

# Reviving Elusive Rights: State Constitutional Unenumerated Rights Clauses as Bounded Guarantors of Fundamental Liberties

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## ABSTRACT

*Unenumerated rights clauses, which preserve inherent rights not enumerated within a constitution, are caught between a rock and a hard place: judges either disregard them for their lack of clarity or use them to fabricate rights. Both results disserve the original purpose of unenumerated rights clauses as bounded guarantors of the fundamental rights of the citizenry. These apprehensions further aggravate state judges, who lack the careful focus of academics and hinder themselves through structuring judicial opinions at the expense of their state constitution's unenumerated rights clause. This Note proposes that state supreme courts possessing unenumerated rights clauses in their state constitutions, with their accompanying sovereign obligations to the public, should more carefully apply those provisions in relevant cases.*

*The Founders' efforts to secure unenumerated fundamental rights through the Ninth Amendment have been thwarted by the U.S. Supreme Court's failure to develop definitive models by which to preserve them. Leading academics have filled theoretical gaps left by the U.S. Supreme Court by generating various methods pertinent to state unenumerated rights clause interpretation, albeit imperfectly. To enhance the efficacy of these provisions, state courts can adopt a series of techniques—including identifying proper sources of fundamental rights, interpreting state and federal provisions distinctly, and ordering state interpretation first after this distinction—that invoke the primacy of state constitutions when protecting inherent rights. After setting forth these interpretive principles, this Note evaluates how Georgia wields its unenumerated rights clause to identify and guarantee particular fundamental liberties. By shifting how they approach their state constitutional unenumerated rights clauses, state supreme courts can avoid apathetic denial of rights owed to their citizenry and instead vigorously bestow constitutional protection over them.*

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\* Executive Managing Editor, *Emory Law Journal*, Volume 70; Emory University School of Law, J.D. 2021; University of Georgia, B.A. 2017. To Robert Schapiro, my faculty advisor and mentor, thank you for guiding me through the world of academic publishing and helping structure my amorphous thoughts into this proposal. To Jon and Shannon Mancil, I would not be where I am today without your support; thank you for cultivating my interests and values. Finally, to Priscilla Mancil, whom I endlessly adore and ceaselessly bore with my law babble—thank you for enduring late-night editing, offering your thoughtful perspective, and sharing life with me. © 2021, Brennan Mancil.

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## INTRODUCTION

Interpreting enumerated constitutional rights is often simple because of their relatively definite nature. When enumerated rights are invoked, judges possess sufficient material to properly define their scope: cogent seminal cases, voluminous evidence of original public meaning, and the text of the document itself. Unenumerated rights lack these supporting materials. Instead of individual explanation, they fall within an unenumerated rights clause, a constitutional provision that recognizes that citizens possess rights not categorically protected within the constitution addressed. Most American state constitutions structure the clause as a catchall provision following an often extensive list of enumerated rights,<sup>1</sup> leading many to spurn the clause as a mere interpretive directive<sup>2</sup> or an unenforceable constitutional provision due to its lack of precision.<sup>3</sup> Others interpret open-ended unenumerated rights clauses as offering opportunities to craft new privileges through judicial opinions.<sup>4</sup>

Additional hurdles in balancing rights protection against rights invention arise in the context of state constitutional jurisprudence. As sovereigns operating within a federal system, states—through their judges—must determine to what extent their state constitution’s unenumerated rights clause preserves liberties in conjunction with the federal constitution, despite the dearth of state-specific interpretive materials. Most legal scholarship in this field, scant as it may be, focuses on the federal unenumerated rights clause within the U.S. Constitution: the Ninth Amendment.<sup>5</sup> Although state supreme courts must nest their state constitutional interpretations within federal constitutional law, the limited federal unenumerated rights precedents that exist muddle the legal basis for protecting the right at issue by shallowly adopting a number of inconsistent legal theories. Notwithstanding this imprecise constitutional guidance, this Note

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1. See, e.g., MONT. CONST. art. II, § 34 (“The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”).

2. See *infra* section II.A.

3. See *infra* section II.B.

4. See *infra* notes 73–74 and accompanying text.

5. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

argues that state constitutional unenumerated rights clauses oblige state supreme courts to conduct the arduous task of discerning legitimate from illegitimate inherent rights falling within the provision.

Part I outlines how the Founders, the U.S. Supreme Court, and state constitutions treat unenumerated rights and provides a legal framework through which judges can interpret state constitutional unenumerated rights clauses. Part II offers academic perspectives on unenumerated rights clauses, which, because of inadequate state-specific analysis in existing literature, focuses largely on Ninth Amendment comparisons. Part III offers tools of state constitutional interpretation to properly elevate state constitutional unenumerated rights clauses. Finally, Part IV applies these approaches to Georgia's unenumerated rights clause to demonstrate how particular rights, sources of rights, and judicial decision-making strategies galvanize the provision for public well-being. In many ways, the process of discovery mimics creation, but by faithfully reading this complex provision judges more fully safeguard constitutionally legitimate fundamental rights.

#### I. THE FEDERAL UNENUMERATED RIGHTS CLAUSE: THE NINTH AMENDMENT

The Ninth Amendment provides a model to anchor other unenumerated rights clause analyses, both because it is found in the supreme federal constitution<sup>6</sup> and because most interpretations of constitutional rights start and end with the federal constitution.<sup>7</sup> A historical assessment of the Ninth Amendment yields several findings: (1) the Founders created an unenumerated rights clause to serve an important role in preserving critical liberty interests; (2) the U.S. Supreme Court's jurisprudential attempts to protect unarticulated fundamental rights often obscure, rather than enlighten, the legal foundation protecting a fundamental right; and (3) state constitutions developed unenumerated rights clauses to invigorate state efforts to ascertain liberties worthy of constitutional insulation.

##### A. *Origin of the Ninth Amendment*

The purpose of the American constitutional system of government is to protect ordered liberty,<sup>8</sup> a Founding-era concern expressed by the Declaration of Independence.<sup>9</sup> Defining which critical liberty interests are protected by the Constitution—"principle[s] of justice so rooted in the traditions and conscience

6. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

7. See *infra* subsection III.B.2.

8. U.S. CONST. pmb. ("We the People of the United States, in Order to . . . *secure the Blessings of Liberty* to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.") (emphasis added).

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

of our people as to be ranked as fundamental”<sup>10</sup>—requires an assessment of the “Nation’s history, legal traditions, and practices.”<sup>11</sup> The Founders’ twin concerns, that fundamental rights would fall outside the U.S. Constitution and that enumeration would discard any outstanding fundamental rights, drove the adoption of the Ninth Amendment.<sup>12</sup> Those concerns echo throughout the states in their own unenumerated rights clauses. These provisions, while vague, preserve “our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”<sup>13</sup> This section begins with a discussion on the concerns of the Founders at the Constitutional Convention. It then assesses the broad text of their final agreement, emphasizing the necessity of unenumerated rights clauses in any constitutional scheme which purports to guarantee the full extent of fundamental liberty.

### 1. The Federalist/Anti-Federalist Debate at the Constitutional Convention Led to the Adoption of the Ninth Amendment

Fear of excluding rights under the U.S. Constitution drove much of the debate between the Federalists and Anti-Federalists throughout the constitutional ratification period. Alexander Hamilton and James Wilson believed the structure of the U.S. Constitution protected every right outside of enumerated government powers.<sup>14</sup> Wilson explained, “[e]very thing which is not given, is reserved.”<sup>15</sup> He expounded that the inclusion of a federal bill of rights was unnecessary, for “it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.”<sup>16</sup> Hamilton even went so far as to claim that “bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be *dangerous*. . . . [W]hy declare that things shall not be done which there is no power to do?”<sup>17</sup>

To the Federalists, a statement of enumerated rights carried with it two dangers: the potential for the federal government to base expansions of its power on these enumerated rights,<sup>18</sup> and the implication that all unenumerated rights were

10. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (cited by *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

11. *Glucksberg*, 521 U.S. at 721. The *Glucksberg* Court applied this methodology to substantive due process, which could define concurrently protected constitutional rights to the Ninth Amendment.

12. *See infra* subsection I.A.1.

13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

14. *See* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 309 (1987).

15. JAMES WILSON, *James Wilson’s State House Yard Speech October 6, 1787*, in 1 COLLECTED WORKS OF JAMES WILSON 171, 172 (Kermit L. Hall & Mark David Hall eds., 2007).

16. *Id.*

17. *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (emphasis added).

18. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 10 (1988)

delegated to the federal government.<sup>19</sup> Hamilton cautioned that a bill of rights containing “various exceptions to powers not granted . . . would afford a colorable pretext to claim more than were granted.”<sup>20</sup> Madison highlighted the danger that explicit enumeration of rights may imply that all “those rights which were not singled out[] were intended to be assigned into the hands of the General Government, and were consequently insecure.”<sup>21</sup> Conversely, his opponents argued that declining to affirmatively reserve rights delegated them away.<sup>22</sup> Neither the Federalists nor Anti-Federalists denied the existence of such rights, but instead debated the prudence of various methods to protect them.<sup>23</sup>

Madison’s original set of proposed amendments to the U.S. Constitution addressed the two fears carried by the Federalists: an unjustified expansion of power built on the enumerated rights and the implied exclusion of unenumerated rights.<sup>24</sup> These concepts found within Madison’s proposal were eventually split into the Ninth and Tenth Amendments.<sup>25</sup> Specific enumeration of fundamental rights<sup>26</sup> appeared to be the easiest means of securing them against immediate government interference.<sup>27</sup> The preceding amendments were “a plain statement of these great and principal rights of mankind,” and not “an exhaustive list; the [N]inth [A]mendment reminds us of this fact.”<sup>28</sup>

## 2. The Text of the Ninth Amendment Offers Judges Minimal Interpretive Guidance

The plain text of the Ninth Amendment indicates that the Founders conceived the scope of rights under that amendment to be broader than other amendments. Its reference to “the people” indicates a class which is composed of “persons who are part of a national community or who have otherwise developed sufficient

19. See Massey, *supra* note 14, at 309.

20. THE FEDERALIST NO. 84 (Alexander Hamilton).

21. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 456 (J. Gales & W. Seaton eds., 1834) (Speech of Rep. J. Madison).

22. See Massey, *supra* note 14, at 309.

23. See *id.*

24. 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, *supra* note 21, at 452 (continuing that enumerated rights instead serve “as actual limitations of such powers, or as inserted merely for greater caution”); see Barnett, *supra* note 18, at 10 (describing “Madison’s initial device”).

25. See Barnett, *supra* note 18, at 10; U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

26. Although distinctions may exist among inalienable, inherent, or fundamental rights, “at the end of the day the differences [among them] may be much more theoretical smoke than practical fire.” J. D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 L. REV. MICH. ST. U. DET. COLL. L. 809, 820 (1999). For the purposes of this Note, these terms will be used interchangeably to refer to non-procedural rights entitled to constitutional protection from government interference.

27. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-12-02-0454> [<https://perma.cc/9Z65-2WW4>] (asserting certain fundamental rights required specification).

