s opinion in *Slaughter-House* provides additional support for the idea of the Ninth Amendment and Privileges or Immunities Clause protecting distinct classes of unenumerated rights. Justice Miller is clear that the Privileges or Immunities of citizens of the United States are those “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>268</sup> *All of these sources are clearly positive law,*

---

258. Yoo, *supra* note 75, at 1032.

259. *Id.*

260. *Id.* at 1033.

261. *Id.* See also Schmidt, *supra* note 21, at 214 (agreeing that the Privileges or Immunities Clause incorporates the Ninth Amendment against the states).

262. See *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

263. Professor Charles Black relies on Section 1 of the Fourteenth Amendment *in its entirety* to reach this result. BLACK, *supra* note 211, at 38–39 (believing that the Privileges or Immunities Clause works with the Citizenship Clause to enforce the Ninth Amendment against the states).

264. See *id.*

265. *Id.* at 48.

266. Schmidt, *supra* note 21, at 178. For another look at incorporation of the Ninth Amendment see Massey, *supra* note 2, at 327–28.

267. E.g., AMAR, *supra* note 127, at 213.

268. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (quoting *Crandall v. Nevada*, 73 U.S. 35, 44 (1867)).

and thus incongruous with the Ninth Amendment retained rights that were not surrendered to secure these very same civil privileges or immunities.

Miller lists a number of specific rights: “to come to the seat of government,” “free access to seaports,” “demand[ing] the care and protection of the Federal government . . . when on the high seas or within the jurisdiction of a foreign government,” “the right to peaceably assemble and petition for redress of grievances,” “the privilege of the writ of habeas corpus,” and “[t]he right to use the navigable waters of the United States.”<sup>269</sup> This non-exhaustive<sup>270</sup> list of civil privileges and immunities does not suggest the clause protects traditional natural or privacy rights more closely associated with the Ninth Amendment.

Justice Miller goes on to note, seemingly because of their contemporaneous passage with the Fourteenth Amendment, that the Thirteenth and Fifteenth Amendments are among the privileges or immunities of United States citizenship.<sup>271</sup> More interestingly, Miller identifies the Fourteenth Amendment’s Due Process Clause as a Privilege or Immunity.<sup>272</sup> While Miller *may*<sup>273</sup> have rejected the idea that the Bill of Rights is incorporated against the states, modern incorporation of the Bill of Rights has taken place *through this very clause!*

Professors Tribe, Wildenthal, and Kevin Newsom<sup>274</sup> are among a growing number of scholars suggesting that the Miller opinion *did* incorporate the Bill of Rights against the states. Under their view, the *Slaughter-house* holding is more appropriately understood as there being no protections against monopolies in the Bill of Rights.<sup>275</sup> Nearly thirty years ago Professor Ely remarked that “a close reading of the various opinions in that case suggests *at least the possibility that all nine justices meant to take exactly that position!*”<sup>276</sup> Supporters of this view point to the

---

269. *Id.*

270. *See id.* (“[W]e venture to suggest *some* which owe their existence to the Federal government, its National character, its Constitution, or its laws.”) (emphasis added).

271. *Id.* at 80.

272. *Id.*

273. See the following paragraph and accompanying material, *infra*.

274. According to Wildenthal, at the time of Newsom’s article, Newsom was a research assistant for Tribe. *How I Learned*, *supra* note 136, at 244 n.11.

275. *See generally* Kevin Christopher Newsom, *Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 650 (1999–2000); *How I Learned*, *supra* note 136.

276. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 196–97 n.59 (1980) (emphasis added). Ely remarks that Field’s strongly-worded dissent may have played a role in the majority’s “hint [at the Bill] . . . [being] soon forgotten.” *Id.*

opinion's unmistakable reference to First Amendment rights:<sup>277</sup> "the right to peaceably assemble and petition for redress of grievances."<sup>278</sup>