28. Massey, *supra* note 14, at 320.

connection with this country to be considered part of that community.”<sup>29</sup> In contrast, the Fifth and Sixth Amendments use the terms “person”<sup>30</sup> and “accused,”<sup>31</sup> respectively, to stipulate their protected classes.<sup>32</sup> The language which the Framers chose in the federal unenumerated rights clause suggests a desire to preserve the liberties of the public writ large, rather than specifically defining the context and persons whose rights are protected. This thinking teeters toward the universal applicability of natural law.<sup>33</sup> Moreover, this broad language does not textually limit the rights within it and, thus, challenges judges to conduct additional assessments to cabin the provision.<sup>34</sup>

The Founders’ apprehensions and the final provision they ratified reflect the importance of unenumerated rights clauses in the American constitutional structure. However, the U.S. Supreme Court’s imprudent refusal to give lower courts satisfactory analytical tools to interpret unenumerated rights clauses impedes state supreme courts in interpreting such clauses found in their state constitutions.<sup>35</sup>

### *B. Federal Jurisprudential Development of Unenumerated Rights*

The federal unenumerated rights clause provides little textual guidance to judges applying it, leading “advocates of an evolving Constitution [to] develop[] sophisticated legal theories of interpretation that permit them to reach the same results based on the text that they had sought in unwritten principle.”<sup>36</sup> The U.S. Supreme Court, in promoting constitutional evolution in the field of rights protections, has advanced a variety of constitutional theories in an attempt to define and protect fundamental, yet unarticulated, liberties on the federal level.<sup>37</sup> They can be rudimentarily divided into three categories: the penumbra theory, substantive

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29. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

30. U.S. CONST. amend. V (listing a number of criminal procedural rights applicable to “person[s]”). Although the term “person” as used in the Fifth Amendment *prima facie* appears broader than “people” as used in the Ninth Amendment, the context in which the term arises, delineating criminal procedural rights, limits its application to the criminal process, whereas the Ninth Amendment’s “people” applies to all members of the national community without additional qualification.

31. U.S. CONST. amend. VI (providing rights for “the accused” in criminal prosecutions).

32. *See Verdugo-Urquidez*, 494 U.S. at 265.

33. *See* Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2269 (2001) (defining the natural law as a moral law transcending “human creation”).

34. *See* William H. Rehnquist, *Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 694 (1976) (concluding the Founders “wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live”).

35. *See* Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 *U. BALT. L. REV.* 169, 170 (2003) (asserting the U.S. Supreme Court “has sparingly applied the Ninth Amendment” and therefore resorts to using the doctrine of substantive due process to constitutionalize particular behaviors).

36. JAMES R. STONER, JR., *COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 9 (2003) (describing how the U.S. Supreme Court used constitutional text to give citizens an ethereal right to personal definition).

37. However, those novel theories not relying on an unenumerated rights clause fall short of the wholesale protection of unenumerated rights.

due process, and reliance on the Ninth Amendment. In a number of seminal decisions, the U.S. Supreme Court muddles these theories to resolve the cases, yet it leaves behind concrete formulations of constitutional theory. State courts, seemingly deferential to the U.S. Supreme Court's mode of thinking, apply analogous theories to reach similar conclusions in rights cases.<sup>38</sup>

The jurisprudence of unenumerated rights first piqued modern interest<sup>39</sup> with the U.S. Supreme Court's decision in *Griswold v. Connecticut*,<sup>40</sup> which found that the collective force of the Bill of Rights creates "penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>41</sup> Using this penumbra theory to create "zones of privacy,"<sup>42</sup> the Court raised the Ninth Amendment among other rights but failed to outline specifically what emanates from the provision.<sup>43</sup> Justice Goldberg's *Griswold* concurrence argued that the federal unenumerated rights clause constituted the Founders' declaration that the preceding eight constitutional amendments did not preclude other fundamental rights.<sup>44</sup> His nod to substantive due process<sup>45</sup> also reflected decades of U.S. Supreme Court precedent using the Fifth and Fourteenth Amendments to protect what the Court ruled to be fundamental liberties.<sup>46</sup> Despite heavily employing substantive due process, the Court recognizes that this doctrine presents its own interpretive challenges.<sup>47</sup> By declining to delineate inherent rights within the U.S. Constitution, the U.S. Supreme Court imperils its rationale in its fundamental rights cases.<sup>48</sup>

The perpetual uncertainty as to the source of a fundamental right generates much of the constitutional confusion obfuscating unenumerated rights. Chief Justice Burger's plurality opinion in *Richmond Newspapers, Inc. v. Virginia*<sup>49</sup> crafted a less than precise methodology for protecting rights. There, the Chief

38. See, e.g., *Mitchell v. Steffen*, 504 N.W.2d 198, 200 (Minn. 1993) (recognizing a fundamental right to travel by relying on U.S. Supreme Court opinions which fail to specify the basis of that right).

39. See Schmidt, *supra* note 35, at 170; Drodny, *supra* note 26, at 815–16.

40. 381 U.S. 479 (1965).

41. *Id.* at 484.

42. *Id.* at 484.

43. See *id.* at 484 (including the Ninth Amendment in the guarantees forming "emanations" of rights). The U.S. Supreme Court took a similar position in *Roe v. Wade*; it failed to specify which amendment provided a constitutional right to privacy in abortion, but simply explained that one surely provided such a right. See 410 U.S. 113, 153 (1973).

44. *Griswold*, 381 U.S. at 492 (Goldberg, J., concurring).

45. *Id.* at 492.

46. Drodny, *supra* note 26, at 812.

47. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (acknowledging courts have "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) ("Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights.").

48. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) (lamenting the decision's "lack[] [of] even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine").

49. 448 U.S. 555 (1980) (plurality opinion).



Justice combined elements from the penumbra theory, cases favorable to substantive due process, and language from the Ninth Amendment to protect an unarticulated right.<sup>50</sup> As the plurality in *Planned Parenthood v. Casey* later bemoaned, fundamental rights find “no refuge in a jurisprudence of doubt.”<sup>51</sup> Therefore, unenumerated fundamental rights require judges, including those on state supreme courts, to state them clearly if they are to be protected.

Many scholars treat the federal unenumerated rights clause as a “constitutional truism,”<sup>52</sup> but this position ignores precedential recognition to the contrary.<sup>53</sup> While the U.S. Supreme Court instructs that these provisions are independent bases of rights protection, it fails to articulate a clear means of determining whether a fundamental right exists within them. This failure compounds the inherent interpretive difficulties plaguing state constitutional unenumerated rights clauses.

### C. State Constitutions and the Development of State Constitutional Unenumerated Rights Clauses

State constitutions exhibit the nation’s earliest efforts to define which liberties were worthy of constitutional insulation. One cannot fully understand the federal constitution, including the Ninth Amendment, without reference to the state constitutions.<sup>54</sup> State constitutions inspired the creation of the federal constitution because they are “the oldest things in the political history of America.”<sup>55</sup> They both established the “basic structures of our [national] political institution”<sup>56</sup> and “brought forth the primary conceptions of America’s political and constitutional

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50. *Id.* at 580. Chief Justice Burger found a right to attend criminal trials to be an important aspect to freedom of speech and press, which could easily be an emanating right from the First Amendment. *Id.* However, he summarized this position as concluding “there was a guaranteed right of the public under the First and Fourteenth Amendments[.]” *Id.* Adding substantive due process to his analysis, coupled with his invocation of Madison’s resolution of the unenumerated rights dilemma, reduces the clarifying value of his plurality opinion in defining the scope of unenumerated rights. *Id.*

51. 505 U.S. 833, 844 (1992) (plurality opinion). Questions as to the strength of the Court’s opinion in *Roe* led the *Casey* Court to state the basis of the right to privacy over an abortion “at the outset and with clarity.” *Id.* at 846.

52. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 3 (2006).

53. United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 96 (1947).

54. Professor Robert F. Williams divides state constitutional rights, compared to federal constitutional rights, into several variants, including the unenumerated rights provisions. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 118–19 (2009). Williams’s particular reference to the state unenumerated rights clause further underscores their importance in the state constitutional interpretive scheme.

55. *Id.* at 15. For example, Massachusetts, not the United States, has the world’s oldest continuously operating constitution. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE IN A FEDERAL SYSTEM* 23 (2005). John Adams asserted “the constitution of the United States was . . . almost entirely drawn” from the constitutions of New York, Massachusetts, and Maryland. 6 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 486 (Charles Francis Adams ed. 1851), [http://oll-resources.s3.amazonaws.com/titles/2104/Adams\\_1431-06\\_Bk.pdf](http://oll-resources.s3.amazonaws.com/titles/2104/Adams_1431-06_Bk.pdf). [<https://perma.cc/D8T6-FESB>].

56. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993).

culture that have persisted to the present.”<sup>57</sup> Between one-third and one-half of the Framers of the U.S. Constitution also shaped their state constitutions,<sup>58</sup> meaning that the Framers likely derived much of their understanding of federal powers and rights from the perspective of their state constitutions.<sup>59</sup> Basing federal rights on state constitutional guarantees, including their unenumerated rights clauses, “was a good model for writing the Bill of Rights, and it is a good model for interpreting them.”<sup>60</sup>

Substantial structural differences between state constitutions and the federal constitution led to the disparate evolution of state constitutional law over time. State constitutions, on average, are over three times longer than the federal constitution.<sup>61</sup> They owe their length to the greater subject matter they must cover in much greater detail relative to the U.S. Constitution.<sup>62</sup> State constitutions may also be amended much more easily than the federal constitution; for example, Alabama has amended its constitution over seven hundred times.<sup>63</sup> The ease with which a state may amend its constitution ensures that its constitution reflects contemporary popular perspectives dominating political thought,<sup>64</sup> unlike the federal constitution, which is mainly a product of the Founding and the Civil War.<sup>65</sup> Frequent re-adoption of those state constitutions with unenumerated rights clauses steers those provisions toward incorporating more modern public views of fundamental liberty.

As the U.S. Constitution and state constitutions have diverged, the importance of state constitutional unenumerated rights clauses has remained constant. By 1868, nearly two-thirds of state constitutions possessed an unenumerated rights clause.<sup>66</sup> Today, a majority of states—thirty-four in total—have clauses guaranteeing rights not

57. *Id.*

58. WILLIAMS, *supra* note 54, at 38 (citing W.C. Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 380, 417 (1897)).

59. Nor were state initiatives influencing the federal constitution in the Founding Era limited to state constitutions. The Virginia Declaration of Rights in particular inspired the creation of the federal Bill of Rights. *See* GARDNER, *supra* note 55, at 23. Its first section affirms the existence of inalienable yet undefined fundamental rights. THE VIRGINIA DECLARATION OF RIGHTS § 1 (Va. 1776).

60. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (2018). This is especially true given all of the rights adopted by the Framers in the U.S. Constitution originate from a state constitution. *Id.* at 8; *see also* WILLIAMS, *supra* note 54, at 37 (noting “[t]here is not a feature of it which can not be found” in state constitutions (quoting CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION* 199 (1966))).

61. *See* GARDNER, *supra* note 55, at 26. Gardner calculates that the average state constitution contains around 26,150 words, while the U.S. Constitution is about 7,300 words long. *Id.* State constitution lengths vary significantly: Vermont’s constitution had a mere 6,600 words while Alabama maintains a gargantuan 315,000-word long constitution. *Id.*

62. *See id.*

63. *See id.* at 27.

64. *See id.* at 28.

65. *See id.*

66. *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1303 (2015).

explicitly made in their constitutions.<sup>67</sup> States commonly structure their unenumerated rights clauses by stating that the enumeration of rights does not deny other rights retained by the people.<sup>68</sup> Only three states have structured such clauses differently. Georgia, instead of speaking to retention, constitutionally protects rights “hitherto enjoyed.”<sup>69</sup> Virginia takes a broader view of rights: instead of protecting retained rights, its constitution protects all “rights of the people.”<sup>70</sup> West Virginia’s constitution, perhaps owing its origin in large part to Virginia, also expands the rights preserved by its constitution; all powers, not rights, undelegated to the U.S. government are reserved by West Virginia and its people.<sup>71</sup>

Some state courts, with uncharacteristic elan, have used their state’s unenumerated rights clauses to constitutionalize particular behaviors falling outside the four corners of the state constitution. Like the U.S. Supreme Court has concluded with the U.S. Constitution,<sup>72</sup> the Supreme Courts of Mississippi<sup>73</sup> and Kansas<sup>74</sup> have recognized a state constitutional right to an abortion founded on their unenumerated rights clauses. Additionally, the Supreme Court of Alaska found that its state constitution’s unenumerated rights clause guaranteed a fundamental right

67. ALA. CONST. art. I, § 36; ALASKA CONST. art. I, § 21; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; CAL. CONST. art. I, § 24; COLO. CONST. art. II, § 28; FLA. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 29; HAW. CONST. art. I, § 22; IDAHO CONST. art. I, § 21; ILL. CONST. art. I, § 24; IOWA CONST. art. I, § 25; KAN. CONST. BILL OF RTS., § 20; LA. CONST. art. I, § 24; ME. CONST. art. I, § 24; MD. CONST. DECLARATION OF RTS., art. 45; MICH. CONST. art. I, § 23; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 32; MONT. CONST. art. II, § 34; NEB. CONST. art. I, § 26; NEV. CONST. art. I, § 20; N.J. CONST. art. I, § 21; N.M. CONST. art. II, § 23; N.C. CONST. art. I, § 36; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. I, § 33; R.I. CONST. art. I, § 24; UTAH CONST. art. I, § 25; VA. CONST. art. I, § 17; WASH. CONST. art. I, § 30; W. VA. CONST. art. I, § 2; WYO. CONST. art. I, § 36.

68. *See, e.g.*, OR. CONST. art. I, § 33 (“This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people.”).

69. GA. CONST. art. I, § 1, para. 29; *see infra* Part IV.

70. VA. CONST. art. I, § 17.

71. *See* W. VA. CONST. art. I, § 2.

72. Although the U.S. Supreme Court defines a right to privacy to encompass abortions largely through clauses other than the Ninth Amendment, as the courts in *Fordice* and *Hodes* show, state supreme courts rely more heavily on unenumerated rights jurisprudence. *See infra* notes 73–74 and accompanying text.

73. *See Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 653 (Miss. 1998) (concluding Mississippians have a state constitutional right to an abortion because “[t]he right to privacy, whether founded in common law or natural law, is constitutionally guaranteed under” Mississippi’s unenumerated rights clause).

74. *See Hodes & Nausser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019). Kansas’s Bill of Rights contains what the Kansas Supreme Court describes as an unenumerated natural rights guarantee, which constitutionalizes natural rights distinctly from its general unenumerated rights clause. *See id.* at 475–76 (characterizing Section 1 of the Kansas Bill of rights as an “unenumerated natural rights guarantee”). *Compare* KAN. CONST. BILL OF RTS., § 1 (“All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”), *with* KAN. CONST. BILL OF RTS., § 20 (“This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.”). The Kansas Supreme Court used its constitution’s unenumerated rights clauses, including the general unenumerated rights clause found in Section 20, to recognize a right to privacy that extends to abortion decisions. *See Hodes*, 440 P.3d at 486.

of self-representation in court proceedings.<sup>75</sup> However, these rare examples, which specify that the state constitution's unenumerated rights clause protects the fundamental right, depart from the more common practice of declaring a right without articulating its state constitutional source.<sup>76</sup>

The Founders, the U.S. Supreme Court, and state constitutions provide persuasive—and often binding—source material for interpreting unenumerated rights clauses both at the federal and the state level. However, the interpretive difficulties inherent in ambiguous rights guarantees, such as state constitutional unenumerated rights clauses, require a means to fit the provision into a broader constitutional structure. Academics have stepped into the void to rationalize unenumerated rights clauses in our federal system.

## II. ACADEMIC THEORIES REGARDING UNENUMERATED RIGHTS CLAUSES

Academic perspectives on the Framers' purpose in drafting the federal unenumerated rights clause differ significantly. By filling the theoretical gaps left by the Founders' specifications and the U.S. Supreme Court's jurisprudence on unenumerated rights clauses generally, these conceptions provide state judges various ways to consider the legal force of unenumerated rights clauses in their state constitutions. The academy has emplaced the unenumerated rights clause in constitutional systems in roughly three different ways: (1) viewing the clause as a signal toward rather than a source of rights; (2) reducing the unenumerated rights clause to a vestigial constitutional organ; and (3) perceiving the provision to confer substantive and identifiable fundamental liberties as a robust cache of rights, albeit with significant effort from judges. Although most academic thought in the field of unenumerated rights focuses on the Ninth Amendment, these methods apply nearly synonymously to interpreting state unenumerated rights clauses, allowing state judges to modify them to fit state cases involving the provision.

### A. *Unenumerated Rights Clauses as Canons of Constitutional Construction*

Judging, as an exercise of “controlled creativity,”<sup>77</sup> requires judges to glean meaning from a variety of sources: the text itself, of course, but also “legal precedents, cultural traditions, moral values, and social consequences.”<sup>78</sup> Lest judging become mechanical, Professor Suzanna Sherry suggests the Framers designed the Ninth Amendment to require judges to consider these extratextual factors

75. See *McCracken v. State*, 518 P.2d 85, 91 (Alaska 1974).

76. See, e.g., *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969) (“The fundamental right of the woman to choose whether to bear children follows from the Supreme Court’s and this court’s repeated acknowledgment of a ‘right of privacy’ or ‘liberty’ in matters related to marriage, family, and sex.”).

77. Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1013 (1988).

78. *Id.* That the Ninth Amendment’s text does not outline specific rights already means judges must rely on extratextual factors. See Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 520–30 (2011) (describing interpretive difficulties surrounding examinations of the Ninth Amendment’s text).

when faced with government infringements of liberty.<sup>79</sup> Because Sherry argues unenumerated rights clauses “direct judges toward moral questions,”<sup>80</sup> a judge cannot interpret the provision to “exclud[e] any examination of the moral dimensions”<sup>81</sup> of constitutional text. To Sherry, an unenumerated rights clause guides judges toward morally grounded sources,<sup>82</sup> but itself possesses no independent relevance. This view contradicts the U.S. Supreme Court’s method of ascribing some independent weight to the text of every provision.<sup>83</sup>

Professor Laurence Tribe similarly relegates the Ninth and Tenth Amendments to rules of construction for judicial interpretation of other constitutional provisions rather than viewing them as constitutional provisions in their own right.<sup>84</sup> However, Tribe concurs with Sherry’s sentiments renouncing judicial abuse of the federal unenumerated rights clause by straying beyond the interpretation of existing provisions; Tribe rejects the notion that the federal unenumerated rights clause “in any way endorses the lawless notion that judges are licensed by that or any other part of the Constitution to impose upon the community whatever system of rights or responsibilities they personally might suppose an ideal, or even a merely just, society *ought* to require.”<sup>85</sup> Instead, he charges judges to decide “which rights or responsibilities follow from, in the sense of being presupposed by and thus being implicit in, the particular structure of legal institutions to which the Bill of Rights, and other parts of the Constitution, have as an historical matter already committed our country.”<sup>86</sup> To Tribe, therefore, unenumerated rights do not require the unenumerated rights clause, but the provision reminds judges that the rights are protected in some manner.<sup>87</sup>

Sherry and Tribe view unenumerated rights clauses as signals toward, not sources of, rights. Applying their view to the state constitutional context, state judges ought to find a source of constitutional rights, but a state constitution’s unenumerated rights clause cannot serve that role. This logic, if extended to other ambiguous constitutional provisions, would lead to a significant diminution of constitutionally protected rights, as rejecting confusing clauses would inherently limit the potential bases of a right. Unless a state judge believes state constitutions ought to guarantee a narrower field of liberties, this perspective should not be adopted.

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79. See Sherry, *supra* note 77, at 1013–14.

80. *Id.* at 1008.

81. *Id.* at 1010.

82. *Id.* at 1013.

83. *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.”).

84. See Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 109 (1987).

85. *Id.* at 107.

86. *Id.* at 108.

87. See Drodgy, *supra* note 26, at 821.

*B. Unenumerated Rights Clauses as Inert Constitutional Provisions*

While Professor Raoul Berger admits the existence of unenumerated rights in the context of the Ninth Amendment, he nonetheless “would deny the power of the courts to protect those rights from infringement by [the] government.”<sup>88</sup> Quoting Alexander Hamilton, Berger confirms that the U.S. Constitution declares, but does not grant, rights.<sup>89</sup> However, to Berger, *unenumerated* rights are not *constitutional* rights.<sup>90</sup> Therefore, the government cannot enforce unenumerated rights,<sup>91</sup> which to him, means “the courts have not been empowered to enforce the retained rights against either the federal government or the states.”<sup>92</sup>

Berger’s theory, however, rejects a fundamental feature of a common law legal system: if there is a right, there is a remedy.<sup>93</sup> For example, the U.S. Supreme Court unilaterally applied the Civil Rights Act of 1871<sup>94</sup>—which creates a cause of action for civil rights violations by state government officials—to federal officials.<sup>95</sup> Although no statute created this federal analogue, the Court quoted *Marbury v. Madison*<sup>96</sup> to explain its rationale: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>97</sup> Only the judiciary can check the violation of an alleged right by the legislative or executive branch. Otherwise, a right, even one Berger would admit exists,<sup>98</sup> would never receive the legal protections entitled to it.<sup>99</sup>

Berger, by relegating the unenumerated rights clause to impotence, denies citizens the rights he recognizes they ought to enjoy. State courts can preserve reserved rights from government intrusion through judicial review, just as they enforce other state constitutional rights provisions. Berger’s conception of fundamental rights, however, recognizes that an unenumerated rights clause protects concrete, if undefined, liberties, and this represents an important step toward perceiving the provision properly within our federal system.

88. *Id.* at 822; Raoul Berger, *Ninth Amendment*, 66 CORNELL L. REV. 1, 20 (1980).

89. Berger, *supra* note 88, at 16.

90. *See id.* at 20.

91. *Id.*

92. *Id.*

93. *See* *Ashby v. White* (1703), 92 Eng. Rep. 126, 136 (Q.B.) (“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it[.]”).

94. 42 U.S.C. § 1983 (2012).

95. *See* *Bivens v. Six Unknown Named Agents of The Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

96. 5 U.S. (1 Cranch) 137 (1803).

97. *Bivens*, 403 U.S. at 397 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

98. *See* Berger, *supra* note 88, at 21 (“[C]ourts [are] not empowered to enforce the retained and unenumerated rights.”).

99. State constitutional “right-to-remedy” clauses enable state courts to protect fundamental liberties more adeptly from legislative infringement, thus potentially positioning state supreme courts better than federal courts to insulate inherent rights. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 158 (2009).

*C. Unenumerated Rights Clauses as Robust Caches of Rights*

The remaining body of academic theories conceptualizes the unenumerated rights clause as more than a rights-indicator or an impotent provision; instead, like any other constitutional rights guarantee, it protects definable and enforceable liberties. Professor Michael McConnell adopts the so-called traditionalist approach in the field of unenumerated rights.<sup>100</sup> Under his view of inherent rights, if society has a tradition of respecting a right, wrought from “the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval,” the public has recognized the right as a fundamental element to society.<sup>101</sup> The re-adoption of state constitutional unenumerated rights clauses in subsequent state constitutions may represent a sufficient acquiescence and subjection to popular approval to meet this definition of a fundamental constitutional right. This traditionalist approach also allows judges to determine the scope of a fundamental right without resorting to “their own ideological or philosophical preferences.”<sup>102</sup>

McConnell elevates the U.S. Supreme Court’s decision in *Washington v. Glucksberg*<sup>103</sup> as a model modern opinion in interpreting fundamental rights.<sup>104</sup> There, McConnell believes, the Court pronounced a right in a way that was “wise, workable and firmly grounded in principles of American constitutionalism,”<sup>105</sup> properly balancing the seemingly contradictory aims of federalism through legislative deference and rights preservation against legislative intrusion.<sup>106</sup> Despite this, McConnell prefers to use the Privileges and Immunities Clause of Article IV<sup>107</sup> to protect unenumerated rights rather than the Ninth Amendment,<sup>108</sup> because the Ninth Amendment permits “open-ended judicial review”<sup>109</sup> on divisive issues better suited for the political branches.<sup>110</sup> State constitutions often possess a privileges and immunities clause,<sup>111</sup> indicating McConnell’s caveat to unenumerated rights protections applies equally in the state constitutional context.

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100. See Droddy, *supra* note 26, at 824.

101. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 682 (1997).

102. *Id.* at 681.

103. 521 U.S. 702 (1997).

104. See McConnell, *supra* note 101, at 681.

105. *Id.*

106. *Id.*

107. See U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

108. Droddy, *supra* note 26, at 826.

109. Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 107 (1988).