Even though all three support incorporation of the Bill of Rights, none appear to suggest that incorporation would include the Ninth Amendment. Tribe limits the incorporated rights to "facets of the Bill of Rights that protect significantly more than collective self-government on the part of the states vis-à-vis the national government (presumably including speech, press, assembly, association, religion, and possibly also a measure of individual self-defense)," and goes on to suggest *some* privacy rights ("engag[ing] in sexual intimacies with a given individual").<sup>279</sup> Nowhere does Tribe suggest incorporation of the Ninth Amendment. Newsom similarly concludes that under *Slaughter-House* the Privileges or Immunities Clause incorporated "many" of the Bill of Rights provisions<sup>280</sup> but expressly reserves consideration on "the protection of unenumerated rights against state interference."<sup>281</sup>

At least one scholar *does* suggest incorporation of the Ninth Amendment through the Privileges or Immunities Clause, albeit with a fundamentally different approach from the above scholars and this Note. Professor Michael Conant argues that the "privileges and immunities of citizens of the United States are found [1] in the original Constitution, [2] in the Bill of Rights, [3] and in English constitutional protections of 1791 preserved by the Ninth Amendment."<sup>282</sup> He explicitly rejects Goldberg's *Griswold* concurrence, and the notion that the Ninth Amendment protects anything resembling privacy rights.<sup>283</sup> Under his theory, the Ninth Amendment (embracing English Constitutional rights) did protect against monopoly,<sup>284</sup> it was incorporated by the Privileges or Immunities

---

277. *Id.* at 196–97 n.59; Newsom, *supra* note 275, at 679; Tribe, *supra* note 145, at 183.

278. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

279. Tribe, *supra* note 145, at 185–86 n.333. Tribe recognizes the "level of generality" problem in this area of rights. *Id.* A more libertarian reading of Ninth Amendment rights, as discussed in this Note, could assist with this very problem.

280. Newsom, *supra* note 275, at 744.

281. *Id.* at 734. Professor Barnett claims "[i]f Newsom is right, then the butchers lost because the right they asserted was not among those that were *enumerated* in the Constitution." RESTORING THE LOST CONSTITUTION, *supra* note 101, at 202 (emphasis added).

282. Conant, *supra* note 71, at 819.

283. *See id.* at 808 ("There was . . . no class of English constitutional immunities against government in 1791 relating to privacy in the general sense under which a statute preventing birth control could be subsumed."). Conant describes *Griswold* as a "poor fact setting in which to raise the Ninth Amendment." *Id.*

284. *Id.* at 789.

Clause,<sup>285</sup> and because there was no freedom from monopolies *enumerated* in the Constitution or Bill of Rights, the Miller opinion failed to find a federal issue.<sup>286</sup> Conant does not examine the possibility (further described in this Note) that the Miller opinion *does* stand for the Ninth Amendment's incorporation against the states, and that freedom from monopoly<sup>287</sup> (or other English constitutional rights circa 1791) is not among the unenumerated rights it protects, just does not include.<sup>288</sup>

To take another look at Justice Miller's opinion, let us suppose the freedom of contract/freedom against monopoly claims at issue in *Slaughter-House* are Ninth Amendment privacy rights (similar to those at issue in *Griswold*).<sup>289</sup> As Ninth Amendment retained rights, one would not think of these rights as "ow[ing] their existence to the Federal government, its National character, its Constitution, or its laws," but instead as retained rights that were never surrendered for the protections of civil government. As a result, they are not *independently* (without some method of incorporation) Privileges or Immunities. However, incorporated by the Fourteenth Amendment *in any fashion*, such rights might be *derivative* Privileges or Immunities under the logic of Justice Miller's opinion. The outcome of *Slaughter-House* itself, of course, still turns on (1) whether these freedom of contract claims are properly natural or private Ninth Amendment rights,<sup>290</sup> and (2) whether the Ninth Amendment is incorporated into some portion of the Fourteenth Amendment.

In the following (and final) Section, I explore the implications of this alternative at length, and briefly go through some simple fact patterns to illustrate the distinct metes and bounds of the two classes of unenumerated rights.

---

285. *Id.* at 790.

286. *See id.* at 825. Conant argues that the Field dissent had the stronger argument in the case, and argues that while the Field dissent recognized English constitutional rights as the foundation of both state and national Privileges or Immunities under both Article IV and the Fourteenth Amendment, had they adopted an incorporation approach to these same rights through the Ninth Amendment they may have garnered more votes. Conant, *supra* note 71, at 826–28.