110. *Id.*

111. See, e.g., GA. CONST. art. I, § 1, para. 7 (“[I]t shall be the duty of the General Assembly to enact such laws as will protect . . . the full enjoyment of the rights, privileges, and immunities due to such citizenship.”) (emphasis added).

Professor Calvin R. Massey refutes Berger's thesis on historical grounds.<sup>112</sup> Lockean philosophy, which dominated colonial political thinking,<sup>113</sup> inspired the construction of a constitution based on separation of powers and the reservation to the people all rights the sovereign did not explicitly assume.<sup>114</sup> To construe the federal unenumerated rights clause "as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise."<sup>115</sup> To Massey, Berger's position is at odds with the Framers' intent, their outspoken concerns, and early judicial precedent.<sup>116</sup> Without judicial enforcement of these rights, they "necessarily shrivel."<sup>117</sup>

Massey concludes that unenumerated rights clauses "protect[] two distinct categories of rights: positive rights, having their source in state law, and natural rights, grounded in conceptions of inalienable rights of man."<sup>118</sup> Identifying positive rights with a "clear textual foundation in state sources in existence at the time of the [U.S.] Constitution's adoption"<sup>119</sup> enables state judges to evaluate which rights the Founders envisioned falling within the Ninth Amendment and, inferentially, parallel state provisions. Referring to natural rights, conversely, carries the inherent difficulty of definition.<sup>120</sup> After admitting natural rights may not be ceded to the government,<sup>121</sup> Massey provides an alternate methodology for courts to implement in divining inherent rights worthy of protection by an unenumerated rights clause: courts should recognize as fundamental only "rights which have some textual foundation in the Constitution, can claim historical authenticity in traditional sources of our organic law, are consistent with the theoretical understanding of natural rights, and command recognition as inherent in personal dignity by a substantial portion of contemporary society."<sup>122</sup> Massey then applies this methodology to affirm a right to privacy grounded in the Ninth Amendment.<sup>123</sup> This proposal fits well within a state constitutional framework because it relies on more readily identifiable sources of law available to state judges.

Professor Randy Barnett describes two conceptions of constitutional rights: (1) rights-powers, which holds that enumerated rights and powers mirror each other

112. See Massey, *supra* note 14, at 312.

113. See *id.* at 316.

114. See *id.*

115. *Id.*; see also *id.* at 319 ("[F]or every wrong there is a remedy." (quoting CAL. CIV. CODE § 3523)).

116. See *id.* at 316–17.

117. See *id.* at 318.

118. *Id.* at 322–23.

119. *Id.* at 326–27.

120. *Id.* at 329.

121. *Id.* at 330.

122. *Id.* at 344.

123. See *id.* at 331–43.



and thus never conflict;<sup>124</sup> and (2) power-constraint, which maintains that rights constrain even lawfully exercised enumerated powers.<sup>125</sup> The initial Federalist position regarding a bill of rights assumed the rights-power approach,<sup>126</sup> but viewing the Constitution in this fashion would render the federal unenumerated rights clause meaningless: if the exercise of express powers cannot violate rights, then courts would merely have to determine the lawfulness of an expression of power to determine its constitutionality.<sup>127</sup> The power-constraint model insists even permissible uses of constitutional powers may violate constitutional rights,<sup>128</sup> and the U.S. Supreme Court appears to embrace this approach with enumerated rights.<sup>129</sup> Because state governments possess plenary powers,<sup>130</sup> the rights-powers model possesses even less weight as a means of protecting unenumerated fundamental rights in the states, and thus Barnett endorses applying the power-constraint model to state constitutional rights.

Barnett also critiques the alleged judicial unenforceability of unenumerated rights. Explaining that the Founders feared legislative violations of liberty the most,<sup>131</sup> Barnett argues that, unless the judiciary can check alleged legislative violations of unenumerated rights through judicial review, “the legislature would be the judge in its own case—something that is not permitted when enumerated rights are violated.”<sup>132</sup> Such legislative unaccountability would essentially create two classes of rights, one set enumerated and so worthy of enforcement by the judiciary, and the other unenumerated and thus unenforced. The plenary nature of state legislative power again threatens state constitutional unenumerated rights through deference to legislative judgments abrogating those rights.

Barnett outlines three methods of interpreting unenumerated rights clauses to protect fundamental liberties: the (1) originalist,<sup>133</sup> (2) constructive,<sup>134</sup> and (3) presumptive<sup>135</sup> methods. The originalist method, which applies the Framers’ original intent, meaning, and intended application of the Ninth Amendment, assumes unenumerated rights exist to be discovered.<sup>136</sup> By sifting through the

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124. See Barnett, *supra* note 18, at 4.

125. *Id.* at 12.

126. See *id.* at 4; *supra* subsection I.A.1.

127. See *id.* at 6–7.

128. See *id.* at 12.

129. See *id.*

130. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (defining these plenary powers).

131. This fear stems from the Founders’ concern about majoritarian establishment of tyranny. See Barnett, *supra* note 18, at 17–18 (quoting Madison’s addresses to Congress and correspondence with Jefferson). Because the majority expresses its will through the legislature, it has a greater propensity to violate rights through majoritarianism than does the executive. See 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, *supra* note 21, at 454–55. Barnett notes Madison neglected to mention a judicial threat to liberty entirely, exhibiting his perception that the third branch of government was “no threat at all.” Barnett, *supra* note 18, at 18 n.61.

132. Barnett, *supra* note 18, at 20.

133. *Id.* at 30.

134. *Id.* at 32.

135. *Id.* at 34.

136. *Id.* at 30.

immense quantity of available source materials, including amendments proposed by states, theoretical writings on natural law from the Founders, and rights enumerated by state constitutions in the Founding Era,<sup>137</sup> judges can find guidance on how to interpret unenumerated rights clauses. The relative recency of state constitutional ratification makes more of these materials available to state judges.

Barnett's constructive method synthesizes the historical resources available to the originalist method and crafts them into a coherent rights narrative to reach legal judgments in individual cases.<sup>138</sup> Going beyond the Founders, the material available to the constructivist includes the types of unenumerated rights recognized as fundamental since the Founding.<sup>139</sup> Recommending state judges craft rights narratives, however, risks popular perception that state judges overextend the state constitutional unenumerated rights clause and thus weaken its legal foundation. Further, shifting through the copious material available to forge a rights chronicle fosters cherry picking—judges might select historical sources favorable to their preconceived notions of justice rather than objectively assess the unenumerated right.

The presumptive method assumes judges cannot completely catalogue all rights within an unenumerated rights clause, thus presenting a practical challenge in its application.<sup>140</sup> Therefore, a presumptivist views the clause as “establishing a general constitutional presumption in favor of individual liberty,”<sup>141</sup> against which the government bears the burden of justifying interference with the right.<sup>142</sup> Although identifying each fundamental right entitled to the citizenry as a whole would be an exhaustive task, state judges capably can answer such questions in individual cases. Because the constructive method encourages narrative creation and the presumptive method repudiates judicial investigation, Barnett's originalist approach is the soundest.

While each of these theories within the umbrella of academic perspectives deepens the theoretical foundation of unenumerated rights clauses, assessing state constitutional unenumerated rights clauses as mere truisms or inoperative

137. *See id.* at 32.

138. *See id.* at 32–33.

139. *See id.*

140. *See id.* at 35 (quoting Wilson's exasperations regarding the enumeration of all the rights of men). However, Barnett himself provides a non-exhaustive list of judicially protected unenumerated rights, proving that while all rights may not be identified, judges possess the power of discernment in some cases. *See id.* at 32 n.106 (citing a list of unenumerated rights protected by the American judiciary, including the presumption of innocence at trial, the right to travel within the United States, and the right to choose and follow a profession).

141. *Id.* at 35.

142. *See id.* at 36. Although Barnett does not describe specific standards for presumptive methodologists, the language he uses resembles evaluating every government act under the strict scrutiny test: where every alleged right is fundamental, every government purpose must be compelling, and every government action must be narrowly tailored to an objective. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion) (applying the strict scrutiny test to abortion); *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (identifying circumstances justifying more stringent judicial review of government acts).

directives denies the clauses their inheritance: judicial recognition that they confer independent, genuine, and enforceable rights to citizens. Issues unique to state courts, including heightened federalism concerns inherent to unelected federal judges, legitimize the robust cache approach (particularly Massey's view and Barnett's originalist method) to provide a judicial backstop to unenumerated rights infringement. State supreme courts should position their constitutional unenumerated rights clause under the robust cache approach to fulfill its aspirational purpose of protecting all legitimate inherent rights.

### III. STATE CONSTITUTIONAL INTERPRETIVE METHODS IN UNENUMERATED RIGHTS CLAUSE CASES

When analyzing unenumerated rights clauses, state courts face more complicated predicaments in reaching constitutional decisions than their federal counterparts. As sovereign governments in a federal system, states must consider two constitutions: their own and the federal constitution. The nature of an unenumerated rights clause itself exacerbates the already frustrating task of identifying protectable rights by lacking textual references on which to latch decisions. Despite these additional challenges, however, state constitutions more clearly communicate popular sentiment, and state judges are well-situated to protect the public's rights. State courts can fulfill their role to bestow constitutional protection over state-specific, publicly-demanded fundamental rights through several means of interpreting state constitutional unenumerated rights clauses, discussed in turn: (1) evaluating appropriate sources for fundamental rights, (2) interpreting state unenumerated rights clauses distinctly from federal analysis, and (3) analyzing the state constitution before the federal constitution in judicial opinions.

#### A. *Find Appropriate Sources of Fundamental Rights Within the Unenumerated Rights Clause*

Although constitutions clearly enumerate rights, constitutions are not the sole source of rights supplied to the people. Abundant sources potentially endow citizens with rights if channeled through existing constitutional text, like the state constitutional unenumerated rights clause. These provisions draw from the same body of common law and historical rights that feed into the federal constitution.

The search for fundamental rights, like all law, is "propaedeutic, not encyclopedic"<sup>143</sup>—it invites case-by-case determinations, rather than necessitates comprehensive collections of indispensable liberties. Inviting judicial inquiry within other sources does not foreclose judicial discovery within the state unenumerated rights clause. Given these searches are not mutually exclusive, there are a few potential external sources of unenumerated rights available to state judges: the (1) common law, (2) natural law, and (3) unique aspects of the state's character. Because the common and natural law endure innate limitations,

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143. STONER, *supra* note 36, at 151–52.

unique state attributes may be the best way of distinguishing a state's available unenumerated rights.

First, the common law reflects centuries of refined judicial wisdom.<sup>144</sup> Its inherently slow progression ensures a single judge or single era of judicial decisions cannot drastically revise the entire body of common law.<sup>145</sup> Furthermore, the common law itself recognizes certain conduct as so antithetical to social expectations that, absent statutory or constitutional explication, the public deserves a remedy.<sup>146</sup> This, in essence, is a recognition of unenumerated fundamental rights.

Catalogues of common law rights exist, lending the judge ample authority to affirm the existence of a right. For example, Blackstone's *Commentaries* expresses three absolute personal rights inherent to Englishmen (and, by extension, their common law heirs in America): a right to personal security, protecting even life at conception; a general right to personal liberty, including freedom to travel and freedom from exile; and a right to personal property, to be used as its owner desires.<sup>147</sup> Furthermore, the common law, aside from the more ethereal or secondary sources of rights found in the great catalogues, presents yet another source of rights: other states.<sup>148</sup> Although sister states do not create binding judgments on a state supreme court, their findings may provide substantially persuasive authority.<sup>149</sup> The U.S. Supreme Court weighs state decisions significantly in its rulings, often justifying its conclusions by how the states have reacted to similar circumstances.<sup>150</sup> State supreme courts pursuing clarity within their state constitution's unenumerated rights clause may therefore turn to other state courts which have addressed similar concerns.<sup>151</sup>

The common law, however, is an imperfect source of rights. The Founders acknowledged the nascent United States inherited the common law of England, but from the moment of severance the country began to create an independent body of common law.<sup>152</sup> The common law may define rights, but it does not

144. Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 L. LIBR. J. 13, 15 (1989) (citing Noah Webster's definition of the common law as "the *unwritten* law, the law that receives its binding force from immemorial usage and universal reception . . . which have been received from our ancestors, and by which courts have been governed in their judicial decisions").

145. See Ryan Whalen et al., *Common Law Evolution and Judicial Impact in the Age of Information*, 9 ELON L. REV. 118, 133 (2017) ("Although the common law is a conservative institution, it does change as it adapts to the constantly evolving society that it regulates. Much of this change occurs as a result of judicial creativity.").

146. See *supra* notes 93, 97.

147. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*121, \*129–42.

148. GARDNER, *supra* note 55, at 104.

149. *Id.*

150. *Id.* at 105–10.

151. See *Elliott v. State*, 824 S.E.2d 265, 280–81 (Ga. 2019) (comparing decisions from nine other states to Georgia's constitutional right against self-incrimination).

152. STONER, *supra* note 36, at 15–16.

create them.<sup>153</sup> The danger with reliance on the common law is that, without tethering the judgment to a clearly identifiable external source, judicial decisions will often exceed constitutional limitations. Judges should be wary of citing judicial pronouncements which themselves do not reference sufficient authority for an alleged unenumerated right. State constitutions afford state judges ample opportunity to create rights given the “progressive rather than static”<sup>154</sup> form they take relative to other sources of law, and the common law similarly evolves with the progress of time.

Second, similar to the common law, natural law imperfectly defines the scope of inherent rights because there is no single agreed upon source of natural rights.<sup>155</sup> Additionally, if the public perceives a vast gulf between the classic conception of natural law and “modern natural rights,”<sup>156</sup> the benefit of relying on the natural law lessens. Because natural rights lack a mechanism to fit modern values, as the common law possesses, and collections of natural rights are difficult to identify, state judges ought to avoid founding declarations of unenumerated fundamental rights on natural law principles without unassailable reasoning.

Finally, absent the common or natural law, the unique character, history, and values of a state may supply the fundamental rights that fall under a state constitution’s unenumerated rights clause. Generally, even if the plain text, state constitutional history, and applicable precedent surrounding a state constitutional provision nearly identically match a federal provision, these unique factors may nonetheless legitimize divergent constructions of the state provision.<sup>157</sup> Because state constitutions are “a democratic expression of American aspirations for good and enduring self-government . . . embod[y]ing the values that Americans understand themselves to hold,”<sup>158</sup> state judges may determine their state’s “demonstrably distinct characters”<sup>159</sup> in interpreting their constitution. In this character-based approach,<sup>160</sup> judges can easily and justifiably give “different meaning even to language that is textually identical” to federal equivalents.<sup>161</sup> In

153. *Id.* at 17 (finding that definitions of “Writ of Habeas Corpus,” “ex post facto” laws, “natural born” citizens, and “good behavior” require reference to the common law).

154. WILLIAMS, *supra* note 54, at 5 (quoting Neil H. Cogan, *Moses and Modernism*, 92 MICH. L. REV. 1347, 1353 (1994)).

155. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 627 (1949) (hypothesizing an argument that judges cannot constitute a “Court of Nature” because the difficulty in defining the “contents of this code of nature” would eliminate the court’s “authority to expound and apply that law”).

156. STONER, *supra* note 36, at 10.

157. See GARDNER, *supra* note 55, at 1–6.

158. *Id.* at 53.

159. *Id.*

160. See *id.* at 54 (2005) (providing normative support within New Judicial Federalism for “character-based interpretational techniques of state constitutions”).

161. *Id.* Compare U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”), with MICH. CONST. art. I, § 23 (“The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people.”).

short, similarly constructed state and federal constitutional provisions could be “like the English and the French . . . at once closely related and persistently at odds.”<sup>162</sup>

The fluidity of population movements and “the porosity of state borders” challenge this notion.<sup>163</sup> While statehood confers on the population a stable and geographically bounded government to foster the development of a peculiar character,<sup>164</sup> homogenization of the polity reduces the state’s unique identity.<sup>165</sup> States certainly do not possess “univocal” self-perceptions,<sup>166</sup> but these limitations, coupled with the unwillingness of state courts to analyze “the intentions of the drafters and ratifiers of the state constitution,”<sup>167</sup> hamper the efficacy of discovering fundamental rights within the state’s unique character.

Pinpointing a clear reference for fundamental rights within an unenumerated rights clause may significantly burden state judges. However, for state constitutional unenumerated rights clause interpretations to confer legitimacy on the decision, the state judge ought to ground his or her opinion in something more than individual judgment.

#### *B. Interpret State Constitutional Issues Distinctly from the Federal Constitution*

State constitutions are fiercely independent legal creatures, differing from the U.S. Constitution “in their origin, function, form, and quality.”<sup>168</sup> Because state constitutions, more so than the federal constitution, “owe their legal validity and political legitimacy to the state electorate, not to the ‘Framers,’”<sup>169</sup> they more loudly express the *vox populi*.<sup>170</sup> This voice, echoed by distinctly interpreting state and federal constitutions, creates what Madison described as “a double security,”<sup>171</sup> ensuring changes in one set of constitutional rights does not mandate a change in the other.<sup>172</sup>

In this vein, the U.S. Supreme Court’s opinion in *Barron v. Baltimore*,<sup>173</sup> establishing that state constitutions reflect the unique judgments of a sovereign

162. STONER, *supra* note 36, at 107.

163. GARDNER, *supra* note 55, at 69.

164. *Id.* at 75.

165. Modern developments enhancing this social homogenization are abundant. *See id.* at 69–72 (enhanced mobility and the nationalization of mass media and commerce); SCHAPIRO, *supra* note 99, at 10 (advances in technology, communications, and transportation which help “render[] state boundaries less significant”).

166. GARDNER, *supra* note 55, at 78.

167. *Id.* at 11.

168. WILLIAMS, *supra* note 54, at 20.

169. *Id.* at 25.

170. *Id.* at 26.

171. THE FEDERALIST NO. 51 (James Madison); *see* GARDNER, *supra* note 55, at 81–83. Because the federal and state governments struggle for power and check each other for “usurpations,” if one level of government violates fundamental rights, the public can lean on “the other as the instrument of redress.” THE FEDERALIST NO. 28 (Alexander Hamilton).

172. THE FEDERALIST NO. 51 (James Madison).

173. 32 U.S. 243 (1833).

government,<sup>174</sup> represents the American departure from “[c]onstitutional universalism,”<sup>175</sup> or the idea that “all American constitutions are drawn from the same set of universal principles of constitutional self-governance.”<sup>176</sup> State constitutions embody state-specific departures from the federal constitution, manifesting the sentiment of a state’s citizenry. When presented with a state constitutional law question, the role of a state supreme court judge is not to ask “whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the [U.S.] Supreme Court.”<sup>177</sup> The proper inquiry, instead, is determining “what the state’s guarantee means and how it applies to the case at hand.”<sup>178</sup> After all, the rights demanded by citizens of Texas likely differ drastically from those demanded by New Yorkers, and state unenumerated rights clauses channel these disparate expectations. Distinct state constitutional interpretation is an important feature of our judicial system and imbues states with tangible civic benefits. The following subsections discuss the justifications for and positive consequences of the distinct interpretation of unenumerated rights clauses.

### 1. Rationales for Distinct Interpretation

There are two primary explanations for why state judges ought to conduct distinct state constitutional interpretation: (1) state and federal constitutions inherently differ and (2) interpretive distinction supports the state court’s judgment on federal appeal. First, state constitutions naturally diverge from the federal constitution for many reasons. In general, state courts may define these variations through independent assessment by considering the state constitution’s “text, its history, its structure, relevant state precedent, the character and values of the people of the state, and prudential considerations relating to the judicial role and the pragmatic consequences of judicial resolution of constitutional questions.”<sup>179</sup>

While most state constitutional unenumerated rights clauses share a similar textual structure with the federal unenumerated rights clause,<sup>180</sup> state unenumerated rights clauses diverge because states have varied historical experiences which should inform judges of state constitutional meaning.<sup>181</sup> Although many of

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174. See *id.* at 247 (“Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated.”).

175. GARDNER, *supra* note 55, at 30.

176. *Id.*

177. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

178. *Id.*

179. GARDNER, *supra* note 55, at 48.

180. Compare U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”), with OKLA. CONST. art. II, § 33 (“The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”). But see GA. CONST. art. I, § 1, para. 29; VA. CONST. art. I, § 17; W. VA. CONST. art. I, § 2.

181. GARDNER, *supra* note 55, at 49. Gardner acknowledges, however, that states experienced many of the most formative events in American history collectively with only rare and minor deviations in

the original state constitutions shared Framers with the U.S. Constitution,<sup>182</sup> the ratification of new state constitutions over time means state courts must derive constitutional meaning from new and changing sets of “Framers.” The citizens of a state “may possess different fundamental values and even relevantly different character traits than the American polity collectively possesses.”<sup>183</sup> State constitutions also acquire a distinct flavor, seasoned with “local conditions and traditions [affecting] their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee.”<sup>184</sup> State constitutional unenumerated rights clauses are not immune from acquiring local variation.

Second, blending state and federal constitutional analysis in judicial opinions may hurt the state court’s interpretation on appeal because poorly delineated analyses reduce the ability of the U.S. Supreme Court to find adequate and independent state grounds for the decision.<sup>185</sup> In *Michigan v. Long*,<sup>186</sup> the Court abandoned the exhausting task of disentangling state from federal law in reviewing state court decisions.<sup>187</sup> Instead, ambiguous judgments referencing federal law would be interpreted against the state court.<sup>188</sup>

The U.S. Supreme Court’s implicit resignation from distinguishing the jurisdictional basis of legal pronouncements has a solution, however. When state courts refer to federal precedent in their decisions solely for its persuasive authority, *Long* requests the state court make a plain statement indicating this use of federal law to avoid judicial review by the U.S. Supreme Court.<sup>189</sup> Georgia, for example, has explicitly acknowledged that federal recognition of a fundamental right may provide persuasive authority to states even when the state supreme court perceives the U.S. Supreme Court’s determination as non-binding.<sup>190</sup> Without clearly stating that a right is protected through the state constitution’s unenumerated rights clause rather than its federal counterpart, the state supreme court’s pronouncement may be hurt on appeal for lack of an identifiable “adequate and independent state ground.”<sup>191</sup>

perspective. *Id.*; see SCHAPIRO, *supra* note 99, at 2 (“[T]he story of the United States since the framing has been a thoroughly nationalist tale, including . . . triumphs of nationalism over regional variation.”).

182. See WILLIAMS, *supra* note 54, at 38.

183. GARDNER, *supra* note 55, at 51.

184. SUTTON, *supra* note 60, at 17 (claiming the public would agree that states with entirely different histories and geographies would interpret rights differently). *But see* SCHAPIRO, *supra* note 99, at 176–77 (“In the unified society of the United States, separating the ‘truly local’ from the ‘truly national’ is a fool’s errand.”).

185. See WILLIAMS, *supra* note 54, at 123.

186. 463 U.S. 1032 (1983).

187. *Id.* at 1040–41.

188. *Id.*

189. *Id.* at 1041.

190. See *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981) (“While the determination of the U.S. Supreme Court that education is not a ‘fundamental right’ does not bind state courts to make the same determination . . . the fact that education is not a ‘fundamental right’ under the U.S. Constitution provides some guidance to the states.”).

191. *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945).



The differences between the federal and state constitutions, coupled with the possibility of endangering state appeals before the U.S. Supreme Court, provide state judges ample justification for distinct interpretation. Therefore, the nondevelopment of an independent body of state constitutional law largely stems from “the unwillingness, or perhaps the inability, of state courts to rise to the challenge.”<sup>192</sup>

## 2. Consequences for Distinct and Indistinct Interpretation

Distinctly interpreting a state constitutional provision, including an unenumerated rights clause, without reference to the federal constitution demands the direction of judicial energies to search for the answer “in text, in history, [and] in alternative approaches to analysis.”<sup>193</sup> This process may tax judges intellectually but yields three benefits, each depending on the relative protections of the state versus the federal provision: (1) the state constitution protects more rights than the federal constitution, (2) both constitutions equally protect the inherent right at issue, or (3) the state constitution confers fewer rights than the federal constitution.