287. Conant describes this right as "the prohibition of grants of domestic monopolies in the ordinary trades." Conant, *supra* note 71, at 802.

288. To be fair to Professor Conant, his article predates *Saenz* by over a decade. Few (if any) scholars likely foresaw a Privileges or Immunities Clause revival in the late 1990s.

289. This raises obvious *Lochner* concerns that are well outside the scope of this Note.

290. In his analysis of a Ninth Amendment claim under Newsom's theory, Professor Barnett seems to require that the right the butchers asserted to have been expressly "enumerated," and the analysis makes no mention of the possibility the right just fell outside of the scope of an incorporated Ninth Amendment. *See* RESTORING THE LOST CONSTITUTION, *supra* note 101, at 202.

---

---

#### IV. THE NINTH AMENDMENT AND PRIVILEGES OR IMMUNITIES CLAUSE AS COUNTERPARTS

The Ninth Amendment and Fourteenth Amendment Privileges or Immunities Clause protect distinct classes of textually-protected unenumerated rights. Courts should interpret both provisions to protect rights that, while not specifically delineated in the Constitution's text, are nonetheless supported by the constitutional text. Each provision protects a distinct class of individual rights; the Ninth Amendment's "rights retained by the people" represent what was not surrendered by entering into the Constitution, while the "privileges or immunities of united states citizenship" represent the rights created by the Constitution itself, and necessary for self-governance in accordance with the constitutional plan.

Accepting that the Ninth Amendment and Fourteenth Amendment protect *different* classes of unenumerated rights is an important first step in reconceptualizing a firmer textual basis for protection of constitutional unenumerated rights. An enforceable Ninth Amendment would offer more consistent, predictable, textual protection for natural and privacy rights—the "rights retained"—than the current substantive due process framework. At the same time, identifying what is protected by the Ninth Amendment would illuminate the rights which are *not independently*<sup>291</sup> Privileges or Immunities of citizenship. A justiciable Privileges or Immunities Clause would give courts a vehicle for protecting those rights necessary for self-governance under the Constitution.

Under this approach, natural rights protected by the Ninth Amendment would most closely track the models proposed by Rubinfeld, Barnett, and Niles, and pertain to privacy and autonomy—matters in which the government would not have a legitimate interest in regulating. Notwithstanding the concerns of Rubinfeld and others about the problematic nature of inquiries in this area,<sup>292</sup> the central question in Ninth Amendment jurisprudence would be whether the activity in question was "purely private."<sup>293</sup>

As discussed above, imposing majoritarian values on the private lives of individuals would not amount to a proper (or constitutional) justification for legislation. Mere knowledge that someone is privately engaging in an

---

291. The Privileges or Immunities Clause *may* incorporate the Ninth Amendment against the states. *See infra* text accompanying notes 309–17.

292. *See supra* sources cited in note 92.

293. *See supra* sources cited in note 92.

undesirable activity or even majoritarian moral-disapproval of such engagements would not constitutionally justify laws prohibiting the conduct at issue. This approach is reasonably consistent with existing Supreme Court jurisprudence.<sup>294</sup> Difficulty alone, however, should not derail this approach, because difficult questions are likely to present themselves under any approach. If these rights were moved under the Ninth Amendment's protection, as this Note discusses below, they would likely be incorporated against the states (as with other individual rights in the Bill of Rights) under whatever incorporation doctrine is in place.

The Ninth Amendment's clear natural rights pedigree makes it the ideal source of protection for the rights not surrendered to the state by the consent of the governed—the “rights retained” in the Amendment's text itself. In terms of Blackstonian common law rights,<sup>295</sup> the Ninth Amendment would protect the “right of personal security,”<sup>296</sup> which encompasses “a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.”<sup>297</sup> As articulated in the natural rights and privacy framework discussed above, these rights end at their precise intersection with others' rights of personal security. Unlike Blackstone's rights of personal liberty and property, his definition of personal security does not invoke a positive source of law. The right to personal liberty is limited by “due course of law.”<sup>298</sup> The right to property is similarly restricted by “the laws of the land.”<sup>299</sup> This category would encompass a broad class of unenumerated autonomy rights, but, as in the natural law and privacy frameworks discussed above,<sup>300</sup> rather than needing to point to a positive protection (fundamentality) for the right (as