First, a state unenumerated rights provision can protect more civil liberties than the federal constitution, and it can shield its citizens from shifts in federal rights jurisprudence. State courts commonly justify broader protections under state constitutions than under the federal constitution through assessing the state’s unique character, values, and history.<sup>194</sup> The rising trend of state supreme courts interpreting state constitutional provisions more broadly than analogous federal provisions has been characterized as the “New Judicial Federalism.”<sup>195</sup> Justice Brennan, an advocate of this movement, urged state supreme courts to “step into the breach” to fill gaps left by the U.S. Supreme Court’s rights jurisprudence for the purpose of enhancing constitutional rights in this manner.<sup>196</sup> Broader constitutional rights found within an unenumerated rights clause benefit state citizens by insulating the protected behaviors from government infringement if those rights fall outside other constitutional rights provisions, federal or state.

Second, a state and federal provision may protect rights to a similar extent. Even though applying the state unenumerated rights clause may appear redundant

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192. GARDNER, *supra* note 55, at 13. However, professional duties oblige attorneys to raise applicable state constitutional provisions when litigating relevant rights, thus enabling judicial intervention by putting the issue in dispute. *See* WILLIAMS, *supra* note 54, at 139; SUTTON, *supra* note 60, at 7–8.

193. Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

194. *See* GARDNER, *supra* note 55, at 55 (describing how New York, Oregon, Texas, and Alaska have recognized state-specific expansions of federal rights through their state’s history, traditions, customs, and values); *id.* at 65–66 (quoting state appellate jurists from New York, Wisconsin, and Washington affirming the use of state “peculiarities” to interpret state constitutions).

195. WILLIAMS, *supra* note 54, at 111; *see* GARDNER, *supra* note 55, at 25.

196. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977); *see* GARDNER, *supra* note 55, at 24.

in this scenario, interpreting the clause concurrently with the Ninth Amendment strengthens judicial federalism and reiterates the legal authority of state constitutions.

Lastly, a state unenumerated rights clause may protect fewer rights than the federal constitution, but independent analysis of the state provision will clarify the state's constitutional history for subsequent cases and present persuasive authority in interpreting the federal constitution. When state courts disagree with the U.S. Supreme Court's expansion of a right, forthrightly expressing such disagreement serves several purposes. Dissension from federal constitutional reasoning "offers a forceful and very public critique of the national ruling"<sup>197</sup> that influences public and official opinions on the decision's propriety. Departure from federal interpretation can create a national legal consensus that the U.S. Supreme Court may subsequently evaluate.<sup>198</sup> A clear statement that a state constitutional unenumerated rights clause does not recognize a constitutional right despite federal discernment thereby aids the state, albeit in the long run.

Citizens do not have to fear distinct state constitutional interpretation yielding lesser protection than the federal constitution; "the national minimum standard guaranteed by the federal [c]onstitution"<sup>199</sup> creates a "federal floor"<sup>200</sup> of rights that must be enforced by state courts. This floor creates a baseline of federally guaranteed rights while providing states the agency to expand the scope of protected rights.<sup>201</sup> Interpreting state constitutional provisions to protect fewer rights than the federal constitution, therefore, carries no practical consequence for state citizens. Instead, it clarifies the meaning of the state constitution and further rebukes improper federal interpretations in the eyes of the state supreme court.

Failure to distinctly interpret a state constitutional provision, on the other hand, can lead to confusion and imprecise application. U.S. Supreme Court declarations creating rights, which require all subordinate courts to align with its interpretation, pressure state supreme courts when interpreting their own state constitutional rights provisions.<sup>202</sup> Such pressure often leads state judges to interpret state constitutions to have a nearly identical meaning to the federal provisions.<sup>203</sup> This phenomenon, called "lockstepping,"<sup>204</sup> occurs when judges anchor the meaning of their state constitution to their immediately preceding interpretation of the federal constitution within an opinion<sup>205</sup> instead of treating both constitutions as the

197. GARDNER, *supra* note 55, at 100.

198. *Id.*

199. WILLIAMS, *supra* note 54, at 114.

200. GARDNER, *supra* note 55, at 35.

201. *Id.* at 35.

202. *See* WILLIAMS, *supra* note 54, at 135.

203. SUTTON, *supra* note 60, at 174.

204. *Id.*

205. *Id.* However, some states require their courts to construe provisions of their constitution in line with federal guarantees. *See, e.g.*, FLA. CONST. art I, §§ 12, 17 (mandating interpreting the right against unreasonable search and seizure and prohibition on cruel and unusual punishment "in conformity with"

governing documents of “independent sovereigns.”<sup>206</sup>

Lockstepping imbues U.S. Supreme Court decisions with a “presumption of correctness”<sup>207</sup> in state cases where mechanical application of its rulings cannot properly reach just outcomes.<sup>208</sup> Instead of adhering to federal interpretations of similar text, gleaning the true meaning of a state constitutional provision might be better served by comparisons to other states. Sister state constitutions often share “historical and linguistic roots,” apply to inherently smaller jurisdictions than the federal government, and almost uniformly construe rights provisions originating in state constitutional law rather than in the federal constitution.<sup>209</sup> State supreme courts may more accurately define fundamental liberties within their state constitutional unenumerated rights clauses by listening to sister courts, rather than by uniformly applying federal constitutional conclusions.

Admittedly, lockstep interpretation benefits American constitutional interpretation. It simplifies complicated areas of law by creating legal uniformity.<sup>210</sup> Non-concurrent interpretation without legitimate justification creates an illegitimate opportunity to air federal constitutional grievances.<sup>211</sup> However, absent a compelling reason to lockstep state and federal constitutional interpretation, states benefit more from distinct interpretation of state constitutional rights.

### C. Order State Constitutional Issues First in Judicial Opinions

Judge Sutton proposes that state judges ought to analyze state constitutional provisions before federal provisions in cases implicating both state and federal constitutional rights.<sup>212</sup> In taking a “state-first approach,”<sup>213</sup> state judges “honor[] the original design of the state and federal constitutions”<sup>214</sup> to elevate the primacy of the states in guaranteeing individual rights. Conversely, the widely implemented “federal-first approach to constitutional interpretation has led to entrenched and still-growing federal domination in the dialogue of American constitutional law.”<sup>215</sup> Although the prioritization of state claims is an easily implementable resolution to the dilemma of state constitutional claim inferiority, only five states have adopted a variation of this method.<sup>216</sup>

By failing to critically inquire into the extent of rights protections in state constitutional law, including the state constitution’s unenumerated rights clause, state

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U.S. Supreme Court interpretation); *cf.* CAL. CIV. PROC. CODE § 410.10 (West 2019) (granting California courts the full authority to “exercise [personal] jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States”).

206. SUTTON, *supra* note 60, at 174.

207. *Id.* at 189; GARDNER, *supra* note 55, at 43; *see* Brennan, *supra* note 196, at 502.

208. *See* GARDNER, *supra* note 55, at 43.

209. SUTTON, *supra* note 60, at 175.

210. GARDNER, *supra* note 55, at 42–43 (quoting *State v. Florance*, 527 P.2d 1202, 1209 (Or. 1974)).

211. *See id.* at 43.

212. SUTTON, *supra* note 60, at 178–79.

213. *Id.* at 179.

214. *Id.*

215. *Id.* at 188.

216. *Id.* at 179 (Maine, New Hampshire, Oregon, Vermont, and Washington).

judges condemn their citizens to enjoy only the baseline rights which the federal constitution guarantees.<sup>217</sup> State judges promote a richness of constitutional law and reject constitutional chauvinism directed against the states through advancing state law analysis first in their opinions.<sup>218</sup> Interpreting state constitutional provisions prior to considering federal constitutional terms enhances the strength of state constitutions while holding the federal constitution in reserve if the state constitution fails to fully cover the right. Creating a state equivalent to the federal constitutional avoidance canon would even encourage this ordering.<sup>219</sup> Furthermore, even in cases where the state constitutional unenumerated rights clause does not protect a liberty to its federal extent—thus requiring a state court to apply the federal provision to protect the right—parallel interpretation of similarly worded provisions assists the U.S. Supreme Court in its own interpretations of that right.<sup>220</sup>

Nor should state judges dread that their state constitution protects a lesser array of rights than does the federal constitution. Federal fallbacks ensure that citizens of a state endure no abridgment of their fundamental liberties. The failure of a state constitution to offer particular protections simply reflects “even universal truths have local dialects.”<sup>221</sup> Similarly worded provisions can carry different understandings of equally treasured rights; different sources, regional traditions, and unique histories supplement facially similar text.<sup>222</sup> The United States is an immense nation: nearly 330 million people span a continent, reside in fifty-one distinct jurisdictions, and carry with them diverse values and normative expectations. For states to serve as laboratories of democracy,<sup>223</sup> state judges need to conduct independent experiments to identify rights protected by their state constitutions.

State judges often obstruct their state constitution’s unenumerated rights clause from reaching its true extent by using inappropriate external sources of rights, blending state and federal unenumerated rights analyses, and ordering federal law first in their opinions. By changing the means of reaching decisions involving the clause to elevate publicly possessed fundamental rights, state judges clear these obstructions to give the provision full effect. The State of Georgia provides a suitable model, demonstrating how state judges can apply these state constitutional unenumerated rights clause methods to accommodate state-specific interests and secure fundamental rights.

217. *See id.* at 188 (finding, with a federal first approach to constitutional rights, “[p]resumptions become destiny”).

218. *Id.* at 190.

219. *Id.* at 181.

220. *Id.* at 187.

221. *Id.* at 189.

222. *Id.*

223. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

#### IV. GEORGIA'S "BOUNDED NINTH" AND APPROACH TO UNENUMERATED FUNDAMENTAL RIGHTS

Unlike most state constitutional unenumerated rights clauses,<sup>224</sup> Georgia's provision guides state judges in the search for fundamental rights by requiring them to examine Georgia's own history. Article I, Section I, Paragraph XXIX of the Georgia Constitution (the "Bounded Ninth")<sup>225</sup> states, "The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have *hitherto enjoyed*."<sup>226</sup> This latter phrase matches the analytical process used by the U.S. Supreme Court in protecting fundamental rights that are "deeply rooted in this Nation's history and tradition."<sup>227</sup>

Reflecting the bounded nature of its state constitutional unenumerated rights clause, Georgia has rejected the existence of various rights under the Bounded Ninth. In a 1910 case challenging a state prohibition statute, the Georgia Supreme Court rejected the argument that Georgians had an inherent right to enjoy or barter intoxicating liquors,<sup>228</sup> a ruling later reaffirmed in 1918.<sup>229</sup> Plaintiffs' claims for relief under this clause have similarly failed in labor and employment disputes. Although "the right to make a living is among the greatest of human rights,"<sup>230</sup> the Georgia Supreme Court has rejected an absolute inherent right to contract, due to the breadth of the state's police powers to regulate professions.<sup>231</sup> Mandatory retirement plans, if applied uniformly, also fall outside the shelter of the Bounded Ninth.<sup>232</sup> Moreover, the Georgia Supreme Court has held mandatory employer contributions to unemployment insurance do not violate the

224. See Anthony B. Sanders, *Baby Ninth Amendments Since 1860: The Unenumerated Rights Americans Repeatedly Want (and Judges Often Don't)*, 70 RUTGERS U.L. REV. 857, 865 (2018). Compare OR. CONST. art. I, § 33, with GA. CONST. art. I, § 1, para. 29.

225. Many scholars refer to state unenumerated rights clauses as "Baby Ninths" to reflect their subordination to the federal unenumerated rights clause. See, e.g., Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 MERCER L. REV. 389 (2017). However, infantilizing this provision seemingly disparages a sovereign governing document. Therefore, in recognition of the historical focus framing its scope, this Note will refer to Georgia's unenumerated rights clause as the "Bounded Ninth."