---

294. See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a law against private homosexual activity between consenting adults); *Stanley v. Georgia*, 394 U.S. 557 (1969) (striking down a law against possession of obscene materials). The framework does not provide an easy answer to the abortion debate, but it presents a different question for analysis: What kind of interest does the State have in the unborn child? See BLACKSTONE, *supra* note 85, at 126. This would likely turn on to what extent the unborn child is a “person,” with enforceable rights of his own—by no means an uncontroversial question.

295. BLACKSTONE, *supra* note 85, at 125. Some of the Fourteenth's framers turned to Blackstone as the source of common law unenumerated rights. Yoo, *supra* note 75, at 1033. “Blackstone described such as documents the Magna Charta, the Habeas Corpus Act, the Petition of Right, and the Bill of Rights as ‘the declaration of our rights and liberties,’ just as the American Bill of Rights had also declared some of these rights.” Yoo, *supra* note 75, at 1033 (quoting and citing BLACKSTONE, *supra* note 85, at 123–25).

296. Yoo, *supra* note 75, at 1033.

297. BLACKSTONE, *supra* note 85, at 125.

298. BLACKSTONE, *supra* note 85, at 130.

299. *Id.* at 134.

300. See material on Niles, *supra* notes 85–108.

in substantive due process) litigants would instead need to establish the relative privacy of the act in question.

The Privileges or Immunities Clause, by comparison, seems better suited to public or political rights—rights more closely associated with governance and the constitutional plan—the privileges or immunities of citizenship. Indeed, “[f]or Blackstone, privileges or immunities seemed to refer to *positive* rights or liberties *secured by society*.”<sup>301</sup> The relationship of the Privileges or Immunities Clause to citizenship<sup>302</sup> suggests that any rights protected by the clause would pertain to organized government (without which there would not be citizens). The relationship between the Privileges or Immunities Clause and self-governance under the Constitution is only amplified by its reference to Article IV. The Ninth Amendment, in contrast, protects the rights retained by the people—rights that exist independently from the enactment of the Constitution. These private Ninth Amendment unenumerated rights were never surrendered to the government in the Lockean social compact.<sup>303</sup>

A component of the right to travel has already been identified as one such enumerated right necessary for participation in the constitutional system of the United States. Other protections within this area might include the right to desegregated public education,<sup>304</sup> voting rights,<sup>305</sup> courtroom access,<sup>306</sup> and similar strengthened equality guarantees within public services necessary for responsible democratic participation.<sup>307</sup> While the primary concern with this Clause would be the potential creation of a “new class” of unenumerated rights, the Rehnquist Court was more willing to find unenumerated rights pertaining to self-governance in the structure or plan of the Constitution than for other types of individual rights.<sup>308</sup> Also, this approach is not inconsistent, nor does it depend on the incorporation debate; these rights would be protected under the Privileges

---

301. *Historical Linguistics*, *supra* note 135, at 1096 (emphasis added).

302. *See* U.S. CONST. amend. XIV.

303. *See supra* material accompanying note 36.

304. *See* Thomas, *supra* note 186, at 68.

305. Tribe, *supra* note 145, at 120 n.51 (“[e]qual access to the franchise”) (citing cases).

306. *Id.* at 117.

307. Guarantees pertaining to education appear to jump to the forefront of this line of thinking. *See, e.g.*, Kara A. Millonzi, *Recent Developments: Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286 (2003).

308. *See* Newsom, *supra* note 275, at 678 (describing Miller’s privileges or immunities as “structural rights”); Tribe, *supra* note 145, at 159–60. There may be a slight difference, as Newsom maintains that some of these rights “have little, if anything, to do with ‘Constitution.’” Newsom, *supra* note 275, at 678.

or Immunities Clause regardless of whether the Bill of Rights is protected under the same clause.

If one were instead to view the Fourteenth Amendment as the source of protection for unenumerated, natural or privacy rights, two limitations of the Privileges or Immunities Clause present substantial hurdles. Only state governments would be prohibited from infringing this class of rights. While “reverse incorporation”<sup>309</sup> might be employed to tie any substantive provision to the Fifth Amendment’s due process clause, it would remain a mystery why the amendment would be drafted to target only the states. Additionally, the amendment’s protection extends only to citizens of the United States. Articulating a rationale for only protecting the inherent privacy rights of citizens is similarly puzzling, as is speaking of these kinds of privacy or natural rights as being exclusively part of United States citizenship. If these rights are retained by people prior to adoption of the Constitution, then, unlike the privileges or immunities of United States citizenship, they would be similarly retained by non-citizens who are not governed by the Constitution. The limitation to citizens also raises questions about how, and if, the Privileges or Immunities Clause’s protections would extend to corporations.<sup>310</sup>

Any new approach presents interesting challenges with regards to incorporation. Drawing this line between Ninth Amendment and Privileges or Immunities Clause rights does not definitively answer which sources of positive law supply the substance for the Fourteenth Amendment. Incorporation debates have largely focused on incorporating the first eight amendments against the states. With a substantive reading of the Ninth Amendment, like the ones described in Part II of this Note, states could be similarly barred from denying or disparaging the rights retained. To that end, if the Privileges or Immunities Clause were utilized as the vehicle for total, selective, or refined incorporation,<sup>311</sup> then it would *technically* include both aforementioned types of unenumerated rights by its inclusion of the Ninth Amendment itself. Worth noting is what Professor Sager has described as “the impulse to spread constitutive norms of constitutional justice to all entities.”<sup>312</sup> Such an impulse clearly supports incorporating

---

309. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

310. See *Curtis*, *supra* note 187, at 102. Under current case law, the clause *does not* protect corporations. *Paul v. Virginia*, 75 U.S. 168 (1868). Given the self-governance nature of the proposed Privileges or Immunities unenumerated rights, this would be unlikely to present any sort of substantial obstacle.

311. *E.g.*, AMAR, *supra* note 127, at xiv–xv.

312. See Sager, *supra* note 20, at 253–54.

the Ninth in the same manner as the already-incorporated individual rights protections of the Bill. To do otherwise would ignore the Ninth Amendment's inclusion *in* the Bill of Rights itself.

Using these categories to replace “fundamental” rights replaces one of (if not) the most troubling, controversial, and inconsistent areas of Supreme Court jurisprudence. Fundamental rights inquiries primarily ask whether a right is fundamental, and only to a lesser extent why the criteria that confer fundamentality also deem the right worthy of Constitutional protection. This methodology has allowed judges to frame the right at issue in a conclusory fashion (for example in *Bowers*)<sup>313</sup> and in numerous instances,<sup>314</sup> has led to a wide open hunt for historical evidence and international perspectives, without a satisfying evaluation of whether engaging in either is appropriate if the Constitution's *text* is to control Supreme Court jurisprudence. The approach discussed in this Note should provide a clearer textual link to the two provisions discussed, and leaves behind inherent “fundamentality” by attempting to better delineate the unenumerated rights protected by the Constitution.

The clearest example of how this analysis would proceed involves an action of the *federal* government that infringes the Ninth Amendment privacy rights discussed above.<sup>315</sup> To use a relatively uncontroversial hypothetical,<sup>316</sup> let's say the federal government passes an otherwise constitutional law banning the use of any method of contraception. Non-procreative sex would almost certainly fall under the privacy protections discussed for the Ninth Amendment—the first category of rights. The Ninth Amendment, being undeniably applicable to the federal government, would provide a litigant with the basis to challenge the legislation at issue. The Privileges or Immunities Clause would not be implicated—contraceptive usage has little, if anything, to do with participation in

---

313. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (“Proscriptions against [homosexual sodomy] have ancient roots.”).

314. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (“[T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society.”); *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (“Our decisions establish that the Constitution protects the sanctity of the family *precisely because the institution of the family is deeply rooted in this Nation's history and tradition.*”) (emphasis added); *Roe v. Wade*, 410 U.S. 113, 129–47 (1973).