226. GA. CONST. art. I, § 1, para. 29 (emphasis added).

227. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

228. *Whitley v. State*, 68 S.E. 716, 724 (Ga. 1910) (concluding allegations that the right to access intoxicating liquors constitutes an inherent right under the Bounded Ninth of 1877 "is without merit"); see also *Stapp v. State*, 32 So. 2d 447, 448 (Miss. 1947) (rejecting a plaintiff's unenumerated right to possess intoxicating liquors because the historical practice had been amended by over fifty years of statutory prohibition).

229. See *Saddler v. State*, 97 S.E. 79, 79 (Ga. 1918) ("[T]he 'prohibition law,' . . . is not violative of any of the constitutional provisions set forth in the demurrer to the accusation [including the Bounded Ninth of 1877].").

230. *Schlesinger v. City of Atlanta*, 129 S.E. 861, 866 (Ga. 1925).

231. See *Jackson v. Beavers*, 118 S.E. 751, 753 (Ga. 1923).

232. See *Murphy v. West*, 52 S.E.2d 600, 603 (Ga. 1949) (concluding claims that the mandatory retirement plan violated the Bounded Ninth of 1877 as "clearly without merit").

unenumerated rights provision.<sup>233</sup>

Despite these rejections, the Bounded Ninth features significantly in Georgia's fundamental rights jurisprudence in several ways: (1) Georgia judges have recognized state-specific constitutional protections in particular areas of alleged rights, (2) Georgia has leaned on the common law to identify fundamental rights within the Bounded Ninth to avoid their manufacture through personal judgments, and (3) the Georgia Supreme Court's clear pronouncements of constitutional interpretive principles enhances the applicability of the Bounded Ninth to protect the fundamental rights of Georgians.

#### A. *Recognized Georgia Fundamental Unenumerated Rights: Parental and Privacy Rights*

Historically, litigants have won by invoking the Bounded Ninth in two broad categories of rights: parental and privacy rights. One of Georgia's key parental rights cases, *In re Suggs*, declared, "The right to the custody and control of one's child is a fiercely guarded right in our society and in our law."<sup>234</sup> The Georgia Supreme Court's recent decision in *Patten v. Ardis* raised provisions of the state constitution which may guarantee that right, including the Bounded Ninth.<sup>235</sup> Lower Georgia courts have reached the same conclusion, basing the right on federal and Georgia precedent, on the U.S. Constitution, and on the Bounded Ninth.<sup>236</sup> Aside from the parent's right to their child's control and custody, Georgia preserves the parent's right to "speak for the minor child" by virtue of its ingrained position in the state's tradition and common law.<sup>237</sup> Concurrences in *In Interest of R. S. T.*<sup>238</sup> and *Hewlett v. Hewlett*<sup>239</sup> further delineate a parent's Bounded Ninth right to familial relations with their child.

The seminal Georgia privacy rights case, *Pavesich v. New England Life Insurance Co.*, first revealed the right<sup>240</sup> in the Georgia Constitution.<sup>241</sup>

233. See *Gernatt v. Huiet*, 16 S.E.2d 587, 589 (Ga. 1941) (citing cases affirming the statute did not violate the Bounded Ninth of 1877).

234. 291 S.E.2d 233, 235 (Ga. 1982) (further suggesting strict scrutiny as the appropriate standard of review). The parental right for custody and control of one's children rests on a variety of sources of law, including statutes, the common law, and Georgia's conception of fundamental rights. See *In re M.F.*, 780 S.E.2d 291, 297 (Ga. 2015).

235. 816 S.E.2d 633, 636 n.9 (Ga. 2018).

236. See *Borgers v. Borgers*, 820 S.E.2d 474, 479 n.4 (Ga. Ct. App. 2018) (Dillard, C.J., concurring).

237. *In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984).

238. See 812 S.E.2d 614, 627 n.3 (Ga. Ct. App. 2018) (Dillard, C.J., concurring) (footnote numbering corresponds to that present in Westlaw on November 22, 2020). Judge Dillard explains this constitutional right is a positive law enshrinement of the same natural law right. See *id.* at 627 n.4.

239. See 825 S.E.2d 622, 628 n.1 (Ga. Ct. App. 2019) (Dillard, C.J., concurring) (footnote numbering corresponds to that present in Westlaw on December 18, 2019).

240. Georgia's recognition of a constitutional right to privacy "was the first recognition of this right by any court of last resort in this country." *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882 (Ga. 1957).

241. See 50 S.E. 68, 71 (Ga. 1905). Justice Cobb, writing for the majority, recognized that a fundamental right's infrequent assertion, while counseling courts to "proceed with caution before recognizing the right," did not indicate a modern genesis. *Id.* at 69.

Subsequent cases affirmed its central finding.<sup>242</sup> *Pavesich* and its progeny did not find the right to privacy emanating from the federal unenumerated rights clause or Bounded Ninth, but rather the federal and Georgia due process clauses and natural law.<sup>243</sup> On its face, therefore, the decision succumbs to the same muddled fundamental rights jurisprudence plaguing the U.S. Supreme Court.<sup>244</sup> However, the court in *Brooks v. Parkerson* found parental rights through an intentional constitutional overlap of general liberty and privacy rights to create a comparable parental interest, hinting that both the Bounded Ninth and due process clauses confer similar protections instead of exemplifying non-distinction of the legal bases of the right.<sup>245</sup>

These privacy rights potentially stemming from the Bounded Ninth apply to a right to privacy from government intrusion.<sup>246</sup> In *Powell v. State*, the Georgia Supreme Court outlined the breadth of that right and declared the right to privacy as “guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution, which protects only those matters deeply rooted in this Nation’s history and tradition or which are implicit in the concept of ordered liberty,” though limited by compelling state interests.<sup>247</sup> In affirming the right to privacy, the *Powell* Court relied on common law and on Georgia precedent.<sup>248</sup> Boldly, the Georgia Supreme Court structured its opinion state-first<sup>249</sup> because it distinguished Georgia’s right to privacy from the federal right to privacy as then understood by the federal courts.<sup>250</sup>

The success of the Bounded Ninth in these fields illustrates two principles for rights in other fields. First, litigants can win cases by arguing that the Bounded Ninth confers enforceable rights to them. Second, Georgia judges have the capacity to employ the provision in decisions by viewing it as a robust cache of rights.<sup>251</sup> Applying the common law to bestow fundamental rights magnifies these realities for Georgians.

### *B. Issue of the Common Law as a Source of Georgia Fundamental Rights*

While the aforementioned cases specify the source of rights protected by the Bounded Ninth, the common law too supplies a body of liberties thus far enjoyed

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242. See *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 2 S.E.2d 810, 815 (Ga. Ct. App. 1939); see also *Ford Motor Co. v. Williams*, 132 S.E.2d 206, 211 (Ga. Ct. App. 1963), *rev’d on other grounds*, 134 S.E.2d 32 (Ga. 1963).

243. See *Pavesich*, 50 S.E. at 71.

244. See *supra* section I.B.

245. See 454 S.E.2d 769, 772 (Ga. 1995) (citing *In re Suggs*, 291 S.E.2d 233, 235 (Ga. 1982)).

246. See *In re J.M.*, 575 S.E.2d 441, 442–43 (Ga. 2003) (citing cases on Georgia’s right to privacy *vis-à-vis* the government).

247. See 510 S.E.2d 18, 22 (Ga. 1998) (internal quotation marks omitted).

248. See *id.* at 21. The court referenced the right’s origins in ancient, Roman, and natural law. See *id.* at 22.

249. See *supra* section III.C.

250. See *Powell*, 510 S.E.2d at 21 n.1 (rejecting U.S. Supreme Court interpretations of fundamental rights because “[p]rivacy rights protected by the U.S. Constitution are not at issue in this case”).

251. See *supra* section II.C.

by Georgians. In 1848, the Georgia Supreme Court invoked principles of the Magna Carta to assert the authority of common law rights.<sup>252</sup> In *Robeson v. International Indemnity Co.*, it explained that a “common-law rule is still of force and effect in this State, except where it has been changed by express statutory enactment or by necessary implication.”<sup>253</sup> The common law informs the state of the meaning of its constitutional provisions, reducing ambiguity where the text is silent.<sup>254</sup>

In its Bounded Ninth jurisprudence, Georgia’s judiciary has melded the common law with the provision to protect particular liberties. Georgia has preserved the common law right to choose one’s profession, justifying state regulation of profession only when its practice adversely affects the public welfare.<sup>255</sup> The Georgia Supreme Court upheld a statute criminalizing interest payments above a fixed rate, finding a historical common law prohibition on usury did not violate the Bounded Ninth.<sup>256</sup> The Georgia Court of Appeals concluded that the right to travel on public roads for private business, though capable of being regulated, was both an inherent and common law right.<sup>257</sup> Although it would seem strange that the common law, stemming from the mother monarchy, would recognize the right of men to participate in free government, the Georgia Supreme Court found such a basis in Blackstone’s *Commentaries* and in American history.<sup>258</sup> These rights, along with others that owe their origins to the common law, stream through the Bounded Ninth into Georgia’s constitutional jurisprudence.

Although Georgia’s cases establish specific rights, the body of law from which the Bounded Ninth draws is not limited to these pronouncements. The Georgia Supreme Court in *Schlesinger* set forth specific inherent rights protected by the Bounded Ninth but did not limit its protections merely to those recognized in the court’s precedent.<sup>259</sup> Georgia has created other means of constitutionalizing particular rights. In 1784, the Georgia General Assembly incorporated English statutes and common law—as they existed on May 14, 1776—into Georgia law, except to the extent they were displaced by Georgia’s own constitutional or

252. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 215–16 (1848).

253. 282 S.E.2d 896, 897 (1981). The court in *Robeson* maintained the common law rule established by a previous case, *Carmichael v. Carmichael*, which limited tort liability between spouses. See *Carmichael v. Carmichael*, 53 Ga. App. 663, 663 (1936) (holding the common law principle survives unless statutorily abrogated).

254. See, e.g., *Williams v. State*, 77 S.E. 189, 190 (Ga. Ct. App. 1913) (“[I]n the absence of any provision in our organic law affecting the right of jury trial, a jury trial in Georgia, to be valid, must be governed by the same rules as prevailed in England at the time that we adopted our Constitution.”).

255. See *Felton v. City of Atlanta*, 61 S.E. 27, 27 (Ga. Ct. App. 1908).

256. See *King v. State*, 71 S.E. 1093, 1095–96 (Ga. 1911).

257. See *Jewel Tea Co. v. City Council of Augusta*, 200 S.E. 503, 505 (Ga. Ct. App. 1938) (distinguishing *Schlesinger v. City of Atlanta*, 129 S.E. 861, 867 (Ga. 1925)).

258. See *White v. Clements*, 39 Ga. 232, 257–58 (1869) (holding that all men had the inherent right to participate in government unless an exception is made, rejecting arguments that men must be positively endowed with political agency to participate).

259. *Schlesinger*, 129 S.E. at 866.



statutory law.<sup>260</sup> At the time of Georgia's founding, these rights included the liberties preserved by the Magna Carta,<sup>261</sup> Petition of Right,<sup>262</sup> Habeas Corpus Act,<sup>263</sup> and English Bill of Rights.<sup>264</sup> The Georgia Supreme Court, in its first year of existence, similarly recognized that rights extended by the Crown to English subjects were carried forward to Georgians living in the United States.<sup>265</sup> The General Assembly's adoption of these common law and historically grounded rights remains in force today.<sup>266</sup>

However, abrogation of the common law by statute presents a constitutional challenge. If the Bounded Ninth constitutionalizes common law rights enjoyed at its ratification, and constitutional rights may not be abridged by statute, then Georgia's statute incorporating the common law—subject to displacement by another statute—may unconstitutionally abridge rights. That said, the Georgia Constitution of 1861,<sup>267</sup> with its Bounded Ninth's nearly identical structure to the current constitution, adopted language safeguarding rights enjoyed until that time, which could include the General Assembly's alterations of common law rights up to that point.

The common law, in the context of recognizing fundamental rights falling within the Bounded Ninth, is a double-edged sword. While it solidifies the

260. See GA. CODE ANN. § 1-1-10(c)(1) (West 2019).

261. See Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341, 372–73 (1985). The Magna Carta established limits on state power and defined an initial set of English constitutional rights, including freedom of the church (Clause 1), limitations on the King's ability to levy taxes without the country's consent (Clause 12), and defense against the deprivation of rights (Clause 39). See *English translation of Magna Carta*, British Library (July 28, 2014), <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [<https://perma.cc/G5TU-QLUU>].

262. The Petition of Right of 1627, receiving royal assent in 1628, expressed four principles outlining English civil liberties: no taxation without Parliamentary consent; no imprisonment without cause (or the right of habeas corpus); no quartering of soldiers imposed on subjects; and no martial law in times of peace. See THE PETITION OF RIGHT 1627, Car. 3 c. 1 (Eng.), <http://www.legislation.gov.uk/aep/Cha1/3/1> [<https://perma.cc/N4WG-KJ29>] (last visited Jan. 16, 2021).

263. The Habeas Corpus Act of 1679 codified the writ to ensure royal consistency in detention. See HABEAS CORPUS ACT OF 1679, Online Library of Liberty, <https://oll.libertyfund.org/pages/1679-habeas-corporus-act> [<https://perma.cc/Y8AZ-KWFE>] (last visited Jan. 16, 2021) (citing FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 483 (Theodore D. Woosley ed., 3d ed. 1883)).

264. The English Bill of Rights of 1689 modelled many rights present in contemporary American Constitutions: prohibitions on excessive bails and fines, restrictions on cruel and unusual punishment, a limited right to bear arms, freedom of speech, and the right to petition the Crown. See ENGLISH BILL OF RIGHTS 1689 (Eng.), [https://avalon.law.yale.edu/17th\\_century/england.asp](https://avalon.law.yale.edu/17th_century/england.asp) [<https://perma.cc/9GFC-H7HS>] (last visited Jan. 16, 2021).

265. See *Nunn v. State*, 1 Ga. 243, 249 (1846). Georgia courts originally understood constitutional rights, despite enumeration, to stem from inherent rights endowed to citizens, even prior to ratification. See also *Wilder v. Lumpkin*, 4 Ga. 208, 219–20 (1848) (stressing laws contrary to, “the fundamental principles of our Social Compact” lack legal force); Hugh William Divine, *Interpreting the Georgia Constitution Today*, 10 MERCER L. REV. 219, 219–20 (1959) (expressing the Georgia Supreme Court's historical consideration of the philosophy backing the source of rights).

266. See GA. CODE ANN. § 1-1-10(c)(1) (West 2019); see also *State v. Chulpayev*, 770 S.E.2d 808, 821 (Ga. 2015) (“The common law of England as of May 14, 1776, has long been the backstop law of Georgia.”).

267. GA. CONST. of 1861, art. I, § 27.

legitimacy of an opinion applying the Bounded Ninth by presenting impartial, extrinsic sources upon which to base the judgment, the common law is nonetheless a creature of the courts and its commentators. These actors represent only a sliver of the public that ratifies a state constitution, and thus, their judgments are a less democratic authority to reach constitutional decisions than enumerated rights or unenumerated rights founded on other sources.

*C. Georgia Constitutional Interpretation and Implications for Unenumerated Rights*

Georgia has adopted a series of constitutional principles that affect the Bounded Ninth. By finding that the provision confers tangible rights<sup>268</sup> and therefore refusing to render it constitutionally inert, the Georgia Supreme Court would likely accept the robust cache approach to unenumerated rights clauses.<sup>269</sup> Accordingly, the court's task when interpreting the Bounded Ninth is to define the extent of existing constitutional rights rather than wax eloquent on academic theories.

The Georgia Supreme Court interprets Georgian constitutional text in accordance with its original public meaning, or what "meaning the people understood a provision to have at the time they enacted it."<sup>270</sup> When nearly identical text carries forward to a new constitution, the court "presume[s] that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary."<sup>271</sup> This constitutionalizes the historically expected rights present in the minds of the Georgian public at the new state constitution's ratification.

Furthermore, when Georgian constitutional text is adopted virtually verbatim by a subsequent state constitution, the Georgia Supreme Court presumes any consistent meaning generated from pre-enactment decisions attaches to the constitutional text because that text "had already been definitively interpreted and [the new constitution's framers] kept it without material alteration."<sup>272</sup> This creates a double down effect, where the re-adoption of even incorrectly interpreted constitutional text then legitimizes similar interpretation in the future. If a state constitution's framers preserve the Bounded Ninth in a subsequent state constitution—despite consistent inaccurate interpretation of the provision's original public meaning—those proclaimed rights will nevertheless reside within the renewed Bounded Ninth.

Additionally, the Georgia Supreme Court will consider U.S. Supreme Court interpretations of federal constitutional text similar to Georgia constitutional text

268. See *Powell v. State*, 510 S.E.2d 18, 22 (Ga. 1998).

269. See *supra* section II.C.

270. *Olevik v. State*, 806 S.E.2d 505, 513 (Ga. 2017).

271. *Elliott v. State*, 824 S.E.2d 265, 269 (Ga. 2019).

272. *Olevik*, 806 S.E.2d at 514; see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 322–26 (West 2012) (describing the canon of prior-construction).

as persuasive authority, but only if two conditions are satisfied: (1) the federal and Georgian constitutional texts share comparable “history, language, and context”<sup>273</sup> and (2) the U.S. Supreme Court interpreted the federal text in light of those shared features.<sup>274</sup> Although the Ninth Amendment does not share precise language with the Bounded Ninth,<sup>275</sup> U.S. Supreme Court precedent may guide the Georgia Supreme Court toward extant national rights which also extend to Georgians. However, the Georgia Supreme Court, as the ultimate court of a separate sovereign, does not “owe those federal decisions [any] obedience when interpreting [Georgia’s] Constitution.”<sup>276</sup> Instead, the Georgia Supreme Court affirms its sovereign right to independently assess the scope of its constitutional provisions, which “may, of course, confer greater protections than their federal counterparts, provided that such broader scope is rooted in the language, history, and context of the state provision.”<sup>277</sup> Because the U.S. Constitution creates a federal floor<sup>278</sup> of rights protections, “a state constitution may also offer less rights than federal law, so long as it does not affirmatively violate federal law.”<sup>279</sup>

Georgia has distinctly analyzed state constitutional provisions to yield every variation available relative to the federal constitution,<sup>280</sup> concluding some state constitutional provisions confer roughly equal rights consistent with their federal equivalent,<sup>281</sup> the state constitution broadens the scope of some already federally guaranteed rights,<sup>282</sup> and Georgia’s rights sometimes more narrowly encompass a right than the federal constitution.<sup>283</sup> By exhibiting its propensity for distinct

273. *State v. Turnquest*, 827 S.E.2d 865, 869 (Ga. 2019).

274. *See id.* at 870 (rejecting the U.S. Supreme Court’s rationale in *Miranda v. Arizona*, 384 U.S. 436 (1966) because it failed to reach that decisions based on analogous language, history, and context).

275. *Compare* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”), *with* GA. CONST. art. I, § 1, para. 29 (“The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed.”).

276. *Elliott*, 824 S.E.2d at 272.

277. *Olevik*, 806 S.E.2d at 512 n.3 (citations omitted).

278. *See supra* note 200.

279. *Olevik*, 806 S.E.2d at 512 n.3 (citations omitted).

280. *See supra* subsection III.B.2.

281. *See Maxim Cabaret, Inc. v. City of Sandy Springs*, 816 S.E.2d 31, 36 (Ga. 2018), *reconsideration denied* (July 12, 2018) (affirming the First Amendment and its Georgia constitutional analogue both protect forms of expressive conduct). *But see Maxim Cabaret*, 816 S.E.2d at 39 (Peterson, J., concurring) (“The text of the Georgia Constitution’s Speech Clause is quite different from the Speech Clause of the First Amendment.”).

282. *See Olevik*, 806 S.E.2d at 508–09 (applying Georgia’s constitutional right against self-incrimination more broadly than the Fifth Amendment); *see also Diversified Holdings, LLP v. City of Suwanee*, 807 S.E.2d 876, 891 (Ga. 2017) (Peterson, J., concurring), *reconsideration denied* (Nov. 14, 2017) (“The text of [Georgia’s] Just Compensation Clause appears broader than the federal Takings Clause.”).

283. *See State v. Turnquest*, 827 S.E.2d 865, 868 (Ga. 2019) (holding, unlike the U.S. Constitution as ruled in *Miranda v. Arizona*, 384 U.S. 436 (1966), Georgia’s Constitution does not require similar warnings to arrested persons before gathering admissible evidence). *Olevik* and *Turnquest*, which address different aspects of the enumerated right against self-incrimination in the Georgia and U.S. Constitutions, show the Georgia Supreme Court possesses the willingness and capacity to analyze constitutional rights to yield these disparate outcomes. This capability could apply equally to alleged rights falling under the Bounded Ninth.

constitutional interpretation, Georgia creates a richer constitutional law to bestow legal protections over state-specific liberties. These techniques, coupled with constitutional protections for particular areas of rights and reference to the common law in decisions, allow Georgia to promote the Bounded Ninth without manufacturing rights.

#### CONCLUSION

State constitutional unenumerated rights clauses create a conundrum in fundamental rights cases unless judges base their interpretations on something beyond their personal judgment. In Justice Thomas' confirmation hearings, while he admitted he feared "judges would use the [N]inth [A]mendment without reference to anything more than his or her own predilections,"<sup>284</sup> he explained a judge could avoid this issue by rooting his judgments "in tradition and history."<sup>285</sup> Responding to a similar concern, Justice Scalia relegated the Ninth Amendment to a truism which judges should refrain from rashly wielding: "Just as the Tenth Amendment is nothing but an expression of the belief in federalism, so also the Ninth Amendment is nothing but an expression of belief in the natural law. But it is not an invitation to the judges to apply whatever they think the natural law says."<sup>286</sup> Justices Thomas and Scalia both express the ever-present fear underlying judicial interpretation of unenumerated rights clauses through a historical lens: that judges might "use history as drunks use lampposts—more for support than illumination."<sup>287</sup>

Nonetheless, state supreme court judges can bypass these concerns while simultaneously protecting constitutionally guaranteed fundamental rights. By recognizing that state constitutional unenumerated rights clauses confer enforceable protections for inherent rights, state supreme courts allay the Framers' worries when they adopted the federal unenumerated rights clause. Furthermore, by adopting several decision-making methods<sup>288</sup> that enhance the legitimacy of unenumerated rights opinions, state judges can ensure that cases triggering the provision concretely protect unarticulated fundamental rights while elevating state courts to their proper place in the system of American federalism. While the Scylla and Charybdis of state constitutional unenumerated rights clauses—either wholly dismissing the provision or indiscriminately fabricating rights—may daunt state judges, they may narrowly avoid these evils by faithfully exploring the rights owed to their citizens.

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284. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 433 (1993), <https://www.loc.gov/law/find/nominations/thomas/hearing-pt1.pdf> [<https://perma.cc/EE56-ZB8H>].

285. *Id.*

286. Interview by Don Franzen with the Honorable Antonin Scalia, Justice, Supreme Court of the United States, in Los Angeles, Cal. (Oct. 1, 2012), <https://lareviewofbooks.org/article/reading-the-text-an-interview-with-justice-antonin-scalia-of-the-u-s-supreme-court/> [<https://perma.cc/Y4SY-E54L>] (2012).

287. Massey, *supra* note 14, at 338 (quoting Floyd Abrams, *Mr. Meese Caricatures the Constitution*, N.Y. TIMES, July 25, 1986, at A31, col. 6).

288. *See supra* Part III.