315. For one example of such a potential conflict see *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (holding the Partial-Birth Abortion Ban Act of 2003 unconstitutional for lack of a mother's health exception), *rev'd* *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

316. *But see* Conant, *supra* note 71, at 808.

government<sup>317</sup> and accordingly would not be spoken of *independently* as a privilege or immunity of United States citizenship.<sup>318</sup>

The result under this framework is also clear in Privileges or Immunities challenges against the states. Suppose, as in *Saenz*, that a state passed a law impermissibly interfering with the right to travel (or even desegregated education, to use Justice Thomas's example). A litigant would be able to successfully challenge the law at issue because it infringed on their unenumerated rights guaranteed by the Fourteenth Amendment's Privileges or Immunities Clause—the privileges or immunities of United States citizenship. The Ninth Amendment would not be implicated, as the rights to interstate travel (at least to the seat of government) and rights pertaining to public education could hardly be said to exist outside of civil government.

Now, suppose a state passes a law banning the use and sale of contraceptives, as in *Griswold v. Connecticut*. Unfortunately in these instances, incorporation comes to the foreground. Under the current regime of incorporating rights under the “due process” clause of the Fourteenth Amendment, “fundamental” rights are given constitutional protection from the actions of state governments. Many explicit guarantees of the Bill of Rights, for example the First Amendment, are incorporated against the states in this manner. If we look at the Ninth Amendment as a substantive guarantee of judicially enforceable privacy rights, then these rights would likely be incorporated against the states in a similar manner. To that end, the rights protected in that fashion would be fundamental under the current substantive due process framework—not because of the “fundamental” pedigree of the right at issue. The rights at issue are fundamental, and protected by the Due Process Clause of the Fourteenth Amendment, *only because* they fall within that class of rights protected by the Ninth Amendment.

In this hypothetical, instead of asking (as the Court has done in other contexts) whether there is a fundamental right to use contraceptives, a court would consider (as above in the federal context) whether the use of contraceptives would be protected as a privacy right under the Ninth

---

317. *But cf.* *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 897 (1992) (noting the view that a “‘woman is still regarded as the center of home and family life,’ with attendant ‘special responsibilities’ that precluded full and independent legal status under the Constitution . . . [is] no longer consistent with our understanding of the family, the individual, or the Constitution”) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

318. If, in fact, the Privileges or Immunities Clause is even applicable to the federal government. See below.

---

---

Amendment. If, as above, the answer was yes, it would be protected under the Due Process Clause of the Fourteenth Amendment—not because it is independently “fundamental,” but because the Ninth Amendment is fundamental, and incorporated against the states by the Due Process Clause.

This approach would only nominally change if incorporation were to take place through the Privileges or Immunities Clause. A state’s refusal to allow the sale of any contraceptives would then be infringing upon the privileges or immunities of United States citizenship. The use of contraceptives is not *independently* a privilege or immunity of United States citizenship—as discussed above, it has a weak nexus with participation in civil government. The Ninth Amendment retained rights, and having a judicial mechanism for enforcing and protecting rights secured by the Ninth Amendment, would *itself* be a privilege or immunity, so rights in this class would be privileges or immunities only because they fall in that subclass. Were incorporation to take place through the Privileges or Immunities Clause, then the Clause would protect two categories of rights: (1) the unenumerated public or political rights discussed in this Note, and (2) rights falling within the incorporated, textual guarantees of the Bill of Rights. While both would technically be privileges or immunities, the former would be granted constitutional protection by the text of the clause, while the latter are merely made enforceable against the states. Activities protected by the guarantees of the Bill of Rights would be enforceable against the federal government even in the absence of the Privileges or Immunities Clause.

A court would not examine whether the use of contraceptives was a privilege or immunity of United States citizenship; a court would engage in the same inquiry discussed for enforcing this right through the Ninth Amendment. If incorporation through the Privileges or Immunities Clause were established, and the right at issue was protected under the Ninth, then it would be enforceable against a state. The right would be a privilege or immunity *by operation of law*, because the entire class of activities protected from governmental interference by the Ninth Amendment would be privileges or immunities of United States citizenship.

To analogize to the First Amendment,<sup>319</sup> one would not generally refer to wearing a “Fuck the Draft”<sup>320</sup> jacket (or displaying a “Bong Hits 4

---

319. U.S. CONST. amend. I.

320. See *Cohen v. California*, 403 U.S. 15 (1971).

Jesus” banner<sup>321</sup>) as a distinct privilege or immunity of United States citizenship. One would more likely refer to the First Amendment as a privilege or immunity, and so nominally every activity protected by the First Amendment would *technically* be a privilege or immunity. The Privileges or Immunities Clause, however, does not independently define whether the right is protected by the other amendment, and a court would not start out by inquiring whether wearing a “Fuck the Draft” jacket is fundamental. The Privileges or Immunities Clause, were it the basis for incorporation, would merely be making this already-federally-protected right enforceable against the states. Indeed, these kinds of traditional free speech protections might be better enforced against the states through a combination of the Ninth Amendment and the Privileges or Immunities Clause to avoid the obvious textual limitation in the First Amendment itself.<sup>322</sup>

This approach encounters the most difficulty in the remaining combination of rights and parties: the federal government’s infringement on unenumerated public or political rights (which, as discussed below, it may have legitimate authority to define). In *Saenz v. Roe*, the Court noted that

Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation.

Although we give deference to congressional decisions and classifications, *neither Congress nor a State* can validate a law that denies the rights guaranteed by the Fourteenth Amendment.<sup>323</sup>

This language calls into question whether the federal government would be able to lawfully infringe a Privileges or Immunities Clause unenumerated public or political right. One approach to this problem could be reading the Privileges or Immunities Clause alongside the Citizenship Clause, which is also in Section 1 of the Fourteenth Amendment.<sup>324</sup>

The first Justice Harlan famously declared that “all citizens are equal before the law.”<sup>325</sup> The text of the Constitution may “support[] the premise that the citizenry ought presumptively to be regarded as comprising but one

---

321. See *Frederick v. Morse*, 2007 WL 1804317 (June 25, 2007).

322. U.S. CONST. amend. I.

323. *Saenz v. Roe*, 526 U.S. 489, 508 (1999) (emphasis added).

324. Professor Black’s method of incorporation is similar to this approach. See generally BLACK, *supra* note 211.

325. *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).

class of persons.”<sup>326</sup> Accordingly, the federal government may be no more free to infringe privileges or immunities than the states would be to violate the Bill of Rights. On the other hand, the federal government may be in a unique position (relative to the state governments) to define privileges or immunities of *national* citizenship, even if the citizenry is viewed as a single class of persons.

Looking to the Ninth Amendment and Fourteenth Amendment Privileges or Immunities Clause for the aforementioned protections is a better judicial mechanism for protecting unenumerated individual rights precisely because it eliminates the inquiry into “fundamentality” and divides that inquiry into two categories of judicial analysis in which the Court may be able to more easily reach decisions. These clauses provide a much better textual basis for unenumerated rights, and employing the clauses for these protections is likely more aligned with the intent of their drafters. In any event, the clauses’ plain language provides a firmer basis for many currently recognized “fundamental” rights, and will better protect autonomy and self-governance in the future.

## V. CONCLUSION

Any reconsideration of unenumerated rights runs the risk of creating what Professor Eastman calls the “Justice Brennan problem.”<sup>327</sup> Conservative jurists may be wary that a new approach will become a departure point for a previously unforeseen class of unenumerated rights.<sup>328</sup> This Note’s reconsideration may appropriately give rise to these kinds of concerns, but failing to recognize the textual commands of the Constitution (as with the Ninth Amendment and Privileges or Immunities Clause) is itself a cause for concern. Continuing to deny these provisions effect is to run afoul of Justice Marshall’s famous exposition in *Marbury v. Madison*,<sup>329</sup> that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.” The words of the Ninth Amendment and Privileges or Immunities Clause do not require a reading without effect, and reading them together, *with* effect, can yield a better textual framework for analyzing unenumerated rights under the Constitution.

---

326. David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1022 (2002).

327. Eastman, *supra* note 161, at 136.

328. *See id.*; Thomas, *supra* note 186, at 63.

329. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

